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March 17, 2015

William F. Russo, Acting Director
Regulation Policy and Management (02REG)
Department of Veterans Affairs
810 Vermont Ave. NW, Room 1068
Washington, DC 20420

**Subject: RIN 2900-AO73, Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits**

Dear Acting Director Russo,

On behalf of the National Academy of Elder Law Attorneys (NAELA), please accept our comments regarding *RIN 2900-AO73, Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits, Proposed Changes to 38 C.F.R. Part 3, Department of Veterans Affairs*.

NAELA represents more than 4,500 attorneys who are experienced and trained to provide legal advocacy, guidance, and services to maintain the quality of the life of persons with disabilities and persons as they age. Many members are accredited by the Department of Veterans Affairs (VA) to assist Veterans in the preparation, presentation, and prosecution of claims. Collectively, we submit this public comment for consideration on behalf of Veterans across the nation.

NAELA welcomes the effort to try to make the eligibility criteria for pension and other benefits administered by VA objective and transparent, but we believe that these proposed regulations, if implemented, would cause substantial harm to wartime Veterans, their spouses, and dependents

and will not solve the serious issue of unscrupulous organizations taking advantage of potential beneficiaries by selling inappropriate annuities or trusts.

In addition, we express the serious concern that the proposed ruleôs 3-year look-back period and transfer of assets penalty exceed statutory authority, opening up VA to future litigation and causing additional uncertainty for Veterans and their families.

## VA Lacks Statutory Authority to Create Look-Back and Penalty Periods

Proposed § 3.276 would create a 3-year look-back period for asset transfers with a maximum penalty period of 10 years related to those transfers. However, VA lacks the statutory authority to do so, putting the agency at risk of litigation and greater uncertainty for Veterans, if implemented.

VA regulations must be authorized by a congressional statute in order to be valid. A regulation that is ñin excess of statutory jurisdiction, authority or limitations é will be held unlawful by a reviewing court.ò 5 U.S.C. § 706(2)(C); 38 U.S.C. § 7261. This standard of judicial review was clarified by the U.S. Supreme Court in *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

Under the *Chevron* standard, federal agency regulations that are *explicitly* authorized by a federal statute are called ñlegislative regulationsò and are ñgiven controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute.ò *Supra* at 844.

A regulation is also valid if there is an *implicit* delegation by congressional statute. In such a case, the regulation is granted deference by courts. If the statute is ñsilent or ambiguous with respect to the specific issue, the question for the court is whether the agencyôs answer is based on a permissible interpretation of the statute.ò *Supra* at 843.

In *Chevron*, the court upheld an Environmental Protection Agency (EPA) regulation because it was a ñreasonable accommodation of manifestly competing interests é .ò

By applying the *Chevron* analysis to the asset transfer and penalty period rules set forth in proposed § 3.276, they can be seen as exceeding statutory authority granted by Congress under the applicable statutes in 38 U.S.C. §§ 501(a)(1), 1522, 1543, and 1506(1).

***Lack of Statutory Authority Under § 501(a)***

First, the statutory authority granted to VA in 38 U.S.C. § 501(a) merely contains the usual, general, and ñnecessary and appropriateò standard given to any federal agency in charge of administering a program. That standard certainly is far too general to qualify as a legislative regulation since § 501(a) does not expressly mention a look-back period and transfer penalty. Nor does § 501(a) constitute implicit delegation of congressional statutory authority for which deference is required because it does not in any way hint at a look-back period and penalty period.

***Lack of Statutory Authority Under §§ 1522, 1543, and 1506(1)***

38 U.S.C. §§ 1522, 1543, and 1506(1) direct VA to deny, reduce, or discontinue the payment of a pension:

> [W]hen the corpus of the estate [net worth] é is such that *under all the circumstances*, including é the annual income of the veteran, the veteranôs spouse, and the veteranôs children, it is *reasonable* that some part of the corpus of such estates [net worth] be consumed for the veteranôs [or spouseôs or childôs] maintenance. (emphasis added)

The Executive Summary of the proposed regulations on page 5 discusses these three statutes, but does not mention the important words ñunder all the circumstances, including é the annual income.ò While we agree that these statutes are silent on when it is reasonable to require the claimant to consume some part of his or her net worth, that silence is not enough to implicitly authorize VA to create Medicaid-like look-back and penalty periods. Rather, it is the province of Congress to create such rules. Congress had the opportunity to do just that from 2012 to 2014 through the submission of S. 3270/ H.R. 6171 (2012) and S. 748/H.R. 2341 (2013), each of which died in session.

These three statutes neither provide explicit nor implicit authority for VA to go back 36 months in time to deny a claim or continue a denial for 10 years into the future. Rather, these statutes are present-oriented in their reach to force a Veteran, spouse, or child to spend down currently held available assets as a condition for pension qualification. There is no suggestion in these statutes that Congress intended any past or future restrictions.

The Summary section makes numerous comparisons between its proposed rule and Medicaid long-term-care rules. But Congress, not the federal agency in charge of the Medicaid program, enacted the look-back and penalty period rules for the Medicaid program in the Omnibus Budget Reconciliation Act of 1993 and Deficit Reduction Act of 2005 (DRA).

A recent example of a congressional statute that provides proper specific regulatory authority is subsection (g) of the Achieving a Better Life Experience (ABLE) Act of 2014:

> (g) Regulationsð The Secretary shall prescribe such regulations or other guidance as the Secretary determines necessary or appropriate to carry out the purposes of this section, including regulationsð
> (1) to enforce the 1 ABLE account per eligible individual limit,
> (2) providing for the information required to be presented to open an ABLE account,
> (3) to generally define qualified disability expenses,
> (4) developed in consultation with the Commissioner of Social Security, relating to disability certifications and determinations of disability, including those conditions deemed to meet the requirements of subsection (e)(1)(B)(ii),
> (5) to prevent fraud and abuse with respect to amounts claimed as qualified disability expenses,
> (6) under chapters 11, 12, and 13 of this title, and
> (7) to allow for transfers from one ABLE account to another ABLE account é .

