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PRACTICE ALERT - “Possible New Rules on Net Worth, Asset Transfers, and Income Exclusions for VA Needs-Based Benefits”

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Submitted on behalf of the ELDER LAW AND SPECIAL NEEDS PLANNING GROUP

In Proposed Rule RIN 2900-AO73 (“Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits”)¹ the Department of Veterans Affairs (VA) has proposed sweeping changes to its regulations governing entitlement to VA pension programs, such as Aid and Attendance. This article will discuss some of the changes that are most likely to impact the elderly. Aid and Attendance is the unofficial name of a VA pension benefit that many elderly veterans receive to help them pay for long term care costs. According to the Government Accountability Office, the VA spent about \$4.3 billion in pension benefits on 517,000 veterans and their surviving spouses in 2011.² The pension benefits can be paid to wartime veterans who are 65 or older or veterans who are totally disabled, or to surviving spouses of veterans.³ The average payments in 2011 were \$9,669 to veterans and \$6,209 for survivors.⁴

VA Pension is a means-tested program, thus to be eligible for pension payments, the claimants must have income that is below the annual pension limits that are set by statute.⁵ The income limits serve as the maximum annual pension payment that the veteran or surviving dependent may receive.⁶ The payment rates and income limits for a claimant who is housebound or unable to perform their activities of daily living, such as “bathing, dressing, eating, adjusting prosthetic devices, and protecting themselves from hazards or dangers in their daily environment,” will be higher.⁷ The VA will deduct from the claimant’s countable income unreimbursed medical expenses.⁸ The VA will also count the assets of the claimant, such as bank account balances, securities, real estate (other than a primary residence) and personal property; however, the VA will give an exception for a vehicle and personal belonging⁹. Although there is no specific monetary limit on the amount of assets a claimant can have, VA claims officers are ordered to investigate whenever a claimant has more than \$80,000 in assets if the assets “will last a reasonable period of time to pay for [the claimants] basic expenses.”¹⁰ The policy reason behind this is “the pension program is not intended to protect substantial assets or preserve an estate for a [claimant’s] heirs.”¹¹ In fact, the federal statutes states that “when the corpus of the estate of the veteran ... is such that under all the circumstances, including consideration of the annual income of the veteran ... it is reasonable that some part of the corpus of such estates be consumed for the veteran’s maintenance.”¹²

According to the proposed rule's summary, the VA is proposing these new regulations in order to "maintain the integrity of the pension program and to implement recent statutory changes."¹³ The new regulations will set guidelines for net worth, penalize transfers of assets, and define the medical expenses that may be deducted from the claimant's income.¹⁴ These new regulations and changes are in response to the Government Accountability Office's (GAO) 2012 report entitled, "Veterans' Pension Benefits Improvements Needed to ensure Only Qualified Veterans and Survivors Receive Benefits."¹⁵ In the report, the GAO made certain recommendations to maintain the needs-based characteristics of these programs and to clarify and explain required issues to allow for more consistent adjudication of pension claims.¹⁶ For example, the GAO recommended that the VA "modify pension application forms ... to include space ... to report asset transfers and to specify annuities, trust, or private retirement income."¹⁷ Other recommendations included "verify financial information during the initial claims assessment process ... [such as] requesting supporting documentation," and "strengthen coordination between pension and fiduciary programs to identify pension claimants or recipients who have transferred or unreported assets."¹⁸

Furthermore the VA believes that the amended regulations will "promote consistency in benefit decisions," by introducing a bright-line limit for net worth, defining net worth to mean assets plus annual income, and specifying what are unreimbursed medical expenses.¹⁹ Moreover, the new regulations will "reduce opportunities for attorneys and financial advisors to take advantage of pension claimants," by establishing a look-back period for gifting or asset transfers. In addition, the look-back period will help to "preserve the integrity of the pension program" by making sure that only indigent veterans or claimants are awarded pensions.²⁰ In terms of impact, according to the VA's Regulatory Impact Analysis for RIN 2900-AO73, these changes "would result in net savings to [the] VA ... estimated to be \$19.3 million in 2016 and \$254.5 million for five years."²¹

