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May 5, 2020

Via Electronic Submission

Director, Office of Regulation Policy and Management (00REG)
Department of Veterans Affairs
810 Vermont Avenue NW, Room 106
Washington, DC 20420

Re: RIN 2900–AQ48, Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments under the VA MISSION ACT of 2018

Dear Director,

The National Veterans Legal Services Program ("NVLSP") and Veteran Warriors, Inc. ("VW," and collectively, the "Organizations") appreciate the opportunity provided by the Department of Veterans Affairs ("VA") to submit comments on proposed improvements and amendments to the Program of Comprehensive Assistance for Family Caregivers (the "Proposed Rule").

NVLSP is a nonprofit organization founded in 1981, which strives to ensure that the government delivers to our nation's veterans and active duty personnel, and their dependents, the benefits to which they are entitled from their military service to our country. NVLSP publishes the *Veterans Benefits Manual*, an exhaustive guide for advocates who help veterans and their families obtain benefits from VA. NVLSP also has provided pro bono representation to thousands of individual veterans, served as class counsel to several classes of veterans, and participated as *amicus curiae* in impact litigation across the country to help ensure these benefits' delivery. As an organization with deep ties to the veterans community and experience with the hurdles veterans face in obtaining health care, we appreciate the opportunity to provide comments on VA's Proposed Rule.

VW provides experienced legislative advocacy, research, and media outreach for veterans who have lost their "voice." VW focuses its efforts on finding solutions and seeking accountability so more veterans and their families receive the services they have earned. VW works directly with family caregivers and has extensive, firsthand knowledge of the difficulties veterans have in getting much-needed care. We likewise appreciate the opportunity to share our firsthand knowledge and provide comments on VA's Proposed Rule.

A common theme in these comments is to revise VA's Proposed Rule to effectuate more fully Congress' intent for the Program of Comprehensive Assistance for Family Caregivers (the

"Caregiver Program" or the "Program"). Congress designed the Caregiver Program for four purposes: (1) to honor the preference of many of our country's seriously injured veterans and their family members for the veteran to receive care in their own homes; (2) to address that many family caregivers are untrained and unsupported, that providing such care is an emotional and financial strain, and that veterans' quality of care depends on their caregivers' well-being; (3) to recognize the caregivers for the many sacrifices that they make to care for our country's seriously injured veterans; and (4) to develop, through Caregiver Program participants, a lower-cost method of caring for seriously injured veterans than institutionalized care.[1]

The Caregiver Program has proven invaluable for those fortunate enough to obtain access. However, VA's proposed changes are significant. As outlined in detail below, the Organizations have concerns that some of these changes will dramatically and unduly limit access to the Caregiver Program for many of the seriously injured veterans entitled to care under the law or reduce the benefits available to such veterans and their caregivers. Given our shared interest in protecting veterans and the family members on whom they rely for essential care and support, the Organizations respectfully submit the following comments for VA's consideration on selected portions of the Proposed Rule.

1. Program Eligibility – Acceptance into the Caregiver Program

In passing Section 161 of the VA MISSION ACT of 2018 (the "Act"), Congress sought to address the obvious inequity in treatment between pre- and post-9/11 veterans by expanding the Caregiver Program to otherwise eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001. At the same time, Congress recognized that the existing demand from post-9/11 veterans "has outpaced expectations by 550 percent leading to delays, workload concerns, and other issues," which has "impeded the timeliness of key functions and negatively affected services to caregivers."[2]

Congress could have responded to this larger-than-anticipated demand by narrowing the scope of seriously injured veterans eligible for the Caregiver Program. But instead, Congress focused on improving VA's ability to serve eligible veterans by requiring VA to implement an information technology system that fully supports the Caregiver Program and allows for data assessment and comprehensive monitoring, as well as requiring VA to describe any barriers to accessing and receiving care and services under the Caregiver Program in its annual reports to Congress.[3] In fact, beyond opening the Caregiver Program to pre-9/11 veterans, Congress actually *expanded* the underlying eligibility criteria with the Act's inclusion of another way in which a veteran may qualify for the Program due to need for personal care services: "a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired."[4]

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[1] *See* S. Rept. 111-80, Caregiver and Veterans Health Services Act of 2009, at 4–6, 7–8 (Sept. 25, 2009).
[2] *See* H. Rept. 115-671, Report accompanying H.R. 5674 – VA MISSION Act of 2018, at 17–18 (May 11, 2018) (*citing* GAO Report 14-1675, Actions Needed to Address Higher-Than-Expected Demand for the Family Caregiver Program, *available at* https://www.gao.gov/assets/670/665928.pdf).
[3] *See* 38 U.S.C. § 1720G note; Public Law 115–182, Sections 162, 163.
[4] *See* 38 U.S.C. § 1720G(a)(2)(C)(iii); Public Law 115–182, Section 161(A)(2)(C).

Before passage of the Act, VA sought public comment on many of the changes included in the Proposed Rule, including how "serious injury" is defined for the purposes of Caregiver Program eligibility. In response, members of Congress submitted comments to make clear that any limitations to Caregiver Program eligibility would be contrary to Congress' intent and "antithetical to the principles of the original caregiver's program."[5] Moreover, as detailed below, many of these limitations are also inconsistent with the plain text of the Act. While agencies generally are afforded substantial deference in interpreting both statutes and the agencies' own implementing regulations, deference is afforded only when the plain text of either is genuinely ambiguous after exhausting all other traditional tools and canons of interpretation.[6] Additionally, in the unique statutory scheme that Congress has created to benefit our country's veterans, their dependents, and through this Program their caregivers, all "interpretive doubt is to be resolved in the veteran's [beneficiary's] favor."[7] Congress has afforded VA *no* latitude to interpret an ambiguous law against a veteran, dependent, or caregiver. Additionally, except where Congress clearly, unambiguously, and expressly has delegated legislative rulemaking authority to VA, the agency has *no* authority to restrict Congress' provision of benefits through this statutory scheme substantively. These are bedrock principles to which VA's final rules regarding the Caregiver Program must adhere.

Notwithstanding a lack of statutory authority to restrict Caregiver Program eligibility, and in the face of congressional warning not to, the Proposed Rule will admittedly "have a substantial impact on eligibility requirements."[8] Worse, it will do so without truly considering the population of veterans who will lose access to the Caregiver Program.

Even under the current regulations, VA has interpreted the Caregiver Program's governing statutes restrictively and has engaged in practices that have denied or terminated Program participation for many thousands of veterans and their caregivers who we believe that, under Congress' intent for the Program, qualify.[9] While the Caregiver Program currently has less than 20,000 participants, we estimate that VA has removed tens of thousands of additional veterans from the Program since January 2014 based on VA-supplied data.[10] From VA's data, we estimate that over 75% of the current participation is at Tier 1. Many of these cases were unjustifiably reduced from Tier 3 to Tier 1 in the last four years. We point out this trend to make

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[5] *See* Comment on Request for Information: Program of Comprehensive Assistance, House Veterans' Affairs Committee Minority Comment Submission (February 5, 2018), *available at* https://www.regulations.gov/document?D=VA-2018-VACO-0001-0346.

[6] *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) (establishing the standard of deference to agency interpretation of its own regulation).

[7] *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

[8] Proposed Rule, 85 Fed. Reg. 13356 (Mar. 6, 2020).

[9] Between 2014 and 2018, many VA stations dropped a significant number of eligible veterans. For example, the Charleston, S.C. VA dropped 94% of its caregivers in this time. *See* "VA's Caregiver Program Still Dropping Veterans with Disabilities," NPR (May 21, 2018), *available at* https://www.npr.org/2018/05/21/611733148/vas-caregiver-program-still-dropping-veterans-with-disabilities.

[10] A 2017 VA Office of Inspector General report also found that VA failed to consistently monitor and document the health and well-being of an estimated 50% of sampled veterans discharged from the Program, which suggests that veterans may have been cut arbitrarily. *See* VA OIG Report, Program of Comprehensive Assistance for Family Caregivers: Management Improvements Needed, Report No. 17-04003-222, at iii (Aug. 16, 2018) ("2018 OIG Report"), *available at* https://www.va.gov/oig/pubs/VAOIG-17-04003-222.pdf.

clear just how restrictive the Proposed Rule will be and urge VA to reconsider many aspects of its proposal to ensure that the Caregiver Program is made available to every individual whom Congress intended for the Program to cover.

A. Redefining "Serious Injury"

In order to be eligible for the Caregiver Program, the Act requires a veteran to have suffered a "serious injury." VA currently defines "serious injury" to mean "any injury, including traumatic brain injury, psychological trauma, or other mental disorder, incurred or aggravated in the line of duty in the active military, naval, or air service on or after September 11, 2001, that renders the veteran or servicemember in need of personal care services."[11] The Organizations here address why we oppose VA's second of four proposed changes to the definition of "serious injury," which now would exclude every veteran who does not have a singular or combined rating of 70% or more based on one or more service-connected disabilities.

VA admits that this change substantively tightens the Program's eligibility criteria.[12] VA has provided no basis to believe that it is a restriction that Congress has intended. VA instead justifies this change, in part, by comparing the Caregiver Program to VA-provided nursing home care under 38 U.S.C. § 1710A, which VA describes as being designed to assist a similar population of veterans and service members.[13] In transporting factors guiding the administration of nursing home care, the Organizations believe VA has contravened its authority under the Caregiver Program's governing statute. The Act does not impose any rating-based threshold to qualify for the Program. Additionally, even if VA could rely on disability ratings as an eligibility requirement, 70% is arbitrary and far too high.[14]

Congress' joint statement when first passing the Caregiver Program in 2010 made clear: "[s]everely injured veterans are defined as those who need personal care services because they are unable to perform one or more independent activities of daily living, require supervision as a result of neurological or other impairments, or need personal care services because of other matters specified by the VA."[15] Unlike this individualized need for personal care services, VA's Schedule for Rating Disabilities reflects its assessment of veterans' impairment in civil ***earning capacity***, ***on average***, resulting from given sets of symptoms.[16] Yet nothing in section 1720G references earning capacity, or any average, as a relevant factor. In contrast, Congress expressly states in 38 U.S.C. § 1710A that nursing home care shall be provided to any veteran with a service-connected disability rated at 70% or more. If Congress wanted to apply a similar eligibility threshold to the Caregiver Program, it would have.

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[11] 38 C.F.R. § 71.20.
[12] *See* Proposed Rule at 13370.
[13] *Id.* at 13369.
[14] Notably, VA-provided nursing home care is not limited to those veterans with a 70% disability rating; such care is also available for veterans in need of care due to a *service-connected* disability, regardless of rating. *See* 38 U.S.C. §1710A(a).
[15] *See* Congressional Record—Senate, Joint Statement on Caregivers and Veterans Omnibus Health Services Act, at S2567 (April 22, 2010).
[16] 38 U.S.C. § 1155; 38 C.F.R. § 4.1.

