

In a similar fashion, employers who have unique or changing first-aid needs in their workplace may need to enhance their first-aid kits. The employer can use the OSHA 300 log, OSHA 301 log, or other reports to identify these unique problems. Consultation from the local fire/rescue department, appropriate medical professional, or local emergency room may be helpful to employers in these circumstances. By assessing the specific needs of their workplace, employers can ensure that reasonably anticipated supplies are available. Employers should assess the specific needs of their worksite periodically and augment the first aid kit appropriately.

\* \* \* \* \*

■ 27. In § 1926.62, revise paragraph (j)(2)(iv)(B) to read as follows:

**§ 1926.62 Lead.**

\* \* \* \* \*

(j) \* \* \*  
(2) \* \* \*

(B) The employer shall notify each employee whose blood lead level is at or above 40 µg/dl that the standard requires temporary medical removal with Medical Removal Protection benefits when an employee's blood lead level is at or above the numerical criterion for medical removal under paragraph (k)(1)(i) of this section.

\* \* \* \* \*

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### 32 CFR Part 199

[DOD-2011-HA-0134; RIN 0720-AB55]

#### TRICARE: Certified Mental Health Counselors

**AGENCY:** Office of the Secretary, Department of Defense.

**ACTION:** Interim final rule.

**SUMMARY:** This rule is submitted as an interim final rule (IFR) in order to meet the Congressional requirement set forth in the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011, Section 724, which required the Department of Defense to prescribe regulations by June 20, 2011, to establish the criteria, as had previously been studied in accordance with Section 717 of the NDAA 2008, that would allow licensed or certified mental health counselors to be able to independently provide care to TRICARE beneficiaries and receive payment for those services. Under current TRICARE requirements, mental health counselors (MHCs) are authorized to practice only with

physician referral and supervision. This interim final rule establishes a transition period to phase out the requirement for physician referral and supervision for MHCs and to create a new category of allied health professionals, to be known as certified mental health counselors (CMHCs), who will be authorized to practice independently under TRICARE.

During this transition period the MHCs who do not meet the requirements for independent practice as established in this rule, may continue to provide services to TRICARE beneficiaries under the requirements of physician referral and ongoing supervision. This transition period, ending December 31, 2014, will allow time for those MHCs who seek to continue providing services under the TRICARE program to meet the independent practice requirements as outlined in this notice. After December 31, 2014, the Department of Defense will no longer recognize those mental health counselors who do not meet the criteria for a CMHC and will no longer allow them to provide services even upon the referral and supervision of a physician.

**DATES:** This rule is effective on December 27, 2011. Written comments received at the address indicated below by February 27, 2012 will be accepted.

**ADDRESSES:** You may submit comments, identified by docket number and or Regulatory Information Number (RIN) number and title, by either of the following methods:

- *Federal eRulemaking Portal:* [www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, 2nd Floor, East Tower, Suite 02G09, Alexandria, VA 22350-3100.

*Instructions:* All submissions received must include the agency name and docket number or RIN for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Dr. Patricia Moseley, TRICARE Management Activity, Office of the Chief Medical Officer, telephone (703) 681-0064.

**SUPPLEMENTARY INFORMATION:** TRICARE serves over 9.6 million beneficiaries comprised of active duty service members, retirees, and their families,

among others. The nature of the conflicts in Iraq and Afghanistan, their duration, and the Department of Defense's appreciation and sensitivity to the impact of combat on a service member's mental health have driven strong efforts to ensure that quality mental health care is available and accessible to TRICARE beneficiaries. One element of these efforts is ongoing attention to increasing the number of quality providers that can assess and treat TRICARE beneficiaries.

