



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

B-336290

May 13, 2024

The Honorable Jon Tester
Chairman
The Honorable Jerry Moran
Ranking Member
Committee on Veterans' Affairs
United States Senate

The Honorable Mike Bost
Chairman
The Honorable Mark Takano
Ranking Member
Committee on Veterans' Affairs
House of Representatives

Subject: *Department of Veterans Affairs: Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge*

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) titled "Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge" (RIN: 2900-AQ95). We received the rule on April 26, 2024. It was published in the *Federal Register* as a final rule on April 26, 2024. 89 Fed. Reg. 32361. The stated effective date of the rule is June 25, 2024.

According to VA, it proposed to amend its regulation regarding character of discharge (COD) determinations. VA stated that after considering public comments, it has decided to finalize its proposal with some modifications to expand VA benefits eligibility, bring more consistency to adjudications of benefits eligibility, and ensure COD determinations consider all pertinent factors.

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 rule was published in the *Federal Register* on April 26, 2024. 89 Fed. Reg. 32361. The House and Senate received the rule on May 1, 2024. Email from Office General Counsel, VA, to Paralegal Specialist, GAO, *RE: Regulatory Compliance w/CRA - AQ95(F) Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge* (May 1, 2024). The stated effective date of the rule is June 25, 2024. Therefore, the stated effective date is less than 60 days from the date of receipt by Congress.

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 Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Luvenia Potts
Reg. Dev. Coord., Ofc. of Reg. Pol. & Mgmt.
Office of General Counsel (OGC)
Department of Veterans Affairs

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF VETERANS AFFAIRS
TITLED
“UPDATE AND CLARIFY REGULATORY BARS TO BENEFITS
BASED ON CHARACTER OF DISCHARGE”
(RIN: 2900-AQ95)

(i) Cost-benefit analysis

In its submission to us, the Department of Veterans Affairs (VA) indicated it prepared an analysis of the costs and benefits of this final rule. However, we identified no such analysis in the rule.

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

The Secretary of VA certified that this final rule will not have a significant economic impact on a substantial number of small entities as defined under 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 have an effect on state, local, or tribal governments, in the aggregate, or on the private sector, of \$100 million, updated annually for inflation, in any one year.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act’s requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act” in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

VA did not discuss the Act in this final rule or in its submission to us.

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

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

On July 10, 2020, VA published a proposed rule. 85 Fed. Reg. 41471. VA stated that given the “various and differing” comments received on the proposed rule, it issued a Request for Information (RFI) in September 2021. 86 Fed. Reg. 50513. VA also stated that it held a two-day listening session to receive oral comments from any member of the public on the RFI questions. VA stated further that it received 148 comments total in response to the proposed rule, RFI, and listening session. Lastly, VA noted that it discussed in detail the public comments addressing issues raised in the proposed rule, RFI, and listening session.

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

VA determined that this final rule contains a collection of information but noted that there are no provisions associated with this rulemaking constituting any new collection of information or any revisions to the current collection of information. VA stated that the collection of information is currently approved by OMB under OMB Control Numbers 2900-0747, 2900-0886, 2900-0002, and 2900-0004.

Statutory authorization for the rule

VA promulgated this final rule pursuant to section 501 of title 38, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

OMB determined that this rule is a significant regulatory action under the Order.

Executive Order No. 13132 (Federalism)

VA did not discuss the Order in this final rule or in its submission to us.