VA itself has previously recognized, in a manner fundamentally contradictory with its proposed change here, that the Caregiver Program provides benefits distinct from other VA benefits programs:

> Congress could easily have linked the caregiver stipend to disability compensation; however, section 1720G instead mandates that VA create a program that is distinct from virtually all other VA benefits programs. The caregiver stipend is designed to assist eligible veterans by enabling Primary Family Caregivers to provide certain home-based care. ***It is not designed to supplement, replace, or be dependent on the level of disability compensation received by the veteran.*** The regulations implementing the Program of Comprehensive Assistance for Family Caregivers, in particular the criteria for calculating the stipend amount, were specifically established to meet the goals of the Caregivers Act governing the Program of Comprehensive Assistance for Family Caregivers. These regulations are not, and need not be, designed to complement the rating schedule in 38 CFR part 4.[17]

VA's explanatory statement for the Proposed Rule fails to adequately address why VA is now changing its position on this point.[18]

Furthermore, even if VA were authorized to consider and set a disability rating as a threshold factor for Caregiver Program eligibility, 70% is far too high. As VA recognizes, 70% is the level associated with providing VA-required nursing home care, yet Congress expressly considered, and rejected, limiting Caregiver Program eligibility to those veterans that would otherwise require nursing home care. On November 19, 2009, the Senate considered Amendment 2785 to Section 102 of the Caregivers and Veterans Omnibus Health Services Act of 2009, which would limit eligibility to those veterans "who, in the absence of personal care services, would require hospitalization, nursing home care, or other residential care."[19] This amendment was rejected by a vote of 66-32, with Senators recognizing that the proposal would "potentially shut out veterans suffering from severe mental illness, or those learning to adapt to life at home with blindness or amputations" and "significantly narrow[s] the eligibility criteria for caregiver assistance."[20] Yet that is exactly what VA proposes to do in the Proposed Rule.

Though VA suggests that "a majority" of currently participating veterans have a single or combined rating of 70% or more, VA has not substantiated this statement, fully considered how many existing participants will lose benefits under the proposed change, or assessed the types of injuries that may render a veteran in need of personal care services without meeting the 70% threshold.[21] As an example, if a veteran is solely rated at 50% for post-traumatic stress disorder

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[17] *See* Caregiver Program Final Rule, 80 Fed. Reg. 1357, 1368 (Jan. 9, 2015) (emphasis added).
[18] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (noting a presumption *against* changes in policy that are not justified by the rulemaking record).
[19] *See* Congressional Record—Senate, Caregiver and Veterans Omnibus Health Services Act of 2009, Vol. 155, Pt. 21 at 28293 (Nov. 19, 2009).
[20] *Id.* at 28308, 28323.
[21] *See* Proposed Rule at 13370.

while requiring 40 plus hours of supervision or protection by a caregiver because of the symptoms, the veteran would not be eligible under the Proposed Rule; however, if a veteran is rated at 70% for any disability yet only requiring 10 hours of assistance per week, the veteran would be eligible. The Organizations believe that VA's proposed change to the definition of serious injury would revoke benefits for a large number of currently eligible veterans. Based on publicly available claims, the Organizations predict that a majority of the Caregiver Program beneficiaries are in the lowest of the three current benefit tiers and receive a stipend equivalent to 10 hours per week of caregiver assistance while only 25% receive the highest level of care. The former group of veterans is most at risk for losing benefits altogether under the proposed change.

Ultimately, the Organizations do not know how many veterans will lose their benefits if VA goes forward with the proposed change and urges VA to assess and quantify such impacts as a part of its final rulemaking. While the Organizations do not oppose further clarification to the term "serious injury," this clarification must be related to Congress' intent that VA provide access to those veterans in need of personal care services without being anchored to an unrelated and overly restrictive VA disability rating. If a change to the definition of serious injury is required, the Organizations respectfully request VA to consider adopting the definition of "serious injury or illness" as used in the Department of Labor's Family Medical Leave Act regulations.[22]

B. Redefining "In Need of Personal Care Services"

In addition to having sustained a "serious injury," the Act requires that a veteran be "in need of personal care services."[23] The Act delineates three reasons that qualify and permit the Secretary to add to that list.[24]

Instead of adding to that list, VA has proposed essentially to restrict it. Currently, VA defines "personal care services" to mean "care or assistance of another person necessary in order to support the eligible veteran's health and well-being, and perform personal functions required in everyday living ensuring the eligible veteran remains safe from hazards or dangers incident to his or her daily environment."[25] VA proposes to create a new definition of "in need of personal care services" applicable only to the Caregiver Program while retaining the current definition of "personal care services" for the Program of General Caregiver Services ("General Caregiver Program") set forth in 38 U.S.C. § 1720G(b). In making this change, VA would now require veterans to need "in-person" care in order to be eligible for the Caregiver Program but not for the General Caregiver Program. The Organizations find this change inconsistent with the authorizing statute, unduly restrictive of Program eligibility, and arbitrary.

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[22] *See* 29 C.F.R. § 825.102 (definition of "serious injury or illness," (2)(i)-(iii)).
[23] 38 U.S.C. § 1720G(a)(2)(C).
[24] *See* 38 U.S.C. § 1720G(a)(2)(C)(i)–(iii) (delineating three qualifying reasons for a veteran to be "in need of personal care services"); *id.* § 1720G(a)(2)(C)(iv) (adding, "such other matters as the Secretary considers appropriate").
[25] 38 C.F.R. § 71.20.

Congress has already defined "personal care services" for both the Caregiver Program and the General Caregiver Program in the same way.[26] Both Programs require an eligible veteran to need "personal care services" as a requirement for eligibility.[27] Under the statute, the only difference in eligibility requirements between the two Programs is that the Caregiver Program requires a veteran to have sustained a "serious injury" whereas the General Caregiver Program does not. Nowhere does the statute suggest that a veteran must receive "in-person" care for the Caregiver Program but not for the General Caregiver Program, and VA's attempt to carve out this qualifier for only the Caregiver Program will not withstand judicial scrutiny.

VA asserts that the Act was "intended to provide assistance to Family Caregivers who are required to be physically present to support eligible veterans in their homes."[28] This is not correct—the statute seeks to enable the *veteran* to obtain care in his or her home regardless of where the *caregiver* is located. While these services are often performed in-person, there are situations where the veteran may receive care remotely, such as when the caregiver checks in to remind the veteran to take his or her medication, guide the veteran through a task that he or she can complete without physical assistance, or provide mental and emotional support should the need arise. Additionally, the term "family member" as defined in the statute does not require the family member to live in the veteran's home if the family member is part of the veteran's immediate family (e.g., sibling, parent, or child).[29]

VA supports its new reading by interpreting the word "personal" on its own, taking it out of its contextual use as a part of the phrase "personal care services." This justification is illogical for two reasons. First, "personal" cannot be read in isolation. If each term of "personal care services" is interpreted individually, using definitions from the same source VA referenced in the Proposed Rulemaking, the phrase would mean: an action "done, made, or performed in person" (personal), to provide "watchful oversight; charge or supervision" or "attentive assistance or treatment to those in need" (care), as "work done for others ***as an occupation or business***" or "an act or variety of work done for others, ***especially for pay***" (service).[30] Under this approach, eligibility could be construed or narrowed to only include family caregivers that otherwise provide care or treatment professionally, which clearly contravenes the intent of the statute and shows that VA cannot create a definition by extracting and massaging individual words in isolation. Second, and as discussed above, if "personal" indeed connotes obtaining "in-person" care, then it must do so for both the Caregiver Program and General Caregiver Program as both require an eligible veteran to need "personal care services."

Beyond the realm of 38 U.S.C. § 1720G, other statutory programs under VA's cognizance include the phrase "in need of [a particular service]," yet VA has never before crafted a unique definition for the entire phrase. For example, Congress requires VA to provide varying

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[26] 38 U.S.C. § 1720G(d)(4)).
[27] *Compare* 38 U.S.C. § 1720G(a)(2)(C) ("[an eligible veteran is any individual who] is ***in need of personal care services*** because of—") *with* § 1720G(B)(2) ("a covered veteran is any individual who ***needs personal care services*** because of—") (emphasis added).
[28] *See* Proposed Rule at 13361.
[29] 38 U.S.C. § 1720G(d)(2), (3).
[30] *See* Proposed Rule at 13361 (citing The American Heritage Dictionary of the English Language (4th ed. 2000)) (emphasis added).

degrees of wartime disability compensation for veterans "in need of regular aid and attendance," "in need of a higher level of care," or benefits for veterans "in need of nursing home care," but VA has not sought to concoct its own *Frankenstein*-like definition similar to what is proposed now.[31]

C. Redefining "Inability to Perform Activities of Daily Living"

Under the Act, the "inability to perform one or more activities of daily living" is one of four bases for finding that an eligible veteran is in need of personal care services. Current VA regulations define "inability to perform one or more activities of daily living" as an inability to complete any one of seven enumerated tasks.[32] VA proposes to modify this definition to require an eligible veteran to need assistance *each time* he or she completes one of these seven enumerated tasks. This change is unduly restrictive. Similar to other parts of the Proposed Rule discussed above, this change serves as a heightened eligibility requirement to obtain benefits under the Caregiver Program. While VA maintains that the change is necessary to limit the Caregiver Program to "eligible veterans with moderate and severe needs," such a restriction is a policy decision that has not been authorized by Congress.

Currently, VA's regulations calculate a participating caregiver's stipend based on whether a veteran requires assistance in completing one or more activities of daily living all of the time, 75% of the time, 50% of the time, or 25% of the time.[33] The frequency of required care is not used to determine whether a veteran is eligible to participate in the Caregiver Program.[34] In expanding the eligibility of the Caregiver Program through the Act, Congress recognized that VA does in fact admit veterans into the Program that do not require assistance *each time* they perform an activity of daily living:

> According to current regulations, the stipend payment is based on the number of hours of caregiving required by the veteran. The maximum stipend is based on the requirement of 40 hours of caregiving each week, the median stipend is based on the requirement of 25 hours of caregiving each week, and the lowest stipend is based on the requirement of 10 hours of caregiving each week. In order to determine the degree of personal care services required by the veteran, VA evaluates the veteran and establishes a clinical rating based on specific criteria regarding the ability to perform activities of daily living and the need for supervision or

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[31] *See* 38 U.S.C. §§ 1114(l), (m), (r), (t); 1710A; 1720C.
[32] 38 C.F.R. § 71.15.
[33] *See* 38 C.F.R. § 71.40(c)(4)(i)–(v).
[34] As expressly stated by Congress, "[e]ligible veterans are defined as those who have a serious injury, including traumatic brain injury, psychological trauma, or other mental disorder," not by the frequency in which the veteran requires care. *See* Congressional Record—Senate, Joint Statement on Caregivers and Veterans Omnibus Health Services Act, at S2567 (April 22, 2010). Similarly, Congress has specified that for Special Compensation for Assistance with Activities of Daily Living under 37 U.S.C. § 439, the amount of assistance needed to perform a particular task determines compensation amount, *not eligibility*. *See* DD Form 2948, "Application for Special Compensation for Assistance with Activities of Daily Living," (May 2019) *available at* https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2948.pdf.