Sections 1522, 1543, and 1506(1) do not provide similar specificity.

In applying the *Chevron* standard to the proposed look-back and penalty periods, it is true that there are gaps in applying §§ 1522, 1543, and 1506(1). However, VA has already adequately filled these gaps in adopting its existing regulations set forth in 38 C.F.R. §§ 3.275 and 3.276.

In particular, 38 C.F.R. § 3.275(d) provides a list of factors VA should consider when evaluating a claim, such as income, convertibility of property into cash, life expectancy, family membership, potential rate of asset depletion, and unusual medical expenses ð and in doing so § 3.275(d) implements the ñunder all the circumstancesò of 38 U.S.C. §§ 1522, 1543, and 1506(1).

By contrast, the look-back and penalty periods of proposed § 3.276 would swallow up the ñunder all the circumstancesò mandate of the three cited statutes. Rather than the multifactor statutory mandate, there would be only two factors under the proposed regulations: whether there was a transfer within 36 months and whether the claimantôs other assets are below the new bright-line Medicaid-related asset limit. Such a regulatory formulation clearly exceeds the authority granted in the three statutes.

Moreover, the look-back period, transfer penalty, and net worth rules of the proposed regulations provide no special protections for a Veteranôs spouse ð unlike the spousal asset and income allowances built into the Medicaid long term care (LTC) program. In the Medicaid LTC program, it is clear that Congressôintent, through these allowances, is to prevent the impoverishment of the community spouse when his or her institutionalized spouse qualifies for Medicaid LTC benefits. The spousal protections provided by the Medicaid LTC program include an exception for divestment of gifts made between spouses, a conversion of assets to provide extra income for the community spouse, a minimum income allowance, and a minimum asset allowance. The proposed regulation only provides one of these protections and falls detrimentally short of congressional intent.

Further evidence that VA does not have implicit authority to issue the look-back period and transfer penalty is provided in the relevant Government Accountability Office (GAO) report, GAO-12-540, May 15, 2012, wherein the GAO made the following specific recommendation:

> Congress should consider establishing a look-back and penalty period for pension claimants who transfer assets for less than fair market value prior to applying, similar to other federally supported means-tested programs.

The GAO report also comments on the role VA should have in this matter:

> VA should (1) request information about asset transfers and other assets and income sources on application forms, (2) verify financial information during the initial claims process, (3) strengthen coordination with the VAôs fiduciary program, and (4) provide clearer guidance to claims processors assessing claimantsôeligibility.

The final rule should strike the look-back period and transfer penalty from the proposed rule, given that it lacks the statutory authority to impose these measures pursuant to 5 U.S.C. § 706(2)(C); 38 U.S.C. § 7261; *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984); and GAO-12-540. This authority rests solely with Congress.

## Proposed § 3.276 Transfer Penalties Exception Is Too Narrow

Under the proposed rule, an applicant cannot rebut the presumption that all gifts and transfers were made for purposes other than VA pension eligibility, with one narrow exception. That exception is for fraud, misrepresentation, or unfair business practice ñrelated to the sale or marketing of financial products or services for purposes of establishing entitlement to VA pension.ò

With this limited exception, Veterans and their surviving spouses will be unjustly penalized for prior transfers that had absolutely nothing to do with VA pension eligibility. Gifts to children at holidays and birthdays will be penalized. Donations to places of worship will be penalized. Contributions to charities will be penalized. All because there is a presumption that the transfer was made for the purpose of qualifying for VA pension and unless there was fraud, misrepresentation, or unfair business practice, the presumption cannot be rebutted. As a result, the Veteran or surviving spouse could be disqualified for VA pension benefits for up to 10 years.

The final rule should require that transfers only made for the sole purpose of qualifying for VA pension be penalized. If the claimant can show by a preponderance of the evidence or a prior pattern of gifts that a transfer was not made for the purpose of qualifying for VA pension but for a completely unrelated purpose, no penalty should be imposed.

## Proposed § 3.276 Should Allow for Partial Cures

Proposed § 3.276(e)(5) only allows a penalty period to be ñcuredò if all assets are returned to the claimant within 30 days of filing a VA pension claim. This means that Veterans who gave an adult child a birthday gift for the past 3 years would be subject to the penalty unless they receive every cent back from the child. In addition, Veterans who made donations to the Wounded Warriors Project for the past 3 years would be penalized unless they demanded and received a return of all of those donations from the nonprofit.

A more equitable solution is to allow for a partial cure of a gift or transfer at any time that will reduce the penalty period according to the amount returned. For example, consider a Veteran who gifts $20,000 to his or her adult child and later applied for VA benefits. Upon notification from VA that the gift made the Veteran ineligible for a VA pension, the child returns $10,000. If the final rule allowed partial cures, the penalty period would be cut in half, which would be fair and equitable. Recalculating the penalty period upon partial cure will take no more time than confirming the cure itself. The final rule should allow a reduction in penalty period for partial returns of transfers.

## Time Allowed to Cure Transfers Should Be Expanded

The proposed time constraints for curing a gift make it nearly impossible to do so. The proposed rules require that all gifts be returned to the claimant within 30 days of filing a VA pension claim. However, many claimants, without the benefit of an attorney or without knowledge of the regulations, will have no idea that they have done something to disqualify them from benefits until they receive a denial letter ð which is, on average, 9 months or later from the filing date. It will be too late at that time for a claimant to return any transferred money and get a penalty removed. Furthermore, 30 days is an extremely limited period of time to track transfers and

recoup them from the prior 3-year period, especially for a claimant who may be suffering from serious medical issues. Moreover, persons with dementia may need a guardian or conservator appointed in order to recover a transfer, which could take a significant amount of time to arrange and process through the court system.

