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Washington, DC 20548

B-299282

December 29, 2006

The Honorable Charles E. Grassley
Chairman

The Honorable Max Baucus
Ranking Minority Member
Committee on Finance
United States Senate

The Honorable Michael B. Enzi
Chairman

The Honorable Edward M. Kennedy
Ranking Minority Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable William M. Thomas
Chairman

The Honorable Charles B. Rangel
Ranking Minority Member
Committee on Ways and Means

Subject: *Department of the Treasury, Department of Labor, and Department of Health and Human Services: Nondiscrimination and Wellness Program in Health Coverage in the Group Market*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on major rules promulgated by the Department of the Treasury, Department of Labor, and Department of Health and Human Services, entitled “Nondiscrimination and Wellness Program in Health Coverage in the Group Market” (RINs: 1545-AY32; 1210-AA77; 0938-AI08). We received the rules on December 13, December 15, and December 18, 2006. They were published in the Federal Register as final rules on December 13, 2006. 71 Fed. Reg. 75014.

The final rules contain provisions prohibiting discrimination based on a health factor for group health plans and issuers of health insurance coverage offered in connection with a group health plan enacted as part of the Health Insurance Portability and Accountability Act of 1996 (HIPPA).

Enclosed is our assessment of the Departments' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rules. Our review indicates that the Departments complied with the applicable requirements.

If you have any questions about this report, please contact James W. Vickers, Assistant General Counsel, at (202) 512-8210.

signed

Kathleen E. Wannisky
Managing Associate General Counsel

Enclosure

cc: La Nita VanDyke
Chief, Publications and Regulations Branch
Internal Revenue Service
Department of the Treasury

Bradford P. Campbell
Acting Assistant Secretary
Employee Benefits Security Administration
Department of Labor

Ann Stallion
Regulations Coordinator
Department of Health and Human Services

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF MAJOR RULES
ISSUED BY THE
DEPARTMENT OF THE TREASURY; DEPARTMENT OF LABOR; AND
DEPARTMENT OF HEALTH AND HUMAN SERVICES
ENTITLED
"NONDISCRIMINATION AND WELLNESS PROGRAM IN
HEALTH COVERAGE IN THE GROUP MARKET"
(RINs: 1545-AY32; 1210-AA77; 0938-AI08)

(i) Cost-benefit analysis

The Departments estimate that the dollar value of the expanded coverage attributable to HIPPA's nondiscrimination provisions is approximately \$850 million annually. The total costs of implementing the wellness provisions should fall within a range of \$8 million to \$15 million annually.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

Since the portion of the final rule, which finalizes the 2001 interim rules, was not preceded by a notice of proposed rulemaking, the requirements of the Act are not applicable.

For the portion of the rule dealing with the wellness provisions, the Departments have prepared a Final Regulatory Flexibility Analysis that complies with the requirements of the Act. The analysis discusses the various ways the provisions will affect the small plans (small entities) and the impact on their costs.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The final rule will not impose either an intergovernmental or private sector mandate, as defined in title II, of more than \$100 million in any one year.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

The final rules were issued using the notice and comment procedures found at 5 U.S.C. 553. On January 8, 2001, interim final rules were published in the Federal Register (66 Fed. Reg. 1378), and on the same date a Notice of Proposed Rulemaking was published regarding the wellness provisions (66 Fed. Reg. 1421).

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule contains two information collections that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The two collections have been approved by OMB and assigned OMB Control Nos. 0938-0827 and 0938-0819, both with the expiration date of April 30, 2009.

Statutory authorization for the rule

The Department of the Treasury's rule is promulgated pursuant to the authority found in sections 7805 and 9833 of title 26 of the United States Code.

The Department of Labor's rule is promulgated pursuant to the authority found in sections 29 U.S.C. 1027, 1059, 1135, 1161-1168, 1169, 1181-1183, 1181 note, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c, sec. 101(g), Public Law 104-191, 110 Stat. 1936, and sec. 401(b), Public Law 105-200, 112 Stat. 645 (42 U.S.C. 651 note).

The Department of Health and Human Services' rule is adopted pursuant to the authority found in sections 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg-63, 300gg-91, and 300gg-92), as added by HIPPA (Pub. L. 104-191, 110 Stat. 1936), and amended by the Mental Health Parity Act and the Newborns' and Mothers' Health Protection Act (Pub. L. 104-204, 110 Stat. 2935), and the Women's Health and Cancer Rights Act (Pub. L. 105-277, 112 Stat. 2681-436).

Executive Order No. 12866

The final rules were reviewed by OMB and found to be "economically significant" regulatory actions under the order.

Executive Order No. 13132 (Federalism)

The Departments consider the final rules to have federalism implications because they have substantial direct effects on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among various levels of government. However, the Departments feel the federalism implications are substantially mitigated because the majority of states have enacted laws that meet or exceed the federal HIPPA standards prohibiting discrimination based on health factors.