> protection based on symptoms or residuals of neurological or other impairment or injury.[35]

So as Congress was expanding eligibility for the Caregiver Program by both opening access to veterans injured prior to 9/11, as well as including another type of activity under eligible personal care services (specifically, the need for regular or extensive instruction or supervision), it expressly chose not to include an "each time" qualification for the performance of activities of daily living. Congress' tacit approval of VA's current acknowledgment of Program eligibility irrespective of whether a veteran requires assistance *each time* he or she completes one of these activities of daily living demonstrates that VA's proposed change contravenes congressional intent.[36]

Alternatively, should VA choose to redefine "Inability to Perform Activities of Daily Living," the Organizations respectfully request VA to adopt the guidance currently applied to administration of the Servicemembers' Group Life Insurance Traumatic Injury Protection ("TSGLI") program under 38 U.S.C. § 1980A. TSGLI provides short-term financial assistance to servicemembers unable to "carry out the activities of daily living" due to a traumatic brain injury.[37] Under this guidance, an individual "requires assistance" to perform activities of daily living if he or she requires physical, stand-by, or verbal assistance, without which the individual would be incapable of performing the task, which is defined as follows:

- Physical assistance – when a patient requires hands-on assistance from another person.

- Stand-by assistance – when a patient requires someone to be within arm's reach because the patient's ability fluctuates and physical or verbal assistance may be needed.

- Verbal assistance – when a patient requires verbal instruction in order to complete the ADL due to cognitive impairment. Without these verbal reminders, the patient would not remember to perform the ADL.[38]

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[35] *See* Senate Rept. 115–212, Report to accompany S. 2193—Caring for our Veterans Act of 2017, at 59 (Mar. 7, 2018) (providing background on the Act's change to the stipend calculation).

[36] *See Brown & Williamson Tobacco Corp. v. Food and Drug Administration*, 153 F.3d 155, 170 (4th Cir. 1998) ("inaction by Congress may be interpreted as legislative ratification of or acquiescence to an agency's position"); *see also Walker Macy LLC v. U.S. Citizen and Immigration Services*, 243 F. Supp. 3d 1156, 1171 (D. Or. 2017) (reasoning that when Congress is silent about a particular agency interpretation while repeated amendments have been passed, it demonstrates legislative acquiescence to the interpretation) (citing *Reyes-Torres v. Holder*, 645 F.3d 1073, 1080 (9th Cir. 2011)).

[37] *See* 38 U.S.C. § 1980A(b)(1)(H). The statute defines activities of daily living to include bathing, continence, dressing, eating, toileting, and transferring, *see* § 1980A(b)(2)(D), which is similar to the seven activities of daily living set forth in 38 C.F.R. § 71.15.

[38] *See* TSGLI Procedural Guide, Version 2.46 at 19–20 (June 12, 2019), *available at* https://www.benefits.va.gov/INSURANCE/docs/TSGLIProceduresGuide.pdf (determining if a member has a loss of Activities of Daily Living). Though this definition is not currently included in the TSGLI implementing regulations, VA has recommended doing so in its TSGLI Year-Ten Review. *See* TSGLI Protection Program Year-Ten Review, at § 4.3 (January 2018), *available at* https://benefits.va.gov/INSURANCE/docs/TSGLI_YTR.pdf.

The Organizations believe that the TSGLI approach better contemplates the ways in which a veteran may be unable to perform an activity of daily living and would be a suitable alternative to VA's proposed addition of an "each time" requirement.

D. Defining "Need for Supervision, Protection, or Instruction"

In addition to "Inability to Perform Activities of Daily Living," an eligible veteran is also in need of personal care services if he or she has "a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury" or "a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired."[39] Under the current regulations, VA defines "need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury" as requiring supervision or assistance due to one of seven enumerated reasons.[40] VA proposed to replace this definition with a new definition of "need for supervision, protection, or instruction" under the guise of broadening the current eligibility criteria.[41] However, the Organizations believe the change will have the opposite effect.

First, VA proposes to meld two independent eligibility requirements in 38 U.S.C. § 1720G(a)(2)(C)(ii) and (iii) into one requirement for the "need for supervision, protection, or instruction."[42] In doing so, VA suggests that 38 U.S.C. § 1720G(a)(2)(C)(ii) and (iii) "capture the personal care service needs of veterans and servicemembers with a significant cognitive, neurological, or mental health impairment, as opposed to an inability to perform an ADL, which captures the personal care service needs of veterans and servicemembers with ***physical impairment***."[43] But this reading muddles the statutory language, which neither limits the inability to perform one or more activities of daily living to physical impairments nor excludes physical impairments from causing the need for supervision or protection.[44] In passing the Act, Congress expressly added 38 U.S.C. § 1720G(a)(2)(C)(iii) as a distinct basis for eligibility rather than merge the elements of § 1720G(a)(2)(C)(ii) and (iii) together.

While VA maintains that the proposed change is necessary because the current definition "unduly restricts VA's ability to consider all function impairments,"[45] VA can accomplish the very same thing by retaining its existing definition of "a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury" and simply adding another definition for "a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired" as Congress has intended. In doing so, the veteran's care provider can evaluate the veteran's specific diagnosis or

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[39] 38 U.S.C. § 1720G(a)(2)(C)(ii), (iii).
[40] 38 C.F.R. § 71.20.
[41] Proposed Rule at 13363.
[42] Section 1720G(a)(2)(C)(ii) specifies the need for personal care services because of "a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury" whereas § 1720G(a)(2)(C)(iii) specifies "a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired."
[43] Proposed Rule at 13363 (emphasis added).
[44] Section 1720G(a)(2)(C)(ii) references "residuals of neurological or other impairment or *injury*." Nothing in the statute suggests that "injury" in this context excludes a physical impairment.
[45] *See* Proposed Rule at 13363.

conditions under the current definition *or* evaluate functional impairments under a new, separate definition pursuant to § 1720G(a)(2)(C)(iii). That would better align with Congress' intent.

The Organizations are concerned that the Proposed Rule will result in a narrow interpretation of when veterans are found to be in need of personal care services by either requiring a physical impairment to serve as the basis of an inability to perform one or more activities of daily living or prohibiting a physical impairment from serving as the basis of a need for supervision, protection, or instruction. Congress added § 1720G(a)(2)(C)(iii) "to ensure the Program is consistently inclusive of the caregiving needs required by mental health conditions, traumatic brain injuries or ***other conditions*** with which eligible veterans may be diagnosed."[46] Therefore, the Organizations submit that restricting or narrowing the ways in which a veteran may need personal care services strays from the intent of the statute.

Second, VA proposes to add a qualification to the definition, requiring that the impairment affect "the individual's ability to maintain his or her personal safety ***on a daily basis.***"[47] For the same reasons that VA's proposed addition of "each time" to the definition of "inability to perform activities of daily living" restricts Caregiver Program eligibility above and beyond that intended by Congress, the "daily basis" requirement here will place an undue hurdle on veterans otherwise eligible for the Program.

E. Imposing New Requirement for Expansion of the Caregiver Program

As discussed above, the Act amended the statute implementing the Caregiver Program to expand eligibility to include caregivers of pre-9/11 veterans. The Act required that this expansion be implemented in two stages. First, beginning on the date that the Secretary submits to Congress a certification that VA has fully implemented the information technology system required under Section 162(a) of the Caring for our Veterans Act of 2018 (the "MISSION Act Certification"), the Caregiver Program would cover veterans who have a serious injury incurred or aggravated in the line of duty on or before May 7, 1975 or on or after September 11, 2001.[48] Second, beginning two years after the Secretary submits the MISSION Act Certification to Congress, the Caregiver Program would be expanded to include caregivers to all veterans.[49] Thus, the Act could not be more clear: (a) the ***only*** requirement to begin the expansion of coverage is the Secretary's submission of the MISSION Act Certification to Congress; and (b) the Secretary is ***required*** to submit the MISSION Act Certification when VA has implemented the required information technology system.

The Proposed Rule expressly deviates from the clear requirements of the Act. Rather than trigger the first expansion of coverage by the Secretary's Submission of the MISSION Act Certification, under the Proposed Rule, the first expansion would not occur until VA issues a final rule specifying a date for such expansion.[50] Thus, if VA has not issued its final regulations

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[46] *See* Senate Rept. 115–212, at 58 (emphasis added).
[47] *See* Proposed Rule at 13406 (definition of "Need for supervision, protection, or instruction") (emphasis added).
[48] 38 U.S.C. § 1720G(a)(2)(B)(ii).
[49] *Id.* § 1720G(a)(2)(B)(iii).
[50] Proposed Rule at 13357-58 ("It is VA's intent that such certification be provided to Congress on the same day that our other proposed regulatory changes would go into effect."); *id.* at 13406 (proposed § 71.20(a)(2)(ii) (the

implementing the Act on the date that the Secretary submits the MISSION Act Certification to Congress, i.e., on the date that VA has fully implemented the new information technology to support the Caregiver Program, the expansion of the Program will not occur.

By adding a second requirement—issuance of final regulations—to the only requirement specified in the Act—submission of the MISSION Act certification—the Proposed Rule exceeds VA's authority under the Act. Moreover, by adding this additional requirement, the Proposed Rule will further delay expansion of the Caregiver Program to both pre- and post-1975 veterans, which is clearly contrary to the intent of the Act. Congress originally envisioned that VA would implement the information technology requirements and submit the MISSION Act Certification by October 1, 2018.[51] We understand that VA is now targeting the implementation of the information technology requirements for the summer or early fall of 2020. This delay is already adversely affecting thousands of pre-9/11 veterans and their caregivers, who should already be in the Caregiver Program. The Proposed Rule will increase the harm being done to these veterans by further delaying the expansion of the Program.