Instead, the final rule should allow a claimant 90 days from *the date of the denial letter* to return a disqualifying transfer and receive a total or partial cure of the penalty period. This would better allow sufficient time for a claimant to trace transferred funds and attempt to recover those funds, if possible.

## Use Comparable Federal Laws for Transfers to a Trust for a Child Incapable of Self-Support

Under proposed 38 C.F.R. § 3.276(d), a Veteran, the Veteranôs spouse, or the Veteranôs surviving spouse could make a transfer to a trust for a disabled child only if that child became permanently incapable of self-support prior to age 18 because of a mental or physical defect, pursuant to 38 C.F.R. § 3.356. This strict standard excludes adult children who become permanently disabled later in life due to an accident, health reasons, age, or other reasons and thereby become dependent again on a Veteran parent. It is inequitable to treat a child who becomes permanently disabled later in life differently from a child who becomes permanently disabled prior to age 18.

The final rule should adopt the same standard as the federal Medicaid law. Under 42 U.S.C. § 1396p(c)(2), an applicant can transfer any asset without penalty to a trust for the sole benefit of a child who is under 21, blind, or disabled as defined in 42 U.S.C. § 1382(c). This will allow a Veteran, the Veteranôs spouse, or the Veteranôs surviving spouse to ensure that any child who is blind or disabled is taken care of properly, regardless of the age the disability began.

## Proposed § 3.276 Disproportionately Harms Surviving Spouses of Veterans

When calculating the transfer of assets penalty, the proposed rule would use the maximum annual pension rate, plus the aid and attendance supplement, divided by 12, based on the type of

applicant. A married Veteranôs rate would be $2,120 per month, a single Veteranôs rate $1,788 per month, and a surviving spouseôs rate $1,149 per month.

By comparison, 42 U.S.C. § 1382b(c), pertaining to Supplementary Security Income (SSI), the penalty devisor for transferring assets is the SSI monthly rate, which is the same for *all* SSI recipients, currently $733 per month. For nursing home Medicaid recipients, the penalty divisor is the average monthly nursing home rate for all applicants in a region. For example, the average nursing home rate per month in Georgia is $5,825, as determined annually by the Georgia Department of Community Health. Thus, all Georgia residents applying for nursing home Medicaid are subject to the same penalty divisor. When a married applicant transfers $100,000, a 17.16-month penalty is assessed ($100,000 divided by $5,825). Likewise, when a single applicant transfers $100,000, the penalty period is 17.16 months.

In the proposed rule, married Veterans, single Veterans and surviving spouses have different penalty periods based on the maximum annual pension rate (MAPR) with Aid and Attendance (A&A) instead of based on the actual dollar amount transferred. In addition, the proposed rule does not specify how gifts or other transfers made by one spouse who then passes away before an application is filed would be treated, which the final rule should clarify.

***Examples of Proposed Rule's Disproportionate Transfer Penalties***

- Married Veteran transfers $10,000 ï penalty = 4.71 months ($10,000/$2,120)
- Single Veteran transfers $10,000 ï penalty = 5.59 months ($10,000/$1,788)
- Surviving spouse transfers $10,000 ï penalty = 8.70 months ($10,000/$1,149)

Surviving spouses are most often women and historically have lower lifetime earnings than their partners. Many served as caregivers to their Veteran spouses. Yet the proposed rule would apply a more stringent penalty on them, almost double, for transferring the same amount of money.

The final rule should use one figure as the penalty divisor for *all* transfers regardless of the type of applicant, which should be the MAPR with A&A for a married veteran ð $2,120. This would be consistent and equitable to all applicants and easier for VA to administer.

## Proposed Definition of "Transfer for Less Than Fair Market Value" and Its Application Related to Annuities and Trusts Are in Conflict

Proposed § 3.276(a)(4) defines ñfair market valueò as the price at which an asset would change hands between a willing buyer and willing seller who are under no compulsion to buy or sell and who have reasonable knowledge of relevant facts.

The proposed rule also defines ñtransfer for less than fair market valueò as the selling, conveying, gifting, or exchanging of an asset for an amount less than the assetôs fair market value, including ñany financial instrument or investment that reduces net worth and would not be in the claimantôs financial interest were it not for the claimantôs attempt to qualify for VA pension by transferring assets to or purchasing such instruments or investments ð two examples of such being annuities and trusts.ò

The proposed rule defines ñannuityò as ña financial instrument that provides income over a defined period of time for an initial payment of principal.ò The proposed rule defines ñtrustò as ña legal arrangement by which an individual (the grantor) transfers property to an individual or an entity (the trustee), who manages the property according to the terms of the trust, whether for the grantorôs own benefit or for the benefit of another individual.ò

The first issue is that the proposed rule does not recognize or acknowledge, through its definitions, the different types of annuities or trusts, thereby treating all of them the same, which would improperly impose transfer of assets penalties.

### *Certain Annuities Comply With the Intent of the VA Pension Program*

Certain annuities comply with the intent of the VA pension program, are in the best financial interest of the claimant, and are exempt by other, similarly situated needs-based programs such

as Medicaid, to which VA has referenced consistently as its guide when proposing changes to the regulations.

By law, VA must consider whether it is reasonable, under all the circumstances, for the claimant to ñconsume someò of his or her estate for maintenance. An annuity as defined by VA, ña financial instrument that provides income over a defined period of time for an initial payment of principal,ò does exactly that.