According to the Executive Summary of the Proposed Rule, "Section 501 of Title 38 of the United States Code, authorizes [the] VA to prescribe regulations necessary for administration of its programs."²² Furthermore, Sections 1522 and 1543 of Title 38 of the United States Code order the VA to "deny, reduce, or discontinue the payment of pension when it is reasonable that a claimant consume some portion of his or her net worth for his or her maintenance."²³ According to the VA, because these Sections do not define "when 'it is reasonable' for a claimant to consume some part of his or her net worth or provide criteria for determining when net worth is excessive, VA may interpret the law by filling [in] these gaps."²⁴ Also, because Section 1503(a)(8) of Title 38 of the United States Code does not define what constitutes a medical expense for VA purposes, the VA believes that it has the authority to "fill that gap."²⁵

Summary of New or Amended VA Regulations

One of the biggest changes would be a clear net worth or asset limit. Currently the pension program does not have a bright line monetary limit on assets, rather the current rule "requires [the] VA to consider the claimant's income with (1) the liquidity of the property, (2) the life expectancy of the claimant, (3) the number of dependent family members, and (4) the potential rate of depletion of available assets."²⁶ Proposed Revised Rule § 3.274 would set the

net worth limit to equal the maximum community spousal resource allowance allowed under Medicaid rules, which is currently \$119,220.²⁷ This limit would be adjusted for inflation concurrently with cost-of-living adjustments to Social Security payments.²⁸ The claimant's net worth would include both his and her assets and annual income.²⁹ The VA would deny a claimant's pension or discontinue it, if the claimant's net worth exceeds the net worth limit of \$119,220.³⁰ The VA opines that the Medicaid program is "analogous to [its] pension program," and that is why it is suggesting using the Medicaid maximum community spousal resource allowance. Furthermore, the VA notes that Congress wanted to "prevent the impoverishment of the non-institutionalized spouse of a Medicaid covered individual."³¹ Similarly, the VA's intent is to prevent impoverishment of veterans and their surviving spouses and dependents.³² The VA also compares the maximum community spousal resource allowance to the costs of a nursing home room and assisted living facility room and notes that the limit would "correspond roughly to the cost of residential care in a nursing home or assisted living facility for one to two years."³³ Similar to the current rules, if the veteran is married, the VA will count both the assets of the veteran and of his or her spouse for a claim.³⁴

Under the new rules, the VA will calculate net worth whenever a claimant files a new or original pension claim or requests to add a dependent or whenever the VA receives information that there has been an increase or decrease in net worth;³⁵ whereas, nothing in the current rules states when the VA must consider net worth.³⁶ Also, under the new regulations, a claimant can rightfully claim that his or her net worth has decreased if the claimant spends down the assets and/or income on "basic necessities such as food, clothing, shelter, or health care."³⁷ The current rule does not address how a claimant who is over the asset limit "may lawfully decrease their net worth and qualify for pension."³⁸ Also included in spend down would be education or vocational rehabilitation expenses.³⁹ If an expense could decrease either the claimant's annual income or assets, the VA will first apply the expense towards the claimant's annual income.⁴⁰ If there are any amounts remaining after deducting the expenses from annual income, the VA will deduct the remaining amounts from the claimant's assets.

Proposed Revised § 3.275 delineates how the VA will determine assets. The revised rule would define assets as meaning "the fair market value of all property that an individual owns, including all real and personal property, unless excluded under paragraph (b) of this section."⁴¹ The VA will subtract from the value of the assets, the value of any mortgages or other encumbrances, unless the mortgage is on the primary residence.⁴² For example, the VA will not count as an asset, a claimant's primary residence, which would include a residential lot equal to or less than 2 acres,⁴³ as long as the claimant is still residing in the primary residence. This is similar to the current rule that excludes the claimant's "dwelling ... including a reasonable lot area."⁴⁴

Under the revised rule, if the claimant is residing in a nursing home, medical foster home, assisted living facility, or at the home of a relative who is providing custodial care to the claimant, then the primary residence will still be excluded as an asset.⁴⁵ This new rule would also state that if the claimant's primary residence is sold, then the sales proceeds are counted as an asset unless the claimant uses the sales proceeds to purchase another residence within the same

calendar year.⁴⁶ Finally, the value of “personal effects suitable to and consistent with a reasonable mode of life,” such as appliances and family vehicles will not be counted as assets.⁴⁷