The National Defense Authorization Act for Fiscal Year 2006 Conference Report, No. 109-360, p. 753-4, requested from DoD a report to Congress on actions taken to improve the efficiency and effectiveness of procedures to facilitate physician referral and supervision of licensed professional counselors (LPCs), including a description of "best practices" employed throughout the military health system to ensure access to services provided by mental health counselors under the TRICARE Program. That report concluded that there remained significant variability among the States in training programs and requirements for licensure as a mental health counselor and that while there was evidence that the extent of training variability had decreased over time, it continued to be evident that professional counselors licensed to practice had quite varying exposure to classroom education and supervised clinical experiences in the assessment and treatment of persons with mental disorders. In conclusion the report noted: "Given the practical obstacles to physician supervision of LPCs and the perceived impediment to accessing services caused by the physician referral requirement, it would be prudent to explore issues of supervision, referral, provider credentialing, and scope of practice to develop options that would preserve quality of care, safeguard the health and well-being of Service members and maximize access to mental health care for all beneficiaries. An examination of these issues would certainly support other activities having the goal of improving mental health care to veterans, active duty service members and their families, including the recent creation of the DoD Task Force on Mental Health."

Section 717 of the National Defense Authorization Act of Fiscal Year 2008 directed the Secretary of Defense to study the credentials, preparation, and training of individuals practicing as licensed mental health counselors and to make recommendations for permitting licensed mental health counselors to practice independently

under the TRICARE program. The study, completed by the Institute of Medicine of the National Academies of Science, recommended allowing LMHCs who meet certain training, education, experience, certification, and licensure requirements to practice independently under the TRICARE program. This interim final rule implements changes to 32 CFR part 199 based on those recommendations.

The certification criteria established in this IFR are largely consistent with the recommendations found in “Provision of Mental Health Counseling Services under TRICARE,” a study funded by DoD and completed in 2010 by the Institute of Medicine (IOM) of the National Academies of Science <http://www.iom.edu/Reports/2010/Provision-of-Mental-Health-Counseling-Services-Under-TRICARE.aspx>.

The IOM recommendations specify that independent practice of mental health counselors (MHCs) in TRICARE should occur under certain circumstances: “A master’s or higher-level degree in counseling from a program in mental health counseling or clinical mental health counseling that is accredited by Council for Accreditation of Counseling and Related Educational Programs (CACREP); a state license in mental health counseling at the “clinical” or the higher or highest level available in states that have tiered licensing schemes; the passage of the National Clinical Mental Health Counseling examination (NCMHCE); and a well-defined scope of practice for practitioners.” The new rule will implement these standards over time while preserving the requirement for 3,000 hours of supervised clinical practice and 100 hours of face-to-face supervision. TRICARE is committed to ensuring that the quality standards recommended by the IOM are adopted by TRICARE, but understands that the availability of CACREP accredited mental health counseling training programs and the use of the NCMHCE as a quality standard are not yet widespread in the field. Therefore, with this rule, TRICARE will adopt new quality standards for the independent practices of mental health counselors as of January 1, 2015, and in addition will recognize mental health counselors as independent providers who have met certain currently recognized quality standards on or before December 31, 2014. Specifically, in order to practice independently, those mental health counselors must have met, in part, one of the following two quality standards on or before December 31, 2014: (1) Possess a master’s or higher-level degree from a mental health counseling

program of education and training accredited by CACREP and must have passed the National Counselor Examination (NCE); or (2) possess a master’s or higher-level degree from a mental health counseling program of education and training from either a CACREP or regionally accredited institution and have passed the NCMHCE. The many professional mental health counselors who meet these quality standards are a resource that TRICARE is anxious to make available to Service members, retirees and their families and their inclusion as independent practitioners under the TRICARE program will ensure that ready access to quality providers is preserved for TRICARE beneficiaries.

Independent practice by mental health counselors would mean a change from working under the supervision and referral of a physician to autonomous practice and third party reimbursement. While access to care was not a direct focus of the IOM study, increasing the availability of fully qualified providers would benefit TRICARE beneficiaries.

This interim final rule establishes a transition period to phase out the requirement for physician referral and supervision for mental health counselors and to create a new category of allied health professionals, to be known as certified mental health counselors (CMHCs), who will be authorized to practice independently under TRICARE.

During this transition period the MHCs who do not meet the requirements for independent practice as established in this rule, may continue to provide services to TRICARE beneficiaries under the requirements of physician referral and ongoing supervision. This transition period, ending December 31, 2014, will allow time for those MHCs who seek to continue providing services under the TRICARE program to meet the independent practice requirements as outlined in this notice. After that date persons who do not meet the requirements for being a CMHC will no longer be recognized by TRICARE and payment for their services will no longer be allowed even if they work under the supervision of a physician.