For example, consider a claimant who converts $100,000 from a savings account into a single premium immediate annuity. The annuity is annuitized over the claimantôs life expectancy, which means that the entire principal amount of $100,000, plus interest, will be paid back to the claimant by the expiration of the claimantôs life expectancy. The guaranteed monthly income is being spent on medical expenses and living expenses. This monthly income is also countable toward the income/net worth limit.

For Medicaid eligibility, Congress decided that these specific types of annuities were to be exempt under the DRA. These annuities are often solid retirement, financial, and estate planning mechanisms. For example, consider a claimant who has $3,000 in monthly income. His/her assisted living facility costs $6,500 per month, leaving him/her with a shortfall of $3,500 per month. With his/her VA pension of $1,788, his shortfall is $1,712 per month. Assuming his/her life expectancy is 3 more years, he/she could convert $60,000 into a single premium immediate annuity (SPIA), which would produce the extra $1,712 per month he/she needs for the rest of his life. His/her other assets would be necessary and used to cover increases in health care costs and daily living expenses.

Certain annuities are in conflict with the intent and integrity of VA pension program and should be treated as either resources or transfers of assets for less than fair market value. Examples of such annuities are (1) revocable annuities, which can be cashed in for the initial premium minus any early withdrawal penalties, and (2) deferred annuities, wherein an initial lump sum is paid but income is deferred until later. This too is consistent with the Medicaid laws enacted by Congress.

The final rule should treat a nonrefundable, nonassignable SPIA, which is actuarially sound as an income stream only, not as a covered asset or as a transfer of assets for less than fair market value. Revocable deferred annuities should be treated as countable toward net worth. Irrevocable deferred annuities should be treated as a covered asset subject to the look-back period and as transfers for less than fair market value.

***Final Rule Should Differentiate Between Revocable and Irrevocable Trusts***

There are two main types of trusts ð revocable and irrevocable. VA has a history of issuing Office of General Counsel opinions on how assets should be treated when they are transferred to a trust.

*Revocable Living Trusts*

Revocable living trusts are legal instruments wherein the grantor retains all rights of ownership and control. These trusts are a common estate planning tool for (1) easing the transition into incompetency and disability and (2) avoiding probate.

The proposed rule would treat all transfers of assets into this type of trust as transfers for less than fair market value and impose a penalty. This is contrary to all laws, in addition to Board of Veterans Appeals Decision, Citation 9712649, April 11, 1997, wherein the court accurately and appropriately held that the income from the trust was countable toward income for VA purposes. It follows that the assets inside the trust would be countable for net worth purposes.

*Irrevocable Living Trusts*

Irrevocable living trusts are legal instruments wherein the assets inside the trust are not available to the grantor of the trust; however, on occasion, the grantor may have reserved the right to receive income from the trust. VAôs long-standing Office of General Counsel opinions regarding irrevocable living trusts include VAOPGCPREC 64-91 (held that only such portion of the trust property as made available for the veteranôs use is countable for income and net worth purposes) and VAOPGCPREC 73-91 (held that assets placed into an irrevocable living trust for the benefit of grandchildren is not countable toward the veteranôs net worth). VA also issued

VAOPGCPREC 33-97, specific to first-party special needs trusts, which held (arguably in error based on federal special needs trust laws) that the assets are countable.

*Final Rule Should Treat Revocable and Irrevocable Trusts Differently*

VA should maintain the current long-standing history of

1. Treating assets in a revocable living trust as countable toward income and net worth standards.
2. Treating assets transferred to an irrevocable living trust as exempt from net worth standards. However, if it is found that VA has the authority to impose a look-back period and transfer of assets penalty without the approval of Congress, a penalty should be assessed on the covered assets transferred to the irrevocable living trust.
3. Overturning the erroneous VAOPGCPREC 33-97 decision to conform to the special needs trust laws at 42 U.S.C. § 1396(p), Social Security Act §§ 1917(d)(4)(A) and 1917(d)(4)(C), exempting a transfer of assets penalty when assets are transferred to a special needs trust for the benefit of the grantor or another individual with disabilities.

## Proposed § 3.275(3) Arbitrarily Excludes Lot Sizes Larger Than 2 Acres

When determining assets for the purpose of net worth, the proposed rule continues to exclude personal residences but creates a new limitation by excluding lots larger than 2 acres.

As stated in VAOPGCPREC 64-91, it is the ñapparent congressional objective of assuring that an incompetent veteran is not rendered homeless by operation of statute by excluding the value of the veteranôs home from the veteranôs estate.ò *See*, by analogy, Sen. Rep. No. 98-604, 98th Cong., 2d Sess., reprinted in 1984 U.S.C. Cong. & Admin. News 4479, 4518 (concerning home exclusion under 38 U.S.C. § 3203(b) (now § 5503(b)). We also note the definition of ñcorpus of estateò for pension purposes as excluding the claimantôs dwelling but ñincluding a reasonable lot area.ò 38 C.F.R. §§ 3.263(b), 3.275(b). *See also* 123 Cong. Rec. S19754 (daily ed. Dec. 15, 1977) (statement of Sen. Alan Cranston).

Current policy defines ñreasonable lot areaò as ñthe degree to which the property is connected to the dwelling and *the typical size of lots in the immediate area*ò and ñ[c]ontiguous land which is

closely connected to the dwelling in terms of use, and *which does not greatly exceed the customary size of lots in the immediate area* é .ò (emphasis added) M21-1MR, Part V, Subpart iii, Chapter 1, § J, 71.d.