For this reason, the Organizations believe that VA's proposal is inconsistent with VA's authority under the Act. The Organizations respectfully urge VA not to continue its course of unlawfully withholding the first expansion of the Caregiver Program pending issuance of final rules. The Secretary instead must submit the MISSION Act Certification as soon as VA has fully implemented the new information technology requirements, and begin expanding eligibility for the Caregiver Program on the date the MISSION Act Certification is submitted, regardless of whether VA has issued final regulations.

F. Imposition of New Geographical Restriction for Eligibility

The Proposed Rule would, for the first time, restrict eligibility for the Caregiver Program to individuals residing in a "State" as defined in 38 U.S.C. § 101(20).[52] The Proposed Rule offers a few policy reasons for this new requirement, such as it is allegedly not feasible to provide benefits under the Caregiver Program outside of a State, because those benefits include, in part, in-home VA support.[53] VA also notes that "administrative limitations" prevent VA from providing benefits in remote areas within a State.[54]

The proposed restriction on providing benefits outside of a State is both inconsistent with VA's authority under the Act and arbitrary and unreasonable. First, the Act imposes no geographic restrictions on the eligibility for the Caregiver Program or the provision of benefits. The only criteria determining whether an individual is eligible to participate in the Caregiver Program and receive benefits are: (i) whether the individual has a serious injury incurred or

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expansion coverage to include pre-May 1975 veterans would be "[e]ffective on the date specified in a future Federal Register document.").

[51] *See* 38 U.S.C. § 1720G note; Public Law 115–182, Section 162(a)(1).

[52] Proposed Rule at 13358; *id.* at 13405 (proposed § 71.10(b)). A "State" is defined to mean "each of the several States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico." 38 U.S.C. § 101(20).

[53] Proposed Rule at 13358.

[54] *Id.*

aggravated in the line of duty in active military, naval, or air service; and (ii) the date on which the serious injury was suffered or aggravated.[55] Nothing in the Act or its legislative history suggests that Congress intended, in any way, to limit the Program to eligible veterans located in a State.[56] In fact, as the Congressional Research Service ("CRS") has noted, one of the reasons why Congress enacted the Act was because the private sector caregivers that would be empowered by the Act are able to address geographic concerns. Thus, the CRS has stated:

> [S]ome see the use of private sector providers as important in ensuring veterans' access to a comprehensive slate of services (in particular, to specialty services that are needed infrequently), ***or in addressing geographic or other access barriers***, such as long wait times for an appointment.[57]

Because the Act and Congress did not intend to impose any geographic restrictions on the veterans eligible for benefits under the Caregiver Program, VA's proposed change exceeds VA's authority.

Second, the policy reasons offered by VA are not sufficient to justify a geographic restriction, thus demonstrating that the proposed change is arbitrary and unreasonable. VA asserts that it is not feasible to provide benefits outside of a State, because benefits, in part, include in-home support.[58] However, VA ignores the fact that many aspects of the Caregiver Program, such as the reminders, prompting, and queueing mentioned above, do not require in-home support. Nor do many of the benefits that the Caregiver Program makes available to caregivers. Further, while VA asserts that it faces constraints to provide benefits to some remote areas within a State, VA does not claim it has no obligation to figure it out. In fact, VA acknowledges that it must explore ways to provide benefits to individuals in remote areas within a State.[59] VA offers no explanation for why it is not also exploring ways to provide such benefits to individuals located outside of a State. In any event, given the statutory mandate to provide benefits with respect to ***all*** eligible veterans, regardless of where they are located, VA's explanations for its rule are simply irrelevant and exceed VA's authority under the Act.

We note, moreover, that VA routinely provides benefits under other programs to veterans located outside of a State, despite any administrative complexities, including VA's Specially

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[55] 38 U.S.C. § 1720G(a)(2) (identifying eligible veterans).
[56] Congress explicitly recognized that the Caregiver Program may be administered in geographic areas where personal care services are not available from a commercial provider. *See* S. Rept. 111-80 at 10.
[57] *See* CRS Report 7-5700, at 3 (Nov. 1, 2018) (emphasis added) (*available at* https://fas.org/sgp/crs/misc/R45390.pdf); *see also id.* at 28 (Section 151 of the VA MISSION ACT "removes all geographical barriers to telemedicine, therefore allowing a telemedicine episode of care to be delivered without regard to where a veteran patient and VA provider are located within the United States and U.S. territories, and without regard to whether the veteran patient is located in a non-VA health care facility.")
[58] Proposed Rule at 13358.
[59] *Id.*

Adaptive Housing program,[60] the Education Benefits program for foreign schools,[61] and the VA Foreign Medical Program.[62] To highlight, VA offers no explanation for why it is able to provide benefits to individuals located outside of a State in these programs, but allegedly cannot do so under the Caregiver Program. [63]

Finally, the Organizations respectfully note that in implementing the Caregiver Program under the current rules, VA has engaged in a practice that we believe clearly is not consistent with VA's authority under the Act. When a veteran and caregiver relocates to a new State, VA has been requiring the veteran to reapply for benefits under the Program, and in a significant number of cases has denied an application for continued participation or placed arbitrary conditions on continued participation, solely because the veteran and caregiver have moved.

Many veterans, like many other retirees, routinely relocate to different parts of the country. Many do so based on the season—they are "snowbirds" who winter in southern locations and spend the rest of the year in another State. Others may simply move from place to place on a frequent basis. Yet, because these veterans relocate, they are being denied benefits, or the benefits are arbitrarily being conditioned on the need to re-apply at their new location. Whether this is occurring for veterans who temporarily relocate, or for veterans who permanently move to another State, VA's practice both exceeds VA's authority under the Act and is arbitrary. The Proposed Rule, by requiring that an individual be located in a State to be eligible, seems, in our view, to be at least partially intended to create a regulatory basis for VA's ongoing practice. However, the Organizations believe that the practice and any attempt to create regulatory support for the practice both are impermissible. For this reason as well, we respectfully request that VA eliminate the proposed geographic restriction on eligibility.

G. Eliminating the Role of the Veteran's Primary Care Team

The Act provides that, for each application for benefits submitted by an eligible veteran and family member, the Secretary must evaluate the application "in collaboration with the primary care team for the eligible veteran to the maximum extent practicable[.]"[64] While the Act does not define the term "primary care team," it is apparent from the context in which the term is used that the primary care team is intended to consist of the entire group of medical professionals that provide treatment to the veteran/applicant in order to provide for his or her medical needs. Thus, it makes sense that Congress wanted the Secretary to collaborate with the medical professionals who treat the individual veteran and who consequently understand intimately the

[60] 38 C.F.R. § 36.4405(a)(5)(ii) ("If outside the United States, in a country or political subdivision which allows individuals to have or acquire a beneficial property interest, and in which the Secretary, in his or her discretion, has determined that it is reasonably practicable for the Secretary to provide assistance in acquiring specially adapted housing.")
[61] 38 C.F.R. Book G, § 21.130 (Education and vocational courses outside the United States).
[62] 38 C.F.R. § 17.35 (Hospital care and outpatient services in foreign countries).
[63] *See also* VA website for Veterans Living Overseas, *available at* https://www.benefits.va.gov/persona/veteran-abroad.asp ("If you're a Veteran who lives overseas, you remain entitled to the benefits and services you earned through your military service.").
[64] 38 U.S.C. § 1720G(a)(5).

medical and clinical needs of the individual when evaluating an application for benefits under the Caregiver Program.

After initial passage of the Caregiver Program, Congress expressly added the requirement for use of primary care teams, recognizing that while the determination for a veteran's approval for the Program is a clinical decision, "there [was] no statutory requirement that VA include the veteran's primary care ***team*** in the evaluation."[65] Congress then added the requirement for use of primary care teams, codifying a practice previously established by VA.[66] Moreover, Congress codified this practice ***after*** recognizing that use of a primary care team may be one of the underlying reasons for perceived delays in processing applications. In a December 3, 2014 congressional hearing, Dr. Maureen McCarthy, Deputy Chief, Patient Care Services, Veteran Health Administration, was asked about backlogs in the application process and stated:

> What the application process involves and why people perceive delays is that that processing in the application requires the veteran and the caregiver to apply, it requires an evaluation by the caregiver support coordinator, and as I mentioned, it is a ***treatment team*** issue. So the ***treatment team***, the primary care ***team*** that is involved with the veteran has to make a decision about whether the support for the caregiver would be beneficial to the veteran. So all of that does take a significant amount of time.[67]

Yet, rather than attempt to streamline the application process by removing use of the primary care teams, Congress actually wrote this practice into law.

Drafted prior to passage of the Act, the current VA regulations define the "primary care team" as:

> a ***group of medical professionals who care for a patient*** and who are selected by VA based on the clinical needs of the patient. The team must include a primary care provider who coordinates the care, and may include clinical specialists (e.g., a neurologist, psychiatrist, etc.), resident physicians, nurses, physicians' assistants, nurse practitioners, occupational or rehabilitation therapists, social workers, etc., as indicated by the needs of the particular patient.[68]

Further, under the current Caregiver Program regulations, the primary care team plays a significant role in many of the key determinations relating to an individual veteran's needs, including determinations regarding the veteran's need for sustained care on a long-term and

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[65] *See* S. Rept. 115-212 at 60.
[66] *Id.* ("Though the veteran's primary care team maintains the veteran's treatment once in the Program, it is the intent of the Committee to ensure multidisciplinary input in the initial evaluation process, when possible.").
[67] *See* Hearing before the U.S. House of Representatives' Subcommittee on Health of the Committee on Veterans' Affairs, "VA's Caregiver Program: Assessing Current Prospects and Future Possibilities," at 21 (Dec. 3, 2014) (emphasis added).
[68] 38 C.F.R. § 71.15 (emphasis added).

ongoing basis, whether the Program would benefit a veteran, initial assessments of caregivers, and maintenance of the veteran's treatment plan.[69]

In 2017 VA took a step towards departing from the requirements of the Act and its own Caregiver Program regulations—a step that we are concerned the Proposed Rule would exacerbate. On June 14, 2017, the Veterans Health Administration ("VHA") issued VHA Directive 1152, which it amended and reissued as VA Directive 1152(1) on October 4, 2018 ("Directive 1152").[70] Directive 1152 discussed, among other things, the role of a veteran's primary care team (also referred to as the Patient Aligned Care Team ("PACT")), i.e., the team of medical professionals who provide treatment to a veteran and make clinical determinations. For example, Directive 1152 describes the primary care team as "being involved in the overall delivery of health care to the Veteran[;]"[71] as authorizing and making clinical determinations;[72] and as collaborating with family caregivers to "[ensure] the overall care and well-being of the Veteran."[73]

Directive 1152 also refers to a Clinical Eligibility Team ("CET").[74] The CET is ***not*** a team of medical professionals who provide treatment to veterans, but instead is a team that makes administrative decisions with respect to a particular facility. Although the Act and VA's current regulations require that the primary care team play a role in eligibility determinations, Directive 1152 purports to make this role optional. Thus, Directive 1152 provides that eligibility determinations "***may*** be made by the Veteran's primary care team."[75] Directive 1152 further states that a "[CET] or an individual VA provider may be designated [by the Chief of Staff of a Medical Center] to complete eligibility determinations[.]"[76] In the Organizations' experience, eligibility decisions are now largely made by CETs, in contravention of the Act's mandate and VA's current regulations. Because CETs may not be made up of medical providers specializing in all of the different types of care that a veteran may need, it is imperative that CETs always consult with a veteran's care providers when making eligibility determinations. Otherwise, a veteran's disabilities may not be fully understood and appreciated, as the statute requires.