Lastly, although this rule sets forth the currently accepted and recommended criteria for an individual to be recognized as a CMHC, Section 199.6(c)(3)(iii)(N)(3) has been added to allow the Director, TRICARE Management Activity to amend or modify existing requirements or add other qualifications or criteria in the future to accommodate professional

quality and licensing standards as they may change over time.

The rule meets DoD’s goal to balance the implementation of quality standards for mental health counselors with beneficiary access to their services. The implementation period of the provider requirements elaborated in this rule permits DoD to preserve patient access to experienced and well-trained mental health professionals while permitting other providers to meet those standards by January 1, 2015. This rule is expected to encourage greater participation of MHCs in the TRICARE network, result in improved access to quality mental health treatment for TRICARE beneficiaries, and sets provider quality standards typical of other mental health providers authorized under TRICARE.

### Regulatory Procedures

*Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”*

Section 801 of Title 5, United States Code, Executive Order (E.O.) 12866, and E.O. 13563 require certain regulatory assessments and procedures for any major rule or significant regulatory action, defined as one that would result in an annual effect of \$100 million or more on the national economy or which would have other substantial impacts. It has been certified that this rule is not economically significant, and has been reviewed by the Office of Management and Budget as required under the provisions of E.O. 12866 and E.O. 13563.

### Public Law 104–4, Section 202, “Unfunded Mandates Reform Act”

Section 202 of Public Law 104–4, “Unfunded Mandates Reform Act,” requires that an analysis be performed to determine whether any federal mandate may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million in any one year. It has been certified that this rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year, and thus this rule is not subject to this requirement.

### Public Law 96–354, “Regulatory Flexibility Act” (RFA) (5 U.S.C. 601)

Public Law 96–354, “Regulatory Flexibility Act” (RFA) (5 U.S.C. 601), requires that each Federal agency prepare a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact

on a substantial number of small entities. This rule is not an economically significant regulatory action, and it has been certified that it will not have a significant impact on a substantial number of small entities. Therefore, this rule is not subject to the requirements of the RFA.

#### Public Law 96–511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

This rule does not contain a “collection of information” requirement, and will not impose additional information collection requirements on the public under Public Law 96–511, “Paperwork Reduction Act” (44 U.S.C. chapter 35).

#### Executive Order 13132, “Federalism”

E.O. 13132, “Federalism,” requires that an impact analysis be performed to determine whether the rule has federalism implications that would have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. It has been certified that this rule does not have federalism implications, as set forth in E.O. 13132.

#### List of Subjects in 32 CFR Part 199

Claims, Dental health, Health care, Health insurance, Individuals with disabilities, Military personnel.

Accordingly, 32 CFR Part 199 is amended as follows:

#### PART 199—[AMENDED]

■ 1. The authority citation for Part 199 continues to read as follows:

**Authority:** 5 U.S.C. 301; 10 U.S.C. chapter 55.

■ 2. Section 199.4 is amended by revising paragraph (c)(3)(ix)(A) introductory text to read as follows:

#### § 199.4 Basic program benefits.

\* \* \* \* \*

- (c) \* \* \*
- (3) \* \* \*
- (ix) \* \* \*

(A) *Covered diagnostic and therapeutic services.* Subject to the requirements and limitations stated, CHAMPUS benefits are payable for the following services when rendered in the diagnosis or treatment of a covered mental disorder by a CHAMPUS-authorized, qualified mental health provider practicing within the scope of his or her license. Qualified mental health providers are: psychiatrists or other physicians; clinical psychologists, certified psychiatric nurse specialists,

certified clinical social workers, certified marriage and family therapists, certified mental health counselors, pastoral counselors under a physician’s supervision, and until December 31, 2014, mental health counselors under a physician’s supervision. No payment will be made for any service listed in paragraph (c)(3)(ix)(A) of this section rendered by an individual who does not meet the criteria of § 199.6 of this part for his or her respective profession, regardless of whether the provider is an independent professional provider or an employee of an authorized professional or institutional provider.