When limiting the lot size to 2 acres, the proposed rule does not offer any commentary on why it was necessary to further refine this definition. This proposed criteria is arbitrary and capricious. The standard the proposed rule used to substantiate limiting the lot size to 2 acres was based on new home sales in 2010. First, those figures are outdated by 5 years. Second, Veterans seeking the pension benefit, many of them elderly, have owned their homes for decades and purchased them without the ultimate goal of filing for VA pension years later.

These proposed changes will have a dramatically negative effect on rural Veterans who have homes on lots similar to the norm in their communities. According to the National Center for Veterans Analysis and Statistics, Veterans as a group tend to live in more rural areas than the general population. In addition, seniors often move to more rural areas in retirement age due to lower costs of living.

***Maintain Immediate Area Analysis or Alternatively Exempt Lot When for Sale***

The final rule should maintain the current intent of Congress, laws, and VA policy by excluding for net worth purposes the personal residence and ñreasonable lot areaò as defined by the VA as ñthe typical size of lots in the immediate area.ò

Additionally, if it is determined that limiting the lot size does not run afoul of congressional intent and a lot size of not more than 2 acres is exempt from net worth standards, the excess property should be exempt, as well as any other real property, as long as it is for sale at current market value. This is consistent with laws and policy in that the convertibility of an asset into cash is an element that is to be considered when determining net worth. Obviously, if the property is listed for sale but is not yet sold, it is not an asset that can be consumed for living expenses or care until actually sold. This is also consistent with Medicaid regulations, to which VA consistently refers as similar to VA pension program. In addition, if the 2-acre rule is implemented, the final rule should provide for a six-month period with which to purchase a new

personal residence. Under the proposed rules, the claimant/recipient of benefits has until December 31st to reinvest the proceeds into a new residence. This disproportionately harms claimants who sell their homes during the second half of the year, especially those who sell in the month of December. Whereas, those who sell during January have an entire year to reinvest in a new home. Changing the regulations to provide all claimants/recipients a six-month period to reinvest would equitably treat all claimants the same regardless of when the house sells.

## VA Should Continue With a Factor Analysis for Net Worth Limits

Proposed § 3.274 seeks to create a test that combines the assets and income of a beneficiary into a single net worth test aligned with the community spousal resource allowance in Medicaid. But the VA already has a process, which can be administered consistently without variation or discretion on behalf of the individual adjudicator. At present, § 3.275(d) requires VA to consider the (1) claimantôs income, (2) liquidity of property, (3) life expectancy of the claimant, (4) number of family members, and (5) rate of depletion of assets.

***Proposed Net Worth Limits Are Harsher Than Medicaid's Limits***

While the Medicaid program is analogous to VAôs pension program, in that they are both needs-based programs, adopting the Medicaid asset limitation for VA purposes, in the way the proposed rule intends to do so, is much more limiting and impoverishing in nature than the Medicaid system.

First, the proposed rule includes both income and assets of the claimant and any family member toward the bright-line figure. Medicaid considers only the assets of the claimant and spouse, not the income.

Second, the proposed rule does not incorporate Medicaidôs protections to prevent the impoverishment of the healthy spouse (the community spouse). One of the Medicaid spousal protections the proposed rule neglects to incorporate is that the community spouse is permitted to acquire assets in excess of his or her asset allowance after the noncommunity spouseôs Medicaid eligibility is established without disqualifying the noncommunity spouse from eligibility. This is

not the case under the proposed rule, wherein any increase in income and assets of the nonveteran spouse can cause the veteran spouse to lose eligibility.

Third, in addition to preserving a certain asset limit for the community spouse to prevent further impoverishment, Medicaid does not consider the community spouseôs income when determining eligibility. The proposed rule, on the other hand, requires that *all* income, from both the Veteran and the spouse, be completely consumed by medical expenses before the claimant meets the income eligibility for the maximum annual pension rate, leaving absolutely no available income for non-medical living expense.

Fourth, Medicaid covers as much as 100 percent of the costs for care (i.e., room and care in a nursing home), including all medication, for the Medicaid recipient. Moreover, Medicaid allows the Medicaid recipient to divert up to as much as $2,980.50 (2015 Maximum Monthly Community Spouse Maintenance Allowance) to the community spouse for nonmedical living expenses. Veteransô pensions merely provide for a small offset of costs. Thus, the VA claimant will continue to rapidly deplete assets to maintain access to long-term care. By contrast, Medicaid will protect a recipientôs assets from the daily costs of care.

Fifth, the bright-line asset/income limit does not take into account the age or degree of care needed by the claimant. A 68-year-old claimant who suffered a stroke and needs 24/7 care will presumably need much more in assets and income than a claimant who is 98 with colon cancer.

***Use Age as a Factor When Determining Financial Need***

The final rule should continue to use age analysis already outlined in M21-1MR, Part V, Subpart iii, Chapter 1, § J:

> No specific dollar amount can be designated as excessive net worth. What constitutes excessive net worth is a question of fact for resolution after considering the facts and circumstances in each case. A number of variables must be taken into consideration when making a net worth determination.

Factors to consider include

- income from other sources
- family expenses
- claimantôs life expectancy, and
- convertibility into cash of the assets involved.

**Note**: In general, the older an individual is, the smaller estate the individual requires to meet his/her financial needs.

The VA life expectancy table is located at M21-1MR, Part V, Subpart iii, Chapter 1, § J, 72, Exhibit 1: Life Expectancy Table for Net Worth Determinations. The final rule could develop a fairly simple formula for determining net worth based on age.

As VA recognizes, the current net worth limit covers between 1 and 2 years of care in a nursing home. But these limits are harsh, particularly for younger Veterans with disabilities who must receive care over a substantial number of years.

