



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

B-330710

February 1, 2019

The Honorable Johnny Isakson
Chairman
The Honorable Jon Tester
Ranking Member
Committee on Veterans' Affairs
United States Senate

The Honorable Mark Takano
Chairman
The Honorable Phil Roe, M.D.
Ranking Member
Committee on Veterans' Affairs
House of Representatives

Subject: *Department of Veterans Affairs: VA Claims and Appeals Modernization*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Veterans Affairs (VA) entitled "VA Claims and Appeals Modernization" (RIN: 2900-AQ26). We received the rule on January 18, 2019. It was published in the *Federal Register* as a final rule on January 18, 2019. 84 Fed. Reg. 138. The effective date of the final rule is February 19, 2019.

The final rule amends the regulations governing claims adjudication and appeals. It also amends the Board of Veterans' Appeals' Rules of Practice. In addition, this rule revises VA's regulations with respect to accreditation of attorneys, agents, and Veterans Service Organization representatives; the standards of conduct for persons practicing before VA; and the rules governing fees for representation. Further, this rule implements provisions of the Veterans Appeals Improvement and Modernization Act of 2017, which amended the procedures applicable to administrative review and appeal of VA decisions on claims for benefits. Pub. L. No. 115-55, 131 Stat. 1105 (Aug. 23, 2017).

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). This final rule was published in the *Federal Register* on January 18, 2019. 84 Fed. Reg. 138. The Senate received the rule on January 22, 2019. 165 Cong. Rec. S498 (Jan. 23, 2019). The *Congressional Record* does not reflect the date of receipt by the House of Representatives. The rule has a stated effective date of February 19, 2019. Therefore, the final rule does not have the required 60-day delay in its effective date.

However, the 60-day delay in effective date can be waived if the agencies find for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agencies incorporate a statement of the findings and their reasons in the rule issued. 5 U.S.C. § 808(2). VA found good cause under CRA to publish this final rule without a 60-day delay in the effective date and to make the rule effective on February 19, 2019. VA determined that this final rule meets the “impracticable” and “public interest” exceptions in CRA because any delay in implementing the rule would have a severe detrimental impact on veterans seeking benefits. VA also noted that it believes that this rule will not result in any new or increased benefit payments (transfers) to claimants but that it will lead to claimants receiving a decision earlier than they would under the legacy appeals process, causing a shift in the timing of benefits paid to veterans and other beneficiaries to earlier fiscal years. VA stated that it is obligated to pay these transfers regardless of timing. VA asserted that this rule does not go beyond the intent or structure of the Veterans Appeals Improvement and Modernization Act of 2017, which received a cost-neutral assessment from the Congressional Budget Office. Therefore, VA believes that Congress has committed to the structure that is causing the timing of the benefits payments to be pulled forward in time, and, therefore, it would be unnecessary and contrary to the public interest to delay the effective date 60 days.

Enclosed is our assessment of VA’s compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Julia C. Matta
Managing Associate General Counsel

Enclosure

cc: Consuela Benjamin
Regulations Development Coordinator
Office of Regulation Policy and Management
Department of Veterans Affairs

ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF VETERANS AFFAIRS
ENTITLED
“VA CLAIMS AND APPEALS MODERNIZATION”
(RIN: 2900-AQ26)

(i) Cost-benefit analysis

The Department of Veterans Affairs (VA) analyzed the costs and benefits of this final rule. VA does not believe that this regulation will result in any new or additional benefits paid to veterans. Rather, VA believes that a modernized appeals process will lead to veterans receiving a decision earlier than they would under the current system, causing a shift in the timing of transfers paid to veterans towards earlier fiscal years. In other words, VA assumes that decisions that were projected to be completed in 2021, under the existing framework, would now be completed in 2019, under the new framework. A net funding shift of \$400.7 million in 2019 and \$2.5 billion over 5 years would result from this regulation. These transfers would be the same under both existing and new frameworks.

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

VA certified that this final rule will not have a significant economic impact on a substantial number of small entities as defined in the Act.

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

VA determined that this final rule will not result in the expenditure of \$100 million or more by state, local, and tribal governments, in the aggregate, or by the private sector.

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

Administrative Procedure Act, 5 U.S.C. §§ 551^{et seq.}

On August 10, 2018, VA published a proposed rule. 83 Fed. Reg. 39,818. VA received 29 comments on the proposed rule, which were addressed in the final rule.

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

VA determined that this final rule contains information collection requirements under the Act. VA is proposing three new collections of information that require approval by the Office of Management and Budget (OMB). VA estimates the total costs of these information collections to respondents will be \$8.4 million over a 5-year period (FY2019-FY2023). Although VA found it difficult to predict the percentage of respondents that will be able to take advantage of the new system forms each year beginning in February 2019, VA estimates that the incremental information collection costs for respondents will be \$1,092,258 in FY2019. VA also determined there will be incremental information collection savings of \$6,258,423 over a 5-year period, once

the legacy forms are no longer in use. VA intends to make related revisions to four information collections previously approved under OMB Control Number 2900-0085 and, pending approval of such revisions, to discontinue OMB Control Number 2900-0085.

Statutory authorization for the rule

VA promulgated this final rule under the authority of section 301 of title 5, sections 2671–2680 of title 28 and sections 501(a), 512, 515, 1901–1929, 1981–1988, 5502, and 5901–5905 of title 38, United States Code.

Executive Order No. 12,866 (Regulatory Planning and Review)

VA determined that this final rule is an economically significant regulatory action under the Order.