Another proposed revised rule, § 3.276, would establish a penalty for asset transfers and gifting. Specifically, § 3.276 would state that the “VA [will] presume that an asset transfer made during the look-back period was for the purpose of decreasing net worth to establish pension entitlement and will consider such an asset to be a ‘covered asset.’”⁴⁸ This rule would define a ‘covered asset’ to be “an asset that ... was part of the claimant’s net worth, ... was transferred for less than fair market value, and ... if not transferred, would have caused or partially caused the claimant’s net worth to exceed the net worth limit [of \$119,220].”⁴⁹ Section 3.276 (a) (4) would use a standard definition for fair market value to be “the price at which an asset would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.”⁵⁰ According to §3.276(a)(5), a transfer would include “selling conveying, gifting, or exchanging an asset for an amount less than the fair market value of [it.]”⁵¹ The term “transfer” would also include “purchase of any financial instrument or investment that reduces net worth and would not be in the claimant’s financial interest but for the claimant’s attempt to qualify for VA pension by transferring the asset to, or purchasing, the instrument, or investment.”⁵² The revised rule would include purchases of annuities and transfers to trusts, even if the trust is for the veteran’s benefit as examples of instruments and investments.⁵³ The look-back period would be equal to 36 months and the penalty period cannot exceed 10 years.⁵⁴ The effect of transferring an asset, would be that the VA will assess a penalty period, which will equal the total covered asset amount divided by the monthly penalty rate, which is the applicable maximum annual pension rate for the particular claimant.⁵⁵

If the claimant can establish that “he or she transferred the asset as the result of fraud, misrepresentation, or unfair business practice related to the sale or marketing of financial products,” then the VA will not consider the asset to be a covered asset.⁵⁶ Another exception to the rule against transferring covered assets to a trust, is if a claimant transfers a covered asset to a trust established for the veteran’s child, whereby that child has been rated incapable of self-support and there are no circumstances when the trust can distribute or benefit the veteran or his or her spouse.⁵⁷ The revised rule also allows for a way to cure the gift/transfer. If the covered assets are returned to the claimant before filing or within 30 days of filing for a claim, then the VA will not assess a penalty.⁵⁸

New rule § 3.278, would define un-reimbursable “medical expenses” which can then be deducted from countable income when determining eligibility for pension, Section 306 pension, Aid and Attendance, and parent’s dependency and indemnity compensation.⁵⁹ According to new rule § 3.278 (c), the VA will consider “medical expenses” to be “items or services that are medically necessary or that improve a disabled individual’s functioning.”⁶⁰ Section (c) then shows examples of “medical expenses;” however, it is not an all-inclusive list.⁶¹ For example, the VA will consider the following to be “medical expenses:” care from a health care provider; medications, medical supplies, medical equipment, medical food, vitamins, and supplements, adaptive devices and service animals, transportation for medical purposes, health insurances,

medical hospitalization, and long term care insurance premiums, smoking cessation products, care in a hospital, nursing home, medical foster home, and inpatient treatment center for drug or alcohol addiction, assisted living facilities and adult day care, and certain in-home care services.⁶² For assisted living facilities expenses, the VA will only pay for health care services or assistances with activities of daily living (ADLs) that are provided by a health care provider.⁶³ If the claimant meets the criteria to be housebound or requires aid and attendance, then the care provider does not need to be a defined health care provider.⁶⁴ Furthermore, in that instance, the medical expenses will include the entire payment to the ALF, including meals and room and board and not just the part of the expenses that are for health care or custodial care.⁶⁵ For in-home care, the expenses must reflect the actual number of hours that the provider attended to the veteran or spouse.⁶⁶ Also, the VA will not count the provider's hourly rate that exceeds the "average hourly rate for home health aides published by the MetLife Mature Market Institute in its Market Survey of Long-Term Care Costs."⁶⁷

The new rule would also define activities of daily living (ADLs) and instrumental activities of daily living (IADLs).⁶⁸ ADLs will mean "basic self-care activities and consist of bathing or showering, dressing, eating, toileting, and transferring" or moving from one position to another or from bed to out of bed.⁶⁹ The VA will define IADLs to be "shopping, food preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation."⁷⁰ This rule would state that custodial care means that a claimant needs regular assistance with two or more activities of ADLs, even if the assistance is due to claimant's mental disorder.⁷¹

According to this new rule, there are certain expenses that the VA will not consider to be "medical expenses." For example, the following will not be counted: items or services that benefit general health, vacation, dance classes, cosmetic procedures, unless it improves a deformity or is related to treatment, meals and lodging, assistance with IADLs, and payments to a VA-appointed fiduciary to manage the claimant's finances.⁷²