***Example Net Worth Limits Using Age as a Factor***

Step 1: (income x life expectancy) + total liquid assets = net worth
Step 2: net worth ï (medical expenses x life expectancy) = net worth for VA purposes

- If the net worth for VA purposes is positive, the claimant is ineligible and denied benefits.
- If the net worth for VA purposes is negative, the claimant is approved for benefits.

*Example 1*
$35,000 annual income x 6 yearsô life expectancy = $210,000 + $130,000
liquid assets = $340,000 net worth
$78,000 annual medical expenses x 6 yearsô life expectancy = $468,000 medical expenses
$340,000 net worth minus $468,000 medical expenses = negative amount = approved

*Example 2*

$65,000 annual income x 3 yearsô life expectancy = $195,000 + $90,000 liquid assets = $285,000 net worth

$78,000 annual medical expenses x 3 yearsô life expectancy = $234,000 medical expenses

$285,000 net worth minus $234,000 medical expenses = $51,000. Net worth for VA purposes; the claim would be denied for excessive net worth.

***Creating a Single Bright-Line Test Because of Delays Is Unwarranted***

The need to impose a bright-line net worth test for all claimants due to VAôs concern that current rules require collection of additional information that is not solicited in the initial application, thus delaying processing times, is unwarranted. Instead, the initial application could solicit the required information from the outset. VA already has a form for soliciting the information subsequent to the application, VA Form 21-8049, Request for Details of Expenses.

VA should modify the current application forms (VA Forms 21-526EZ and 21-534EZ) to include or incorporate the necessary information solicited in VA Form 21-8049. The formula for net worth would then be as follows:

> Step 1: (income x life expectancy) + total liquid assets = net worth
> Step 2: net worth ï [(medical expenses x life expectancy) + (nonmedical living expenses x life expectancy)] = net worth for VA purposes

The basic issue in evaluating net worth is to determine whether the claimantôs financial resources are sufficient to meet the claimantôs basic needs (both medical and nonmedical) without assistance from the VA. M21-1MR, Part V, Subpart iii, Chapter 1, § J, 67.g. Using the formula above satisfies the current laws without making changes to the net worth standard.

**Proposed § 3.278 Limiting Deductible Medical Expenses Violates Statutory Authority and Harms Those Seeking Less Restrictive Environments**

The proposed rule goes too far in limiting medically necessary expenses for the health and welfare of Veterans, particularly senior Veterans and their spouses who are beginning to show

signs of advanced aging and/or dementia. The proposed cap on fees paid to caregivers would limit Veteransô choices to providers that charge at or below the national average. This is unduly burdensome on families, particularly those in higher cost areas of the country. More importantly, restricting the ability to deduct medical expenses, specifically the hourly amount of home health care provider rates to $21 per hour exceeds statutory authority under 38 U.S.C. § 1503(8). Those provisions allow for ñamounts equal to amounts paidé for unreimbursed medical expenses.ò Thus, the provisions only allow for regulations to define what constitutes a medical expense as exclusions of income. These provisions do not allow for monetary limitations on those medical expenses, but instead deem ñamounts equal to amounts paidò as exclusions of income for qualification purposes.

***Remove the Licensure Requirements***

Proposed § 3.278(b)(8) removes the facilityôs licensure requirement and the requirement that it be staffed with custodial care providers 24 hours per day or, in the alternative, the requirement that the facility be staffed 24 hours per day even if the primary duty of the staff present at certain times (such as overnight) are providing direct custodial care or serve as emergency responders. Proposed § 3.278(d)(2) should be expanded to either remove or significantly increase the limitation on payments to an in-home attendant. Proposed § 3.278(d)(2)(i) should be amended to include medication management as an activity of daily living.

***Proposed § 3.278(b)(8) Definition of "Custodial Care" Effectively Eliminates the Ability of Any Person Who Is Rated as Housebound but Does Not Have a Mental Disorder to Deduct Facility Fees as Medical Expenses***

Veterans who are eligible to receive a VA pension qualify for the pension at the Housebound rate if they have a single permanent disability that is rated at 100 percent by a schedular evaluation and either have at least one additional disability independently rated at 60 percent or more per 38 C.F.R. § 3.351(d)(1) or are permanently housebound by reason of their disabilities per 38 C.F.R. § 3.351(d)(2).

Some Veterans move to independent living facilities when living in their private dwellings no longer meets their needs due to the following: (1) not having transportation to medical

appointments or to places for meeting other basic living needs, such as the grocery store; (2) not being able to safely exit the house in the event of a fire because of limited mobility (e.g., having a fall risk, being in a wheelchair); or (3) being identified as having a high risk for strokes, heart attacks, or other medical ailments based on their medical history. These individuals no longer drive; are essentially confined to their homes, as defined in 38 C.F.R. § 3.351; and are in need of a safer environment due to their medical conditions. Nevertheless, under proposed § 3.278, their facility fees would not be deductible because they do not meet the proposed requirement for receiving custodial care resulting from their not having mental disorders that require supervision or not needing the assistance with two activities of daily living. As defined, custodial care would require the ñregular assistance with two or more activities of daily living or regular supervision because an individual with a mental disorder is unsafe if left alone due to the mental disorder.ò

Not allowing the deduction of independent living fees as medical expenses will prevent many seniors from living functionally in the least restrictive environment possible. While independent living facilities are usually significantly less expensive than assisted living facilities and nursing homes, they are almost exclusively considered ñprivate payò and are the first step in the dramatic increase in health care and living expenses as health declines.

The final rule should permit Veterans and other appropriate claimants to deduct facility fees, including fees for independent living facilities and assisted living facilities, as long as a licensed physician certifies that they have a medical condition requiring such level of care. This is consistent with current laws and policy, specifically M21-1MR, Part V, Subpart iii, Chapter 1, § G, 43.h.

