U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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December 11, 2015

The Honorable Johnny Isakson
Chairman
The Honorable Richard Blumenthal
Ranking Member
Committee on Veterans' Affairs
United States Senate

The Honorable Jeff Miller
Chairman
The Honorable Corrine Brown
Ranking Member
Committee on Veterans' Affairs
House of Representatives

Subject: *Department of Veterans Affairs: Expanded Access to Non-VA Care Through the Veterans Choice Program*

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 "Expanded Access to Non-VA Care Through the Veterans Choice Program" (RIN: 2900-AP60). We received the rule on November 30, 2015. It was published in the *Federal Register* as an interim final rule on December 1, 2015. 80 Fed. Reg. 74,991.

The interim final rule revises medical regulations that implement section 101 of the Veterans Access, Choice, and Accountability Act of 2014 (the Choice Act), which requires VA to establish a program to furnish hospital care and medical services through eligible non-VA health care providers to eligible veterans who either cannot be seen within the wait-time goals of the Veterans Health Administration (VHA) or who qualify based on their place of residence (referred to as the Veterans Choice Program or the Program). These regulatory revisions are required by the most recent amendments to the Choice Act made by the Construction Authorization and Choice Improvement Act of 2014, and by the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015. The Construction Authorization and Choice Improvement Act of 2014 amended the Choice Act to define additional criteria that VA may use to determine that a veteran's travel to a VA medical facility is an "unusual or excessive burden," and the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 amended the Choice Act to cover all veterans enrolled in the VA health care system, remove the 60-day limit on an episode of care, modify the wait-time and 40-mile distance eligibility criteria, and expand provider eligibility based on criteria as determined by VA. VA states that the interim final rule revises VA regulations consistent with the changes made to the Choice Act as described above.

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). The interim final rule has a stated effective date of December 1, 2015. The rule was received on November 30, 2015, and was published in the *Federal Register* on December 1, 2015. Therefore, the interim final rule does not have the required 60-day delay in its effective date. The 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. §§ 553(d)(3), 808(2). VA determined that there was good cause to publish this rule without prior opportunity for advance notice and public comment which would be impracticable, unnecessary, or contrary to the public interest and to publish this rule with an immediate effective date. Section 101(n) of the Choice Act authorized VA to implement the Veterans Choice Program through an interim final rule and provided a deadline of no later than November 5, 2014, the date that is 90 days after the date of the enactment of the law. Additionally, according to VA, the Program is only authorized to run until August 7, 2017, or until funds expire, which creates a need for expedited action. The changes made by the Construction Authorization and Choice Improvement Act included an immediate effective date under section 3(b) of that Act and to publish this rule with an immediate effective date. The Secretary of VA issued three interim final rules published at 79 Fed. Reg. 65,571 (November 5, 2014), 80 Fed. Reg. 22,906 (April 24, 2015), and 80 Fed. Reg. 66,419 (October 29, 2015).

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. Our review of the procedural steps taken indicates that VA complied with the applicable requirements.

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

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Michael P. Shores
Chief Impact Analyst, Office of Regulations
Policy and Management
Office of the General Counsel
Department of Education

ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF VETERANS AFFAIRS
ENTITLED
"EXPANDED ACCESS TO NON-VA CARE THROUGH
THE VETERANS CHOICE PROGRAM"
(RIN: 2900-AP60)

(i) Cost-benefit analysis

In the interim final rule, VA does not include the text of the cost-benefit analysis associated with the rule but instead directs readers to the regulatory impact analysis at http://www.regulations.gov, or at http://www.va.gov/orpm/ by following the link for ''VA Regulations Published From FY 2004 Through Fiscal Year to Date." In that analysis, VA states that the rule implements provisions of two public laws which enhance the Veterans Choice Program by removing administrative burden, allowing more veterans to meet basic Choice eligibility, providing a method for veterans to use the program due to unusual or excessive burden, and allowing more providers to participate in the program. According to VA, the regulations do not expand the medical benefits package available under Choice. VA notes that the number of new veterans who meet basic Choice eligibility as a result of these changes is small compared to the total enrolled population. Additionally, according to VA, the number of veterans who now meet the specific eligibility requirement based on residence does increase slightly with these provisions, but again small compared to the total enrolled population. VA also notes that, based on the original legislation, veterans must choose to use Choice--VA cannot require veterans to use the program. According to VA, this introduces some variables that prevent VA from making an accurate estimate of veterans who will choose the Choice program. For this reason and based on many variables, the reliance methodology used in VA's analysis accounts for the uncertainties. VA states that estimates of increased expenditures associated with the changes within this rule result from legislative changes after the FY 2016 and FY 2017 Advance Appropriations was submitted, and VA's estimates reflect a change from that budget base estimate. Based upon the assumptions that authority to spend funds under this current legislation expires no later than August 7, 2017, the Low End Volume total costs associated with this interim final rule are estimated to be $315 million and the High End Volume total costs are estimated to be $1.8 billion.

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

VA certified that the interim final rule will not have a significant economic impact on a substantial number of small entities. VA stated that the rule will not have a significant economic impact on participating eligible entities and providers who enter into agreements with VA but, to the extent there is any such impact, it will result in increased business and revenue for them. VA also stated that it does not believe there will be a significant economic impact on insurance companies, as claims will only be submitted for care that will otherwise have been received whether such care was authorized under this Program or not. Therefore, VA stated that the rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

(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 interim final rule will not result in the expenditure by state, local, or tribal governments in the aggregate, or by the private sector, of $100 million or more 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.

VA concluded that there was good cause to publish this rule without prior opportunity for public comment and to publish this rule with an immediate effective date. VA found that it was impracticable and contrary to law and the public interest to delay this rule for the purposes of soliciting advance public comment or to have a delayed effective date, and therefore issued three interim final rules published at 79 Fed. Reg. 65,571 (November 5, 2014), 80 Fed. Reg. 22,906 (April 24, 2015), and 80 Fed. Reg. 66,419 (October 29, 2015). The interim final rule changes the criteria VA may consider when determining if a veteran faces an unusual or excessive burden in traveling to the nearest VA medical facility. The interim final rule also expands eligibility for veterans in other ways (through the new criteria related to wait times and to the distance requirements), as well as expands eligibility for providers as required and permitted by the most recent amendments to the Choice Act. These changes will increase the number of veterans who are eligible for the Veterans Choice Program. In order for these veterans to have access to needed health care under the Program, VA stated that it is essential that the revised criteria be made effective as soon as possible. For the above reasons, VA issued this rule as an interim final rule. However, VA stated that it will consider and address comments that are received within 120 days of the date this interim final rule is published in the *Federal Register*.

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

VA states that the interim final rule will impose collections of information, at 38 C.F.R. 17.1530(d), under PRA no new or proposed revised collections of information are associated with this interim final rule. The information collection requirements for § 17.1530(d) are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control number 2900–823.

Statutory authorization for the rule

The interim final rule is authorized by section 101 of the Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No.113-146, 128 Stat. 1754, as amended by the Department of Veterans Affairs Expiring Authorities Act of 2014, Pub. L. No. 113-175, 128 Stat. 1901, 1906, the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. No. 113–235, 128 Stat. 2130, 2568), the Construction Authorization and Choice Improvement Act (Pub. L. No. 114-19, 129 Stat. 215), and the Surface Transportation and Veterans Health Care Choice Improvement Act (Pub. L. 114-41, 129 Stat. 443).

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

VA examined the economic, interagency, budgetary, legal, and policy implications of the rule, and it determined that it is an economically significant regulatory action under Executive Order 12,866.