Effective Date

The above revised and new rules are not yet effective. According to the Federal Register, these amendments and proposed rules were published on January 23, 2015. The public was allowed to comment until March 24, 2015. According to the Regulations.gov website, the rules will be in the Final Rule stage on "12/00/2016,"⁷³ however, according to Martha Schimpf, an Analyst, at the Veterans Benefits Administration of the VA, the "VA does not anticipate publication of the final rule before April 2017."⁷⁴ In addition, Ms. Schimpf has indicated that there have been "several changes as a result of some of the public comments on the proposed rule[s]."⁷⁵ Unfortunately, the VA is unable to share the changes because they are still in draft form and have not been internally approved.⁷⁶ It remains to be seen when these changes will take effect and what will be their final form.

¹ Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits, 80 Fed. Reg. 3840 (proposed January 23, 2015) (to be codified at 38 C.F.R. pt. 3) *available at* https://www.federalregister.gov/documents/2015/01/23/2015-00297/net-worth-asset-transfers-and-income-exclusions-for-needs-based-benefits?utm_campaign=subscription+mailing+list&utm_medium=email&utm_source=federalregister.gov.

² U.S. GOVERNMENT ACCOUNTABILITY OFFICE, VETERANS' PENSION BENEFITS IMPROVEMENTS NEEDED TO ENSURE ONLY QUALIFIED VETERANS AND SURVIVORS RECEIVE BENEFITS 2 (2012) *available at* <http://www.gao.gov/products/GAO-12-540>.

³ *Id.*

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* For example, the maximum annual pension and income limit for a veteran who is applying for basic pension was \$12,256 in 2012; however, the maximum annual pension and income limit for a veteran applying for pension with Aid and Attendance benefit was \$20,447 in 2012. *Id.* at 4.

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ *Id.* at 4.

¹² 38 U.S.C. §1522(a).

¹³ *See supra* text accompanying note 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* summarizing U.S. GOVERNMENT ACCOUNTABILITY OFFICE, VETERANS' PENSION BENEFITS IMPROVEMENTS NEEDED TO ENSURE ONLY QUALIFIED VETERANS AND SURVIVORS RECEIVE BENEFITS (2012).

¹⁷ *See supra* text accompanying note 2 at 23.

¹⁸ *Id.*

¹⁹ *See supra* text accompanying note 1.

²⁰ *Id.*

²¹ U.S. DEPT. OF VETERANS AFFAIRS, REGULATORY IMPACT ANALYSIS FOR FIN 2900-AO73 2 (2014) *available at* <https://www.regulations.gov/document?D=VA-2015-VBA-0003-0003>.

²² *See supra* text accompanying note 1.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* citing 38 § U.S.C. 1503(a)(8).

²⁶ *Id.* at 3842.

²⁷ *Id.* at 3841.

²⁸ *Id.* at 3858.

²⁹ *Id.*

³⁰ *Id.* at 3843.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 3858.

³⁶ *Id.* at 3844.

³⁷ *Id.* at 3841.

³⁸ *Id.* at 3844.

³⁹ *Id.*

⁴⁰ *Id.* at 3858.

⁴¹ *Id.* at 3859.

⁴² *Id.*

⁴³ *Id.* at 3841.

⁴⁴ *Id.* at 3846.

⁴⁵ *Id.* at 3859. Note, if the primary residence is rented out, the rental income will count towards income. *Id.*

⁴⁶ *Id.* at 3841.

⁴⁷ *Id.* at 3860.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 3841.

⁵⁵ *Id.* at 3860.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 3861.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 3862.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 3841.

⁶⁹ *Id.*

⁷⁰ *Id.* at 3861.

⁷¹ *Id.*

⁷² *Id.*

⁷³ A073 – Proposed Rule – Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits *available* at <https://www.regulations.gov/docket?D=VA-2015-VBA-0003>.

⁷⁴ E-mail from Martha Schimpf, Analyst, Pension and Fiduciary Service (21PF), Veterans Benefits Administration, Department of Veterans Affairs, to Heidi M. Brown, Esq., Osterhout & McKinney, PA (Oct. 28, 2016, 11:32 EST)(on file with author).

⁷⁵ *Id.*

⁷⁶ *Id.*