***Activities of Daily Living Should Include Medication Management***

Although medication administration is usually defined as an activity of daily living, without proper medication management, a personôs health declines much more rapidly, increasing the cost of care and accelerating the need for higher levels of care, including skilled nursing facilities. A person with memory loss who cannot remember to take medication, or the right dosage at the proper time, and a person with a physical disability who needs assistance reading or opening medication dispensers, should be treated the same as a person who needs assistance

putting on a shirt or taking a bath. Treating medication management as one of the two necessary activities of daily living under the custodial care definition is consistent with the question asked on VA Form 21-2680, Examination for Housebound Status or Permanent Need for Regular Aid and Attendance, ñDoes claimant require medication management?ò

The proposed rule makes an exception to the activities of daily living by permitting the deduction of medically necessary travel expenses. It follows that VA make an exception by regarding medication management as an activity of daily living and a medical expense, given that taking medication is directly related to a personôs medical condition and, the need for medication management is, therefore, directly related to the medical condition and treatment of that condition.

The final rule should include medication administration as one of the two ADLs necessary to meet the need for Aid & Attendance level of care.

***Proposed § 3.278(d)(2) Limits the Rate of Payment That Will Be Deductible for In-Home Health Care Providers Regardless of Whether They Work With an Agency or Their Actual Skill Levels***

Limiting the deductible in-home health care provider fee will only limit an individualôs ability to assess and access quality care. The changes to the laws are capricious for two primary reasons.

First, Proposed § 3.278(d)(2) is based on the average rate for in-home health care across the county. This is unduly burdensome on claimants who live in higher cost areas (with costs generally higher on the coasts than in the Midwest) and on claimants who live in urban areas as opposed to rural areas (with costs generally lower in rural areas). The proposed regulation, by using the average rate of in-home health care as a benchmark, would mean half of all in-home health care would be provided at a rate higher than the proposed rule would allow.

Second, it is unjust to cap expenses without any regard for the needs of the individual claimant and without verifiable abuses. All in-home health care providers are not of an equal skill level, and depending on state licensing requirements, it is frequently required under state law to have a

health care provider with more advanced skills perform certain activities such as injecting insulin, changing colostomy bags/tubes, and providing services for an individual who uses a feeding tube. These providers, because of their skill levels, are often able to command a significantly higher rate of pay than more traditional in-home health care providers. The cap on expenses does not take situations such as these into account; therefore, this proposal will be unduly burdensome on claimants who need higher levels of care. This runs contrary to the stated intent of the proposed rule to ensure Veterans access to the highest level of care possible.

The final rule should provide no specific cap or limitation on fees for care providers.

## Establish an Effective Date That Provides Appropriate Notice Due Process That Is Fair to Claimants and Makes Implementation Feasible

***Proposed rule changes should be no less than one year from when the rules become final.*** Implementing a 3-year look-back period would bring an unfamiliar process to VA, requiring an estimated 70 additional adjudicators at the cost of $100,000 each to process the applications, according to the Congressional Budget Office in a November 12, 2013, report on S.944, *Veterans Health and Benefits Improvement Act of 2013*.

The proposed rule does not state when an effective date would occur after the rule becomes final. But, imposing an immediate effective date, or going back to when the rule changes were proposed, will subject VA to an unattainable goal, will violate notice and due process laws, and harm applicants through delays in processing. Additional staff will need to be hired and adequately trained to review complicated financial statements with applications. Moreover, applicants, including those with dementia or a severe physical disability, will suddenly need to obtain and submit 3 years' worth of financial information, which they may not have readily available and will need to order, incurring additional time and fees.

Applications for Medicaid take several months to cull through documents related to financial transactions. The individual state-specific Medicaid agencies process the applications, wherein they are knowledgeable about specific financial entities in their state. By contrast, VA adjudicators would need to possess knowledge on a national basis regarding financial entities

and variances in statements. Those hired to administer the new system should be experienced in reviewing financial data and fully trained before the consideration of any claims. Reviews of claims made before the enactment of the new rules, indeed, before the placement of the properly trained adjudicators, would further bog down the pension system and create an even larger backlog.

Medicaid agencies had approximately 20 years of experience with calculating a three-year look-back prior to Congress extending it to a 5-year look-back under The Deficit Reduction Act of 2005. When implementing an effective date, itôs therefore critical that the final rule provide enough time to attain any new funding required for the 70 new staff CBO estimates is required and properly train them to avoid further delays when implemented.

***Previous Legislation Recognizes the Need for a Delayed Effective Date***

Recent legislation introduced in both the Senate and House of Representatives recognizes the need to delay the effective date of a look-back and penalty period. For instance, S. 3270/ H. R. 6171 (112th Congress) required that the changes "shall take effect on the date that is one year after the date of the enactment of this Act and shall apply with respect to payments of pension and increased pension applied for after such date and to payments of pension and increased pension for which eligibility is re-determined after such date."

A year later, S. 748/ H.R. 2341 (113th Congress) included similar provisions, but added a caveat: shall take effect on the date that is one year after the date of the enactment of this Act and shall apply with respect to payments of pension and increased pension applied for after such date and to payments of pension and increased pension for which eligibility is re-determined after such date, *except that no reduction in pension shall be made under such subsections because of any disposal of covered resources made before such date.* (emphasis added)

This caveat would be critical to allow the care for pension recipients to continue uninterrupted if the final rule implemented a hard effective date. Members of Congress recognized that potential beneficiaries would be unfairly blind-sided if they were otherwise qualified at the time of their application, but were terminated due to a change in the law.