\* \* \* \* \*

■ 3. Section 199.6 is amended by adding paragraph (c)(3)(iii)(N) and revising (c)(3)(iv)(C) to read as follows:

#### § 199.6 TRICARE—authorized providers.

\* \* \* \* \*

- (c) \* \* \*
- (3) \* \* \*
- (iii) \* \* \*

(N) *Certified mental health counselor.*

For the purposes of CHAMPUS, a certified mental health counselor (CMHC) must be licensed for independent practice in mental health counseling by the jurisdiction where practicing. In jurisdictions with two or more licenses allowing for differing scopes of independent practice, the licensed mental health counselor may only practice within the scope of the license he or she possesses. In addition, a CMHC must meet all of the requirements contained in this paragraph (c)(3)(iii)(N)(1) or the requirements of paragraph (c)(3)(iii)(N)(2) of this section.

(1) The requirements of this paragraph are that the CMHC:

(i) Must have passed the National Clinical Mental Health Counselor Examination (NCMHCE) or its successor as determined by the Director, TMA; and

(ii) Must possess a master’s or higher-level degree from a mental health counseling program of education and training accredited by the Council for Accreditation of Counseling and Related Educational Programs (CACREP); and

(iii) Must have a minimum of two (2) years of post-master’s degree supervised mental health counseling practice which includes a minimum of 3,000 hours of supervised clinical practice and 100 hours of face-to-face supervision. This supervision must be provided by a mental health counselor who is licensed for independent practice in mental health counseling in the jurisdiction where practicing and must be conducted in a manner that is

consistent with the guidelines for supervision of the American Mental Health Counselors Association.

(2) The requirements of this paragraph are that the CMHC, prior to January 1, 2015:

(i) Possess a master’s or higher-level degree from a mental health counseling program of education and training accredited by CACREP and must have passed the National Counselor Examination (NCE); or

(ii) Possess a master’s or higher-level degree from a mental health counseling program of education and training from either a CACREP or regionally accredited institution and have passed the NCMHCE; and

(iii) Must have a minimum of two (2) years of post-master’s degree supervised mental health counseling practice which includes a minimum of 3,000 hours of supervised clinical practice and 100 hours of face-to-face supervision. This supervision must be provided by a mental health counselor who is licensed for independent practice in mental health counseling in the jurisdiction where practicing and must be conducted in a manner that is consistent with the guidelines for supervision of the American Mental Health Counselors Association.

(3) The Director, TRICARE Management Activity may amend or modify existing or specify additional certification requirements as needed to accommodate future practice and licensing standards and to ensure that all CMHCs continue to meet educational, licensing and clinical training requirements considered appropriate.

(iv) \* \* \*

(C) *Supervised mental health counselor.* For the purposes of TRICARE, a supervised mental health counselor is an individual who does not meet the requirements of a certified mental health counselor in paragraph (c)(3)(iii)(N) of this section, but meets the requirements of this paragraph (c)(3)(iv)(C). After December 31, 2014, this category of provider will no longer be recognized by TRICARE and no reimbursement may be made to any person for services provided by this category of provider. However, prior to January 1, 2015, a supervised mental health counselor is one who meets all of the following requirements and conditions of practice:

(1) Minimum of a master’s degree in mental health counseling or allied mental health field from a regionally accredited institution; and

(2) Two years of post-masters experience which includes 3,000 hours

of clinical work and 100 hours of face-to-face supervision; and

(3) Is licensed or certified to practice as a mental health counselor by the jurisdiction where practicing (see paragraph (c)(3)(iv)(D) of this section for more specific information); and

(4) May only be reimbursed when:

(i) The TRICARE beneficiary is referred for therapy by a physician; and

(ii) A physician is providing ongoing oversight and supervision of the therapy being provided; and

(iii) The mental health counselor certifies on each claim for reimbursement that a written communication has been made or will be made to the referring physician of the results of the treatment. Such communication will be made at the end of the treatment, or more frequently, as required by the referring physician (refer to § 199.7 of this part); and

(iv) The date of services provided is on or before December 31, 2014.