The Proposed Rule would take the next step towards eliminating the role of a veteran's primary care team from these decisions. The Proposed Rule would revise the definition of "primary care team" to mean "one or more VA medical professionals who care for a patient

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[69] *See* 38 C.F.R. §§ 71.20(c) (primary care team role in determining whether a veteran's serious injury renders the veteran in need of personal care for at least six continuous months); 71.20(d) (primary care team role in determining whether it is in the best interest of the individual to participate in the program); 71.25(c) (primary care team role in performing initial assessment of a proposed caregiver); 71.25(f) (primary care team role in determining whether to an approve an individual as the primary or secondary caregiver); 71.30(b)(2) (primary care team role in maintaining a veteran's treatment plan).
[70] *See* VHA Directive 1152(1), Caregiver Support Program (Oct. 4, 2018), *available at* https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=5423.
[71] *Id.* at 10.
[72] *Id.* at 12, 16.
[73] *Id.* at 17.
[74] *Id.* at 10.
[75] *Id.* at 8 (emphasis added).
[76] *Id.*

based on the clinical needs of the patient."[77] Further, the Proposed Rule would eliminate the role of the primary care team other than its role in collaborating with the Secretary in evaluating an application.[78] These changes are inconsistent with the Act, and thus exceed VA's authority. The changes also are arbitrary.

First, while the Act does not define the term "primary care team," it clearly refers to a team. Moreover, in the context in which it is used, it is critical that all of the medical professionals treating a veteran be involved in evaluating an application for participation in the Program, so that a full and complete assessment of the veteran's medical health and best interest is made. The Proposed Rule, however, would effectively remove the concept of a primary care team from the definition, and allow any one medical provider to constitute the "team." As a result, a single medical provider, who may not have full knowledge of all of a veteran's medical needs and treatment, or who may, like a typical CET, have no involvement in the veteran's treatment, could collaborate with the Secretary in assessing an application for participation in the Caregiver Program. This is contrary to the plain language of the Act (requiring a "team" of the veteran's medical providers to collaborate) and the congressional intent, and will result in potentially inaccurate, inadequate and incomplete information regarding a veteran's medical needs being considered and evaluated as part of the application process. The likely impact is that otherwise worthy applications may be denied, or benefits unnecessarily curtailed, to the harm of veterans.

Moreover, by no longer requiring that a veteran's entire ***team*** of medical professionals participate in evaluating an applicant, the Proposed Rule would effectively give VA much greater autonomy in making decisions on applications, and substantially reduce or eliminate the role of a veteran's medical professionals in the application process. In particular, by expanding the autonomy of VA and reducing or eliminating the role of a veteran's team of medical professionals, the process of appealing a denial of an application will be less meaningful because the "record" will not include all relevant information from the veteran's medical team. This clearly is contrary to the plain language and intent of the Act, and thus exceeds VA's authority.

Importantly, this approach already has been proven to cause harm both to the stability of the veteran's recovery and the family unit. As just one of hundreds of examples that the Organizations have personally experienced, we point to one veteran, a triple amputee who suffered his injuries as a result of stepping on an improvised explosive device ("IED") while serving in combat in Afghanistan. The veteran was reduced from Tier 3 to Tier 1 by a doctor on the basis of a determination that he no longer needed a full-time caregiver. The doctor who made this determination was a primary care provider working in a women's health clinic who either had not provided any treatment to the veteran or somehow overlooked that he is a triple amputee. This veteran is just one of many who have suffered harm because of VA's minimization or elimination of the role of the medical professionals providing actual treatment to veterans, an approach which the Proposed Rule would codify.[79]

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[77] Proposed Rule at 13406.
[78] *Id.* at 13364.
[79] VW has worked with veterans in hundreds of cases in which the appeal team consists of the same personnel who made the decisions to lower the tier rating or outright revoke the veteran from the program. By reducing the input

Second, by removing the primary care team from many of the determinations and roles that they currently perform, and which veterans and caregivers have relied upon for years, the Proposed Rule will eliminate an important ***and expert*** voice—a voice that Congress intended to have an integral role—for veterans in these determinations. These include determinations regarding the veteran's need for sustained care on a long-term and ongoing basis, whether the Program would benefit a veteran, initial assessments of caregivers, and maintenance of the veteran's treatment plan.[80] Eliminating the primary care team's role in these areas will inevitably result in less-informed decisions being made about the needs and care of veterans and the benefits that participation in the Caregiver Program would provide, leading to veterans being denied participation or receiving benefits less than those to which they are entitled. In sum, these changes are likely to cause harm to the very veterans that the Act is intended to help. By doing so, the proposed changes are arbitrary and unreasonable.

The road that VA proposes here seems to end with one or a few decision makers per region, far removed from each veteran's actual care, making Caregiver Program *adjudications* rather than actual care providers making what VA characterizes as and what really should be medical determinations. The Organizations consider that § 1720G(c)(1) would permit appeals beyond the VHA for adjudications of such a nature.[81]

Accordingly, the Organizations respectfully request that VA make no changes in the definition of "primary care team" or to the role that the primary care team currently performs with respect to the Caregiver Program.[82]

H. VA-Caused Delays in Completing Eligibility Requirements

The Proposed Rule includes a change that would allow VA to deny an application due to VA's own delays and inactivity. This change is arbitrary and inconsistent both with the Act and with VA's own commitment, as expressed in the explanatory material in the Proposed Rule.

Under the Act, an eligible veteran and a family member must jointly submit an application to participate in the Caregiver Program.[83] As part of the application process, the Secretary, in collaboration with the veteran's primary care team, must evaluate, among other things, the amount of instruction, preparation and training, if any, the family member would need

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and participation of a veteran's entire team of medical professionals, the proposed revision to the definition of "primary care team" will make it exceedingly unlikely that appeals will be reversed, even if the veteran otherwise would have been approved based on the full input of his or her medical team. As a result, the appeal process may become simply a rubber-stamp exercise of denials.

[80] *See* 38 C.F.R. §§ 71.20(c) (primary care team role in determining whether a veteran's serious injury renders the veteran in need of personal care for at least six continuous months); 71.20(d) (primary care team role in determining whether it is in the best interest of the individual to participate in the program); 71.25(c) (primary care team role in performing initial assessment of a proposed caregiver); 71.25(f) (primary care team role in determining whether to approve an individual as the primary or secondary caregiver); 71.30(b)(2) (primary care team role in maintaining a veteran's treatment plan).

[81] *See infra* at Section 4.

[82] If anything, primary care teams need more oversight, not less. *See* 2018 VA OIG Report at 15 (noting that 65% of evaluated Veterans Integrated Service Network (VISN) program leads "were poorly positioned to provide adequate program oversight.").

[83] 38 U.S.C. § 1720G(a)(4).

to provide the personal care services.[84] The Secretary is required to provide the family member with such instruction, preparation and training.[85] Upon successful completion by the family member of such instruction, preparation and training, "the Secretary ***shall*** approve the family member as a provider of personal care services for the eligible veteran."[86] Neither the Act nor VA's current regulations impose a time limit for completion by the family member of such instruction, preparation and training.

The Proposed Rule would impose a new 90-day period for a family member to complete the instruction, training and preparation. If the family member does not meet the 90-day deadline, the application will be denied. Importantly, VA reserves the right to deny an application even where the failure to meet the 90-day deadline is due to VA's own fault.

Thus, the Proposed Rule provides:

> Individuals who apply to be Family Caregivers must complete all necessary eligibility evaluations (along with the veteran or servicemember), education and training, and the initial home-care assessment (along with the veteran or servicemember) so that VA may complete the designation process no later than 90 days after the date the joint application was received by VA. If such requirements are not complete within 90 days from the date the joint application is received by VA, the joint application will be denied, and a new joint application will be required. VA ***may*** extend the 90-day period based on VA's inability to complete the eligibility evaluations, provide necessary education and training, or conduct the initial home-care assessment, when such inability is ***solely*** due to VA's action.[87]

There are several problems with this proposed language. First, as noted, the Act does not impose any time period in which a family member must complete the education and training requirements as a condition of eligibility, and thus imposing a 90-day limit arguably exceeds VA's authority. While the current regulations require training to be completed within 45 days, completion of the training is not a condition of veteran eligibility but rather that of the caregiver approval process.[88]

Second, even if imposing some time period were consistent with the Act, it clearly is arbitrary to allow VA to deny an application where VA's own delays prevent the family member from completing his or her education and training requirements within 90 days. Under the Proposed Rule, however, if that occurs, VA has no obligation to extend the time period, but could deny the application even though VA itself is at fault. Indeed, this is contrary to VA's own commitment as stated in the explanatory material in the Proposed Rule, where VA states that it

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[84] *Id.* § 1720G(a)(5)(B).
[85] *Id.* § 1720G(a)(6)(A).
[86] *Id.* § 1720G(a)(6)(B) (emphasis added).
[87] Proposed Rule at 13407 (proposed § 71.25(a)(2)(ii) (emphasis added).
[88] 38 C.F.R. § 71.40(d)(1).

"would not penalize an applicant if he or she cannot meet the 90-day timeline as a result of VA's delay in completing eligibility."[89] VA's commitment is not matched by its proposed change in the regulation. This is particularly troubling in light of a recent report of the VA Office of Inspector General ("OIG") that found that VA itself has been responsible for substantial delays in processing applications. The OIG found that VA caregiver support coordinators ("CSCs") for the Caregiver Program "took too long to determine if veterans were eligible for the [Caregiver Program]."[90] VA's current regulations require VA to make an eligibility determination within 45 days of receipt of a completed application.[91] The OIG found that VA did not timely process 65% of veterans' applications within the 45-day period.[92] In fact, CSCs took from three to six months to process 55% of applications—from 45 to 135 days longer than required under the regulations.[93] An estimated 14% of veterans waited more than six months to be approved.[94] Given VA's record with respect to approving completed applications, it is plainly unreasonable to allow VA to reject applications when VA's actions or inaction prevents an applicant from completing all requirements relating to the application.