***Grandfather in Transfers Prior to the Enactment Date of the Final Rule***

To ensure a fair and efficient rollout of the new regulations, VA should not subject claims made prior to the enactment date to the look-back period or transfer penalties. Less than one percent (1%) of applicants make transfers to become eligible for benefits, according to VA. Thus, the overwhelming majority of claimants who made gifts or other transfers prior to the effective date will have done so without knowingly taking into account the new rules and should not be denied benefits that are helping them pay for care.

Using Medicaid as a reference, the effective date of the Deficit Reduction Act of 2005 (DRA) was February 8, 2006. Any applications for Medicaid submitted after that date, but that identified transfers of assets prior to that date, were subject to the transfer rules prior to the effective date, which had a three-year penalty. For example, a claimant made a gift of $20,000 in January 2005, but applied for Medicaid in March 2006. This claimant was subject to the prior three-year look back, even though his application was filed after the effective date of DRA because his/her transfer of assets was before the effective date. In contrast, a claimant who transferred assets on February 15, 2006, who then applied for Medicaid on March 1, 2006, would be subject to the five-year look back rules because the transfer was made after DRA effective date.

In its justification, the proposed rule expresses the desire to retain the "spirit of Medicaid regulations." Yet, unlike Medicaid, it would subject prior claimants to the same penalties as claimants after the proposed regulations are adopted. If enacted, this would be a violation of these claimants' due process rights. As stated earlier, in the Medicaid legislation that expanded the look-back period, Congress grandfathered in actions taken by applicants prior to the enactment date.

The final rule should set a specific effective date of no less than one year from the adoption of the final rules and grandfather all transfers made prior to the effective date, penalizing only transfers made after the effective date.

## Cost to Implement a Look-Back Period Will Outweigh Its Benefits

### *A 3-Year Look-Back Period Will Result in a Net Loss to Taxpayers According to the Congressional Budget Office*

The Congressional Budget Office (CBO) estimated in a November 12, 2013, report that if a 3-year look-back period was implemented, VA would need to hire 70 new employees, at an expense of $100,000 per person, to handle the increased workload of reviewing and processing applications because of the additional financial information to be analyzed. This equaled a total cost of $7 million per year over the look-back period once the look-back period was fully implemented.

By contrast, CBO estimated that once fully implemented, the look-back period would only save $5 million per year (scaling up from $2 million in the first year, with an additional million saved each year until it plateaued at $5 million). *Thus, even after full implementation, a look-back period would result in a net loss to taxpayers of $2 million per year*.

Following CBOôs estimates, the purported benefit to limit VAôs estimated 1 percent of beneficiaries who transfer assets for the purposes of qualifying do not outweigh costs to the government in ensuring the stated goal of program integrity that the proposed rule intends to achieve.

The regulatory impact analysis for the proposed rule estimates a different cost without reference to or disagreement with why the CBO is flawed in its analysis. For instance, it estimates that with the 3-year look-back period, the VA will save $36.7 million in 2020 alone, a number over 7 times greater than the $5 million savings per year in the CBO estimate and a full 19 times the difference in the overall cost estimate, which shows a $2 million dollar loss. In addition, the regulatory impact analysis does not appear to include the stated costs of the increased need for hiring new administrators and the substantial training that will be required. Rather it states that it assumes the administrative efficiencies gained would be minimal.

### *Assessing 3 Years of Financial Transactions Will Lead to Further Delays*

Presently, we estimate that Veterans pension claims take anywhere from 6 months to 2 years to

approve, averaging around 9 months. However, many benefits are denied quickly and those who likely do qualify often must wait longer than the average time. This time period is already a concern, given both the high costs of long-term care and the unfortunate fact that the life expectancy of many potential beneficiaries is often very short. Itôs an unfortunate fact that, even now, NAELA members work with Veterans who pass away before their benefits are ever approved due to these delays.

In addition, long-term care can come at a high price. For instance, 9 months in a nursing home costs $58,500, using the semi-private room cost estimate discussed in the proposed rule. A 2-year wait time in a nursing home would cost an estimated $156,000, which is above the total net worth amount allowed under the proposed rule. We fear that requiring claims adjudicators to review 3 years of financial documentation will likely result in more claims getting approved at the 2-year mark or worse, further impoverishing Veterans and their spouses paying for the high costs of long-term care as a result.

## Make Wartime Veterans and Their Families More Aware of These Benefits

The proposed rule focuses on reducing the number of wartime Veterans and their surviving spouses with conditions such as Alzheimerôs and ALS from receiving long-term-care support due to their financial positions. But regardless of the new limitations that could get imposed, too few Veterans with these conditions and their families know, understand, and access this benefit than could.

In 2011, the GAO concluded in its report VA Enhanced Monthly Benefits that *elderly veterans and their family members are the primary recipients of enhanced monthly benefits, but that many potential recipients are unaware of the benefits*.

In 2004, only 22 percent of eligible pension recipients actually received a benefit. A study estimated that in 2010, between 565,000 and 925,000 Veterans and between 940,000 and 1.38 million surviving family members would be eligible for, but would not receive, VA pension benefits. The study further concluded that VA should be doing more to create awareness of these benefits.

VA should continue with efforts to advertise these benefits to Veterans and their families regardless of the outcome of the final rule. Veteransô pensions offer a critical long-term-care lifeline for some of our wartime Veterans who are most in need and their surviving spouses, particularly given the crushing costs of long-term care. Itôs unfortunate to see so many Veterans struggle to pay for long-term care while unaware of benefits that can alleviate some of the burden of these costs.

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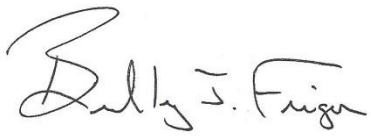
Thank you for your consideration of our comments. If you have any questions, please contact David Goldfarb, NAELAôs Public Policy Manager, at 703-942-5711 #232 or dgoldfarb@naela.org.

Sincerely,



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