\* \* \* \* \*

Dated: December 21, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

[DOD-2010-OS-0043; RIN 0790-AI62]

### 32 CFR Part 222

### DoD Mandatory Declassification Review (MDR) Program

AGENCY: Department of Defense.

ACTION: Final rule.

**SUMMARY:** This part implements policy established in DoD Instruction 5200.01. It assigns responsibilities and provides procedures for members of the public to request a declassification review of information classified under the provisions of Executive Order 13526, or predecessor orders.

**DATES:** *Effective Date:* This rule is effective January 26, 2012.

**FOR FURTHER INFORMATION CONTACT:** Robert Storer, (571) 372-0483.

**SUPPLEMENTARY INFORMATION:** The Department of Defense published a proposed rule on September 27, 2010 (75 FR 59176-59179). Three sets of comments were received and are addressed below.

*Comment 1:* As an initial matter, this proposed rule contains no paragraph (j), and there appears to be no current

paragraph (j) to which this could be referring. While it is entirely reasonable for the DoD to amend this rule later to cover the issue of fees, it is improper for the DoD to include a reference *now* to a potential later amendment that will itself have to go through the notice and comment rulemaking procedure. It is far more reasonable to leave this subparagraph out of the current iteration and add it when the actual paragraph (j) is added to the rule.

*Response 1:* Paragraph revised to be consistent with section 2001.33(e) of 32 CFR (see section 222.10).

*Comment 2:* It is entirely proper that a requester shall not be given MDR appeal rights for records withheld pursuant to FOIA exemptions. However, it is not proper for records to be withheld pursuant to FOIA exemptions as part of the MDR process without providing the proper appeal rights that accompany all FOIA withholding decisions.

*Response 2:* The FOIA and MDR process are separate and distinct processes. A MDR is not a FOIA Request; a requester does not have the right to appeal MDR's denied under FOIA exemptions without having filed a FOIA Request. If a requester is denied under the rules of FOIA, the requester must submit a FOIA request for those records in order to have the exemptions examined. (See par 4 and par 5(c)3(d) of section 222.5.)

*Comment 3:* Proposed Section 222.5(a)(vii) reads as follows: "This section shall not apply to any request for a review made to an element of the Intelligence Community that is made by a person other than an individual as that term is defined by 5 U.S.C. 552a(a)(2), or by a foreign government entity or any representative thereof."

This language differs meaningfully from the interpretive guidance rules in Section 32 CFR 2001.33(i), which say, in part, "requests for mandatory declassification review made to an element of the Intelligence Community by anyone other than a citizen of the United States or an alien lawfully admitted for permanent residence may be denied by the receiving Intelligence Community element."

*Response 3:* Section removed from final rule.

4: *Comments from DoD Internal review of proposed rule:*

a. Change the Executive Order in the last line of Paragraph 1 from 12958 to 13526.

b. Appoint an appellate authority and process MDR appeals for information originating in the OSD, the Office of the Chairman of the Joint Chiefs of Staff and

the Joint Staff, and DoD components not listed in the Appendix to Enclosure 2.

c. Insert reference to DoD 5200.1-R so the paragraph reads "The DoD Components shall process MDR requests \* \* \* in accordance with DoD 5200.1-R and Part 2001 of title 32 \* \* \*"

d. Replace paragraph 7.b with the following (or similar) statement: "The DoD Component shall consult with DOS as necessary to determine whether the information is subject to a treaty or international agreement that would prevent its declassification. The office to consult is \* \* \* (U//FOUO) The purpose of the statement is to allow DoD intelligence organizations that have existing, authorized agreements for coordinating actions on FGI to continue to use those arrangements with counterpart organizations of foreign governments for the purposes of coordinating Mandatory Declassification actions.

e. Updated all DoD Component contact information.

*Response to Internal Comments:* Internal comments from staffing reviews were incorporated as appropriate. Changes were made in the following sections: references, paragraph (d), § 222.5 MDR processing procedures of the final in response to the comments received.

### Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"

It has been certified that 32 CFR part 222 does not:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

### Sec. 202, Public Law 104-4, "Unfunded Mandates Reform Act"

It has been certified that 32 CFR part 222 does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.