Finally, under the Proposed Rule, VA ***may*** consider (without any obligation to do so) extending the deadline, but only if a delay is ***solely*** due to VA's actions. This ignores the very real possibility, if not the likelihood, that VA's failure to act could be one contributing factor to a delay, but not the only factor. For example, VA proposes to remove a current requirement that VA conduct an initial home-care assessment within 10 business days of certifying that caregiver education and training has been completed, because VA does not intend to burden applicants.[95] But, if VA proposes a time for the initial home-care assessment that does not work for an applicant and must be rescheduled for a later date, then the Proposed Rule leaves open the possibility that VA would determine any delay in meeting the 90-day deadline not to be solely due to VA's delays. As a result, VA could force an applicant either to meet an unreasonable request to schedule a home-care assessment or face the possibility of having an application denied with no substantive decision, and having to submit a new application.

For these reasons, the Organizations respectfully submit that VA's regulations must ***require*** VA to extend the 90-day deadline where VA's inability to complete the eligibility evaluations, provide necessary education and training, or conduct the initial home-care assessment contributed to a failure to meet the deadline, unless and to the extent that the applicant has unreasonably delayed the process.

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[89] Proposed Rule at 13375.
[90] 2018 OIG Report at 7.
[91] 38 C.F.R. § 71.40(d)(1).
[92] 2018 OIG Report at 8; *see also* Proposed Rule at 13374.
[93] 2018 OIG Report at 8.
[94] *Id.*
[95] *Id.* at 13377.

2. Benefits Under the Caregiver Program

A. VA's Proposed Changes Relating to the Monthly Stipend

As noted above, Congress designed the Caregiver Program to: honor the preference of veterans to receive care in their own homes; provide training and support to family caregivers (recognizing that providing care is an emotional and financial strain and that the quality of care provided by family caregivers depends on their own well-being); recognize the sacrifices made by family caregivers; and develop a lower-cost method of caring for seriously injured veterans than institutionalized care.[96] While support is given to family caregivers through the Program, that support is entirely focused on providing benefits to veterans.

An important benefit that the Caregiver Program offers to veterans is the monthly stipend provided to each family caregiver who is designated as the primary provider of personal services to a veteran.[97] The amount of the stipend is required to be based on the amount and degree of personal care services provided.[98] Under VA's current regulations, the stipend is based on the "combined rate" multiplied by the number of weekly hours of assistance given by the caregiver.[99] The "combined rate" is the Bureau of Labor Statistics ("BLS") hourly wage rate for home health aides at the 75th percentile in the eligible veteran's geographic area of residence, multiplied by the Consumer Price Index for All Urban Consumers ("CPI-U"), as determined on an annual basis.[100]

The BLS wage rates are based on surveys conducted by the BLS of actual wages paid in various industries. As BLS explains, the BLS Occupational Employment Statistics ("OES") program:

> collects data on wage and salary workers in nonfarm establishments in order to produce employment and wage estimates for about 800 occupations. . . . The OES program produces these occupational estimates for the nation as a whole, by state, by metropolitan or nonmetropolitan area, and by industry or ownership. The Bureau of Labor Statistics produces occupational employment and wage estimates for approximately 415 industry classifications at the national level.[101]

Importantly, although the stipend amounts are based on the BLS surveys of wages, the payment of the stipend is not treated as the payment of a wage or salary, and the family caregivers are not treated as employees of the government. Thus, the Act states that nothing in the statute "shall be construed to create . . . an employment relationship between the Secretary and an individual in receipt of assistance or support under this [Act]."[102] This is consistent with

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[96] *See* S. Rept. 111-80, Caregiver and Veterans Health Services Act of 2009, at 4–6, 7–8 (Sept. 25, 2009).
[97] 38 U.S.C. § 1720G(a)(3)(A)(ii)(V).
[98] *Id.* § 1720G(a)(3)(C)(i).
[99] 38 C.F.R. § 71.40(c)(4)(v).
[100] *Id.* § 71.15.
[101] *See* Overview of BLS OES program, available at https://www.bls.gov/oes/oes_emp.htm.
[102] 38 U.S.C. § 1720G(c)(2)(A).

the premise of the Program, which is that the veterans, and not the caregivers, are the recipients of the Program benefits, and the payment of the stipend (and other support given to caregivers) is given solely to benefit the deserving veterans.

The Proposed Rule proposes two changes in the approach to determining the monthly stipend amount. As discussed more fully below, the Proposed Rule proposes to replace the standard used to calculate the stipend amount, and to replace the three-tier structure of stipends with a two-tiered structure. Each of these changes individually is problematic. Taken together, these changes suggest an ongoing attempt to treat caregivers more and more like employees of the federal government, and an effort to reduce overall the amount of stipends that will be paid. The changes are inconsistent with the requirements of the Act and are arbitrary, and will cause harm to the deserving veterans that Congress intended to help by creating the Caregiver Program.

1. Replacement of BLS Wage Survey-Based Calculation of the Monthly Stipend Amount with a Government Wage Scale-Based Calculation

The Proposed Rule would delete the definition of "combined rate"[103] and replace it with a new term, "monthly stipend rate,"[104] which would be used to determine the monthly stipend amount. "Monthly stipend rate" is defined in the Proposed Rule as "the Office of Personnel Management (OPM) General Schedule (GS) Annual Rate for grade 4, step 1, based on the locality pay area in which the eligible veteran resides, divided by 12."[105]

From a practical standpoint, it appears that the change will reduce the benefits available to caregivers and may mistakenly suggest that the caregivers are government employees by virtue of their receipt of a stipend based on the government wage scale. VA first claims that the Combined Rate has "not always been reflective of actual wage rates[.]"[106] As a result, VA asserts, "the average hourly rate assigned in many areas is well above the average hourly rate of a home health aide."[107]

VA's claims are unreasonable on their face, and exceed VA's authority under the Act. The Act provides that the monthly stipend shall be "***not less than*** the monthly amount a ***commercial home health care entity*** would pay an individual in the geographic area of the eligible veteran to provide equivalent personal care services to the eligible veteran."[108] The Combined Rate that VA currently uses is based on the BLS statistics, which, as noted above, are based on surveys of actual wages paid for home health aides in a geographic area.[109] VA's claim that the BLS statistics do not reflect the actual rates for home health aides thus is implausible and arbitrary.

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[103] Proposed Rule at 13358.
[104] *Id.* at 13363.
[105] *Id.* at 13406.
[106] *Id.* at 13382.
[107] *Id.*
[108] 38 U.S.C. § 1720G(a)(3)(C)(ii) (emphasis added).
[109] *See* Note 101 and accompanying text above.

Similarly, VA's decision to replace the BLS wage survey-based calculation with the government wage scale reflected in OPM's GS schedule is unreasonable and inconsistent with the statutory mandate. Whatever virtues VA sees in the GS scale, it is undeniable that it is a ***government wage scale***, and not a scale of actual wages paid ***by commercial health care entities***, as required by the Act. The fact that VA concedes that it is proposing the use of the GS scale because, in its view, the BLS statistics result in "inflated" rates, notwithstanding that VA offers no support for this position, merely underscores that the purpose of this change is not to implement the statutory mandate to pay commercial wages, but to reduce the benefits paid under the Caregiver Program.[110]

The Organizations respectfully suggest that using the GS scale, rather than the BLS statistics, is illogical and contrary to the requirements of the Act. As such, VA's proposal exceeds the authority of VA under the Act and is arbitrary. Accordingly, the Organizations respectfully request that VA reverse its position and continue to use the BLS statistics as the basis for calculating the monthly stipend amount.

2. Qualifying for the Top Tier of the Monthly Stipend Payment

Under the current VA regulations, VA pays three tiers of monthly stipend amounts, based on VA's determination of the eligible veteran's level of dependency based on "the degree to which the eligible veteran is unable to perform one or more activities of daily living (ADLs) or the degree to which the eligible veteran is in need of supervision or protection based on symptoms or residuals of neurological or other impairment or injury[.]"[111] VA assigns a rating based on these determinations, and the rating determines whether the caregiver is eligible for the highest tier of the stipend (equivalent to 40 hours per week), the mid-level tier (equivalent to 25 hours per week, or 62.5% of the full stipend), or the lowest tier (equivalent to 10 hours per week, or 25% of the full stipend).[112]

The Proposed Rule would replace these three tiers with two tiers. For veterans whom VA determines are unable to self-sustain in the community, the monthly stipend for the primary family caregiver would be equal to the monthly stipend rate.[113] For all other veterans, the

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[110] VA's claim that using the GS scale is more appropriate because the BLS statistics have resulted in inflated rates is also undermined by VA's contradictory statement that the BLS wage growth and GS wage growth "have tracked closely in the past[.]" Proposed Rule at 13382. In any event, VA's claim that the wage growth under the two scales have tracked closely does not appear to be accurate. For example, according to BLS, in 2018 the annual wages nationally for the 75th percentile of Home Health Aides was $28,030. *See* https://www.bls.gov/oes/2018/may/oes311011.htm. In 2019, the annual wages for Home Health and Personal Care Aides was $29,460, *see* https://www.bls.gov/oes/current/oes311120.htm, an increase of 5.1%. In contrast, in 2018 the annual salary for the GS-4, step 1 scale was $25,871, see https://www.federalpay.org/gs/2018, and in 2019 the annual salary for GS-4 step 1 was $26,233, *see* https://www.federalpay.org/gs/2019, an increase of only 1.4%. This example also shows that the impact of using the GS scale rather than the BLS scale will be to reduce the monthly stipend amounts by relying on a scale that does not reflect actual wages paid by commercial providers. Regardless of whether the increases in the BLS and GS scales are similar, however, and even regardless of whether one scale would produce a higher rate than the other, the use of the GS scale is inappropriate because it does not represent rates paid by commercial health care providers (as required by the Act).

[111] 38 C.F.R. § 71.40(c)(4).

[112] *Id.* § 71.40(c)(4)(iv).

[113] Proposed Rule at 13408 (proposed § 71.40(c)(4)(i)(A)(2)).

monthly stipend for the primary family caregiver would be equal to 62.5% of the monthly stipend rate.[114] Accordingly, the level of the stipend depends on a determination whether an eligible veteran is able to "self-sustain in the community."

The Proposed Rule would define "unable to self-sustain in the community" to mean that an eligible veteran:

> (1) Requires personal care services each time he or she completes ***three or more*** of the seven activities of daily living (ADL) listed in the definition of an inability to perform an activity of daily living in this section, ***and is fully dependent on a caregiver to complete such ADLs***; or
>
> (2) Has a need for supervision, protection, or instruction ***on a continuous basis***.[115]

Thus, to be eligible for the top tier monthly stipend payment, a veteran must be fully dependent on the caregiver to complete at least three ADLs, or require supervision on a continuous basis. This is a significant change from the current regulations, which require only an assessment of the degree to which a veteran is unable to perform ***one or more*** ADLs or is in need of supervision. The change unnecessarily and arbitrarily limits the flexibility of the Secretary to consider all relevant factors in determining how much help an eligible veteran needs. If an eligible veteran is fully dependent on a caregiver to perform just two ADLs (such as adjusting a special prosthetic or orthopedic device without assistance, or toileting), or has a need for supervision for, say 18 hours a day, the caregiver will not be eligible for a full monthly stipend payment. This will be true even if the Secretary otherwise determines that the degree of the veteran's reliance on the caregiver to perform ADLs or need for supervision would justify having a caregiver for 40 hours per week. Consequently, this proposed change will make it harder for a deserving veteran's caregiver to qualify for a full monthly stipend amount, which will necessarily reduce the benefit provided and likely will make some family members less willing to serve as the primary caregiver. As a result, this change will arbitrarily and adversely impact veterans for whom the Caregiver Program is intended to provide critical help, contrary to Congress' intention in enacting the Act.

In addition to being arbitrary and unreasonable, the Organizations believe that this change exceeds VA's authority because it is inconsistent with the express requirements of the Act. Under the Act, the amount of the monthly stipend is to be based upon the amount and degree of personal care services provided.[116] The determination of the amount and degree of personal services provided, in turn, "shall" take into account the following factors:

> (I) The assessment by the family caregiver of the needs and limitations of the veteran.

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[114] *Id.* at 13408 (proposed § 71.40(c)(4)(i)(A)(1)).
[115] *Id.* at 13406 (emphasis added).
[116] 38 U.S.C. § 1720G((a)(3)((C)(i).

> (II) The extent to which the veteran can function safely and independently in the absence of such supervision, protection, or instruction.
>
> (III) The amount of time required for the family caregiver to provide such supervision, protection, or instruction to the veteran.[117]

The flexible approach in the current VA regulations to determining the applicable monthly stipend tier allows the Secretary to consider all of these factors. Under the Proposed Rule, however, the assessment by the family caregiver of the needs and limitations of the veteran could be ignored, and, as discussed above, the amount of time required for the family caregiver to provide his or her supervision, protection or instruction to the veteran would be irrelevant. This is because, regardless of the assessment of the family caregiver, and regardless of whether the Secretary believed that a caregiver would require, for example, 40 hours to provide the required supervision, if the veteran needs help with only two of the seven ADLs and does not need continuous, around-the-clock supervision, the caregiver would not qualify for the full monthly stipend payment.[118] For this reason, this aspect of the Proposed Rule would exceed VA's authority because it is contrary to the requirements of the Act.[119]

Accordingly, the Organizations respectfully request that VA reject the proposed changes to determining the monthly stipend amount tier, including the definition of "unable to self-sustain in the community," and retain the approach reflected in the current regulations.

B. Annual Eligibility Reassessments and Semi-Annual Wellness Contacts

The Act requires the Secretary to ''periodically evaluate the needs of the eligible veteran and the skills of the family caregiver of such veteran to determine if additional instruction, preparation, training, or technical support . . . is necessary.''[120] These periodic reviews are intended to address, among other things, the well-being and health care needs of the veteran. Consistent with this intent, VA's current regulations implement this requirement in part by requiring that:

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[117] *Id.* § 1720G((a)(3)((C)(iii).

[118] The explanatory material in the Proposed Rule states that VA would take into account input from the Family Caregiver when determining whether a veteran is unable to self-sustain in the community. Proposed Rule at 13374. Despite this statement, the Proposed Rule would, contrary to the requirements of the VA MISSION ACT, allow VA to ignore a family caregiver's input when making that determination.

[119] The Proposed Rule also is inconsistent with prior regulatory views expressed by VA, particularly insofar as the proposed definition of unable to self-sustain may require that a veteran need continuous supervision. When VA issued its most recent changes to the Caregiver Program regulations, it considered and rejected requests to increase the cap on the monthly stipend amount above 40 hours per week. In so doing, VA noted that "it could jeopardize the health and welfare of the eligible veteran to require or expect a Primary Family Caregiver to work more than 40 hours per week. A significant factor in the passage of the Caregivers Act was the amount of work and stress that caregivers experience. . . . Neither the law, nor sound VA policy, contemplates overburdening caregivers by expecting them to provide care for more than 40 hours per week." 80 Fed. Reg. 1369 (Jan. 9 2015). The Proposed rule reflects an apparent about-face by VA with respect to these concerns.

[120] 38 U.S.C. § 1720G(a)(3)(D).

> The primary care team will maintain the eligible veteran's treatment plan and collaborate with clinical staff making home visits to monitor the eligible veteran's well-being, adequacy of care and supervision being provided. This monitoring will occur no less often than every 90 days, unless otherwise clinically indicated, and will include an evaluation of the overall health and well-being of the eligible veteran.[121]

Directive 1152 similarly provides that each veteran's health needs be monitored every 90 days, unless otherwise clinically indicated. For example, Directive 1152 requires each VA Medical Center Chief of Staff to "[ensure] that initial in-home assessments and ongoing program monitoring (conducted every 90 days, unless otherwise clinically indicated) . . . evaluate the well-being of the Veteran."[122] Similarly, Directive 1152 provides that "ongoing interim monitoring is required every 90 calendar days . . . to monitor the Veteran's overall health and well-being and adequacy of care and supervision being provided."[123]

The Organizations believe that a quarterly assessment of the well-being and health needs of veterans, as required by the Act, VA's current regulations, and Directive 1152, would be invaluable because they would allow VA to adjust the benefits provided and ensure that the evolving needs of each eligible veteran is being met on a regular basis.

The Proposed Rule would add a requirement for an annual reassessment of a veteran's eligibility for the Caregiver Program,[124] eliminate the quarterly assessment that is supposed to occur (but, in our experience, too often does not) and replace it with a semi-annual wellness contact.[125] It appears that the wellness contacts will not allow VA to adjust the benefits needed by a veteran. Thus, the process envisioned by the Proposed Rule would only allow an eligible veteran to receive increased benefits on an annual basis.

As the VA OIG has recognized, VA historically has not consistently monitored veterans and their caregivers or documented the health needs of veterans, which change over time.[126] Our experience unfortunately also has been that these quarterly assessments too often do not adequately assess a veteran's well-being and are performed by personnel who are not involved in the treatment of the veteran, and are used to reduce benefits without a reduction actually being warranted. Conversely, it is the Organizations' experience that these quarterly assessments rarely result in an increase in benefits, even when a legitimate assessment of the veteran's needs would justify such an increase.

We respectively suggest that the solution to the issues raised by the OIG is not to "cement in stone" VA's current practice of performing less frequent monitoring and offering less frequent opportunities to address the needs of veterans. Rather, VA should use this opportunity to implement processes that are consistent with the Act, and Congress' intent for the Program,

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[121] 38 C.F.R. § 71.40(b)(2).
[122] Directive 1152 at 8.
[123] *Id.* at 16.
[124] Proposed Rule at 13378–80, 13407–08 (proposed § 71.30).
[125] *Id.* at 13880, 13408 (proposed revised § 71.49(b)(2)).
[126] OIG Report at 11-141.

which is to provide benefits that address the actual needs of veterans based on regular, periodic assessments. While each veteran's needs may change at a different rate, we believe, based on our experience, that having more frequent, properly implemented assessments and opportunities to address the needs of an eligible veteran is critical. Waiting a year to give a veteran a necessary additional benefit is simply too long.

For this reason, we would strongly encourage VA to: (i) require wellness contacts on at least a quarterly basis; (ii) provide that wellness contacts will include a full assessment of a veteran's health needs, based on the input of the primary care team providing treatment to the veteran; and (iii) explicitly provide that, if warranted based on such quarterly wellness contacts, the benefits provided to an eligible veteran and his or her caregiver may be adjusted without having to wait for the annual reassessment. We believe this is consistent with the overall intent of the Caregiver Program and will better serve the needs of eligible veterans.

3. Revocation of Participation in the Caregiver Program and Reductions in Benefits

VA's current rules allow VA to immediately revoke the designation of a family caregiver, and therefore participation in the Caregiver Program, if the eligible veteran no longer meets the eligibility requirements for the Program.[127] However, if the revocation is due to improvement in the eligible veteran's condition, or the veteran's death or permanent institutionalization, the family caregiver generally will continue to receive benefits for 90 days.[128] When VA first proposed this provision as an interim final rule, it noted that "this continuing period of eligibility for benefits is not contemplated by 38 U.S.C. 1720G, but we believe it is an appropriate and compassionate way to interpret and enforce the law."[129]

The Proposed Rule would effectively reduce the period following a revocation during which a family caregiver would continue to receive benefits by allowing VA to revoke participation due to a noncompliance (i.e., failure to continue to meet the eligibility requirements) upon 60-days' notice.[130] VA asserts that the notice period will give the veteran and caregiver an opportunity to redress any noncompliance.[131] Therefore, VA asserts, unlike under the current regulations, "we would not provide a period of extended benefits in cases of revocation for noncompliance."[132]

The Organizations welcome the requirement to provide advanced notice before revoking a veteran and caregiver's participation based on a finding that the veteran no longer meets eligibility requirements. However, we respectfully suggest that there is no need to change VA's current approach, based on its view of what is an "appropriate and compassionate way to interpret and enforce the law," by effectively reducing the period of time in which the caregiver

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[127] 38 C.F.R. § 71.45(c).
[128] *Id.*
[129] 76 Fed. Reg. 26156 (May 5, 2011).
[130] Proposed Rule at 13394, 13397, 13410 (proposed § 71.45(a)(2)(iii)). Under the Proposed Rule, VA can revoke participation without providing advanced notice if the revocation results from a family caregiver committing fraud, neglecting, abusing or exploiting the eligible veteran, being unwilling to provide the personal services, or where there are personal safety issues for the eligible veteran. *Id.* at 13410 (proposed §§ 72.45(a)(2)(i) and (ii)).
[131] *Id.* at 13397.
[132] *Id.*

will continue to receive benefits from 90 days to 60 days. Therefore, we respectfully request that VA modify its Proposed Rule to require 90 days' advanced notice before revoking participation based on noncompliance.

Further, in keeping with VA's stated purpose of giving the veteran and caregiver an opportunity to address the alleged areas of noncompliance, we request that VA modify the Proposed Rule to include detailed requirements for the content of the notice, and the documentation that must be provided to the veteran and caregiver. The Proposed Rule simply refers to an advanced notice "of [VA's] findings[.]"[133] This is insufficient and unreasonable.

Moreover, in our experience, the benefits available to veterans (such as the stipend tier) are reduced with little notice and no explanation to the veteran. Such actions have an adverse impact on veterans, even though they may not constitute a complete revocation of the veteran's participation in the Program. We believe that VA should take this opportunity not only to impose a notice requirement before revoking participation, but also to require a notice whenever a benefit will be reduced, allowing the veteran to respond and requiring VA to consider the response, all ***before*** implementing the reduction in benefits.

We therefore respectfully request that VA modify the Proposed Rule as follows:

First, the Proposed Rule should require 90 days' notice to a veteran before either reducing any benefit under the Program or revoking the veteran's participation in the Program.

Second, the Proposed Rule should require that such notice contain at least the following information (to the extent applicable):

Notice of Reduction in Benefits

- The specific reduction in benefit, if any;
- A detailed explanation of the basis for the determination to reduce the benefit;
- The identity of all personnel involved in the decision to reduce the benefit;
- All information relied upon by VA in making its determination to reduce the benefit; and
- Copies of all documentation relied upon by VA in making its determination to reduce the benefit.

Notice of Revocation of Participation in the Program

- Each specific eligibility requirement with respect to which VA claims the veteran or caregiver is noncompliant;

[133] *Id.* at 13410 (proposed § 71.45(a)(2)(iii)).

- The identity of all personnel involved in the decision to revoke the veteran's participation in the Program;

- A detailed explanation for how the veteran or caregiver is noncompliant with each such requirement;

- All information relied upon by VA in making its determination of noncompliance, or upon which VA's determination was based; and

- Copies of all documentation relied upon by VA in making its determination of noncompliance, or upon which VA's determination was based.

Third, the Proposed Rule should allow the veteran to respond to any such notice and provide information or explanations for why the reduction in benefits or revocation should not be implemented. The veteran's response generally should be due within 60 days of receipt of the notice, but the veteran should be permitted to request an extension of 60 days to provide the response, which request should be granted in the absence of any determination that such request is being made in bad faith. If a veteran requests a 60-day extension, VA should not be permitted to implement the reduction in benefits or revocation until at least 30 days after such extension.

Fourth, the Proposed Rule should require VA to give good-faith consideration to the response provided by the veteran, and to consider additional input from the veteran's primary care team.

Finally, the Proposed rule should require VA to provide a written decision, after considering the veteran's response. If the VA still determines to reduce the veteran's benefits or revoke the veteran's participation in the Program, reduction or revocation should not be effective until at least 30 days after VA provides its written decision to the veteran.

We believe that these proposals are consistent with the Act and Congress' intent, and will ensure that no veteran is denied benefits or has his or her participation in the Program revoked without having an opportunity to provide relevant information to VA. As a result, these proposals will minimize the likelihood that the needs of deserving veterans will be go unmet.

4. <u>Review of VA Decisions in Connection with the Caregiver Program</u>

VA regulations provide that:

> All questions of law and fact necessary to a decision by the Secretary of Veterans Affairs under a law that affects the provision of benefits by the Secretary to veterans or their dependents or survivors are subject to review on appeal to the Secretary. Decisions in such appeals are made by the Board of Veterans' Appeals.[134]

[134] 38 C.F.R. § 20.104(a).

VA's regulations include a non-exhaustive list of questions over which the Board of Veterans' Appeals ("Board") has jurisdiction under this general authority, including questions concerning entitlement to various benefits and assistance.[135]

The Board also has appellate jurisdiction over "questions of eligibility for hospitalization, outpatient treatment, and nursing home and domiciliary care; for devices such as prostheses, canes, wheelchairs, back braces, orthopedic shoes, and similar appliances; ***and for other benefits administered by the Veterans Health Administration***."[136] The exception here is that the Board does not have appellate jurisdiction over medical determinations by the VHA, "such as determinations of the need for and appropriateness of specific types of medical care and treatment for an individual," because such decisions "are not adjudicative matters and are beyond the Board's jurisdiction."[137] The Board's regulations offer typical examples of medical decisions beyond the Board's jurisdiction, such as "whether a particular drug should be prescribed, whether a specific type of physiotherapy should be ordered, and similar judgmental treatment decisions with which an attending physician may be faced."[138]

In 2016 VHA issued VHA Directive 1041 ("Directive 1041") addressing how disputes involving medical decisions are resolved.[139] Directive 1041 covers "clinical disputes" which "generally arise when a patient and a provider disagree with medical determinations of the need for and appropriateness of specific types of medical care and treatment for an individual."[140] The dispute process may include internal VA reviews by Veterans Integrated Services Networks Director, a VA Medical Facility Director, the Office for Quality, Safety and Value, and the Office of Patient-Centered Care and Cultural Transformation.[141] VHA envisions that the Board plays no role in the process described in Directive 1041, on the basis that clinical disputes are focused on medical treatment, and therefore involve medical decisions.

The Act states that a "decision by the Secretary under this section affecting the furnishing of assistance or support shall be considered a medical determination."[142] This provision is consistent with the Board's regulations and VHA's articulated intent for Directive 1041. Questions of the type of assistance or support to be provided under the Act are the types of judgmental questions, like those regarding what kind of drug or therapy should be provided, or the need for or appropriateness of specific types of medical care or treatment, that are not adjudicative in nature and therefore not subject to review by the Board. Rather, they are decisions about medical treatment.

VA has consistently taken the position, however, that ***all*** decisions made under the Act, and not simply those "affecting the furnishing of assistance or support," are medical decisions

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[135] *Id.* §§ 24.104(a)(1)–(29).
[136] *Id.* § 20.104(b) (emphasis added).
[137] *Id.*
[138] *Id.*
[139] *See* VHA Directive 1041, Appeal of VHA Clinical Decisions (Oct. 24, 2016) *available at* https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=3285.
[140] *Id.* § 3.
[141] *Id.* § 5.
[142] 38 U.S.C. § 1720G(c)(1).

that are not appealable to the Board. The Proposed Rule continues this trend. For example, the Proposed Rule notes repeatedly that certain references to "clinical" decisions have been removed because, according to the Proposed Rule, such references are redundant given that the Act mandates that all decisions are "medical decisions."[143] The Proposed Rule clearly states VA's position: "[The Caregiver Program] is a clinical benefit program and ***decisions under 1720G are considered medical determinations***[.]"[144]

The Organizations respectfully disagree with VA and believe that VA's position is not supported by the language of the Act, the Board's regulations, or established case law.

First, the Act does not state that all decisions under the Caregiver Program are medical decisions. Rather, the Act says that a decision "affecting the furnishing of assistance or support" shall be considered a medical determination. VA's interpretation of the Act would read these words out of the language. It is well-established that in interpreting a statute, every clause and word should be given meaning;[145] no sentence or word should be treated as superfluous.[146] Thus, VA cannot simply assume that the phrase "affecting the furnishing of assistance or support" was surplusage and has no meaning. On the contrary, that phrase must be treated as having been included intentionally by Congress and as qualifying which decisions under the Act are considered medical decisions.

Second, the plain meaning of the phrase "affecting the furnishing of assistance or support" is consistent with the Board's regulations and Directive 1041, as well as other precedents addressing the types of decisions that are considered medical decisions and beyond the Board's jurisdiction. Medical decisions are judgment calls regarding the type of treatment that is appropriate for an individual[147]—in other words, judgment calls regarding the "furnishing of assistance or support." But other decisions, involving objective criteria, including factors that will determine access to benefits, have consistently been treated as non-medical decisions subject to the Board's jurisdiction. For example, courts have held that questions regarding the scheduling of appointments,[148] whether a veteran is entitled to reimbursement for a procedure performed at a private hospital,[149] or whether a veteran is eligible for fee-based outpatient care for service-connected disability,[150] are not medical determinations and are within the jurisdiction of the Board. Accordingly, VA's position that all decisions, including non-judgmental decisions

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[143] *See, e.g.*, Proposed Rule at 13371, 13374, 13378.
[144] *Id.* at 13395 (emphasis added).
[145] *See, e.g.*, *Setser v. United States*, 132 S. Ct. 1463, 1470 (2012) ("Our decision today follows the interpretive rule . . . that we must 'give effect . . . to every clause and word' of the Act.").
[146] *See, e.g.*, *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004) ("It is, moreover, 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or otherwise insignificant.'") (quoting *TRW v. Andrews*, 534 U.S. 19, 31 (2001).
[147] *See, e.g.*, 38 C.F.R. § 20.104(b) (examples of medical decisions include "whether a particular drug should be prescribed, whether a specific type of physiotherapy should be ordered, and similar judgmental treatment decisions with which an attending physician may be faced.").
[148] *Veterans For Common Sense v. Shinseki*, 643 F.3d 845, 896 (9th Cir. 2011).
[149] *Zimick v. West*, 11 Vet. App. 45, 48 (Vet. App. 1998).
[150] *Meakin v. West*, 11 Vet. App. 183, 185-187 (Vet. App. 1998).

about matters other than the treatment of eligible veterans, i.e., their assistance and support, are medical decisions is unreasonable.

Finally, it is clear that there are decisions made with respect to the Caregiver Program that are not medical decisions, and should be subject to the Board's appellate jurisdiction. These include, for example, procedural questions and objective factual questions, such as whether an applicant has furnished all required information, whether VA has contributed to a delay in an applicant caregiver completing his or her training and education requirements in a timely manner, whether a veteran's serious injury was incurred or aggravated in the line of duty, when a serious injury was incurred or aggravated (e.g., before 9/11 or on or after 9/11, or after the first phase of the Program expansion is implemented, before May 7, 1975), or whether an applicant's disability rating meets or exceeds 70%. All of these decisions must be made as part of the Caregiver Program, and none of them involve medical decisions. These non-medical decisions, i.e., decisions unrelated to the assistance or support to be provided to a specific individual, should continue to be subject to Board review. Nothing in the language of the Act requires a contrary conclusion.

For these reasons, the Organizations respectfully request that VA include in its final rules specific guidance as to which decisions under the Caregiver Program constitute medical decisions, and which decisions or questions are not considered medical decisions and are therefore subject to appeal and review by the Board.

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NVLSP and VW appreciate and welcome the opportunity to provide these comments and respectfully ask that VA consider these comments and our recommended changes to the Proposed Rule. If you have any questions regarding our comments, please contact Barton F. Stichman, Executive Director, NVLSP at bart@nvlsp.org or Lauren Price, Founder and Managing Director, VW at lauren@veteran-warriors.org.

Respectfully Submitted,

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