DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AO73

Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its regulations governing veterans' eligibility for VA pensions and other needs-based benefit programs. The amended regulations establish new requirements for evaluating net worth and asset transfers for pensions and identify which medical expenses may be deducted from countable income for VA's needs-based benefit programs. The amendments help to ensure the integrity of VA's needs-based benefit programs and the consistent adjudication of pension and parents' dependency and indemnity compensation claims. Lastly, the amendments effectuate: Statutory changes for pension beneficiaries who receive Medicaid-covered nursing home care; a statutory income exclusion for disabled veterans; and longstanding statutory income exclusions for all VA needs-based benefits.

DATES: *Effective Date:* This rule is effective October 18, 2018.

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SUPPLEMENTARY INFORMATION:

A. Overview of Proposed Provisions Producing the Majority of Public Comments

In a notice of proposed rulemaking published in the **Federal Register** on January 23, 2015 (80 FR 3840), VA proposed to amend its adjudication regulations governing its needs-based pension benefit for wartime veterans and for surviving spouses and children of wartime veterans, as well as its adjudication regulations governing its older pension programs and parents' dependency and indemnity compensation (DIC).

The 60-day public comment period ended on March 24, 2015. VA received over 850 comments from an array of constituencies, including advocates, advisors, law firms, members of Congress, State government agencies, professional associations, veterans service organizations, and other interested members of the public. We read, analyzed, and considered each comment and are grateful to all who invested their time to comment. Some commenters stated that our explanation for certain provisions is unclear. We believe that we provided adequate justification in the proposed rule for this rulemaking but nonetheless provide further justification for this rulemaking in this final rule document. Many made valuable contributions, and we made changes in the final rule as a result. We grouped the comments by topic and discuss them by topic group later in this document.

The majority of the comments focused on several specific provisions, and we summarize those here. First, we proposed changes to the pension benefit program with respect to the amount of net worth a claimant could have to qualify for pension (for purposes of this supplementary information, references to a claimant include a beneficiary). We proposed a bright-line net worth limit and proposed as the limit the dollar amount of the maximum community spouse resource allowance (CSRA) for Medicaid purposes, at the time of publication of the final rule. We proposed to define net worth for VA purposes as the sum of a claimant's assets and annual income.

Second, we proposed to set forth the manner in which VA calculates a claimant's assets. We proposed to clarify VA's treatment of a claimant's residence for asset calculation purposes. We proposed a definition of ''residential lot area'' to mean the lot on which a residence sits that is similar in size to other residential lots in the vicinity, but not to exceed 2 acres (87,120 square feet), unless the additional acreage is not marketable.

Third, we proposed to establish a 36-month ''look-back'' period and a penalty period not to exceed 10 years for those who transfer assets during this look-back period to qualify for pension. We proposed that a transfer for less than fair market value would include an asset transfer to, or purchase of, any financial instrument or investment that reduces net worth and would not be in the claimant's financial interest were it not for the claimant's attempt to qualify for pension. We proposed that examples of such instruments or investments would include trusts and annuities. We further proposed to create a presumption that, in the absence of clear and convincing evidence showing otherwise, an asset transfer made during the look-back period was for the purpose of decreasing net worth to establish pension entitlement. We proposed that the presumption could be rebutted by clear and convincing evidence that the claimant transferred the asset as the result of fraud, misrepresentation, or unfair business practice related to the sale or marketing of financial products or services for purposes of establishing entitlement to pension. The proposed rule provided that VA would not consider as a transfer for less than fair market value a trust established on behalf of a child whom VA has rated incapable of self-support. The proposed rule provided that VA would not recalculate a penalty period unless the original calculation was shown to be erroneous or VA received evidence, within 60 days after VA notified the claimant of the decision, that all covered assets were returned to the claimant before the date of claim or within 30 days after the date of claim.

Finally, we proposed to define and identify medical expenses that VA may deduct from countable income for its needs-based benefits that utilize such deductions. We proposed definitions of ''activities of daily living'' (ADLs); ''instrumental activities of daily living'' (IADLs); ''custodial care''; and ''assisted living, adult day care, or similar facility.'' We proposed to define ''custodial care'' as regular assistance with two or more ADLs or supervision because an individual with a mental disorder is unsafe if left alone due to the mental disorder. The proposed rule provided that, generally, medical expenses do not include either assistance with IADLs or meals and lodging in an independent living facility. The proposed rule provided that an in-home care attendant's ''hourly rate may not exceed the average hourly rate for home health aides published annually'' in the Market Survey of Long-Term Care Costs published by the MetLife Mature Market Institute.

For the reasons set forth in the proposed rule and in the discussion below, we are adopting the proposed rule as final, with changes as explained below to proposed 38 CFR 3.261, 3.262, 3.263, 3.270, 3.272, 3.274, 3.275, 3.276, 3.278, and 3.279.

B. Terminology Clarifications Regarding VA Pension and Other VA Needs-Based Benefits

Multiple commenters did not understand various VA benefits and one commenter expressed confusion by our use of the term ''needs-based.'' As used in this supplementary information, ''needs-based'' refers to a VA benefit in which the claimant's income is an entitlement factor or both a claimant's income and assets are entitlement factors. ''Need'' as used here refers to financial need and does not refer to a claimant's level of disability. Another term for ''needs-based'' is ''means-tested.'' The following VA benefits are needs-based: Pension for veterans and survivors under current pension laws (''current-law pension,'' formerly called ''improved pension''), section 306 pension for veterans and survivors, old-law pension for veterans and survivors, and parents' DIC. The following VA benefits are not needs-based (*i.e.,* the amount of a claimant's income or assets does not impact the benefit amount or entitlement to the benefit): Disability compensation for veterans; DIC for surviving spouses or children; death compensation for surviving parents, spouses, or children; and Spanish-American War pension. There is a minor exception to these lists: A veteran who receives disability compensation may receive additional compensation when the veteran has a parent or parents who are dependent on the veteran for support. *See* 38 U.S.C. 1115. Because VA evaluates a veteran's parent's income and assets when determining if the parent is dependent on the veteran for support, such cases are considered ''needs-based'' insofar as the parent's need is concerned.

At least one commenter expressed the belief that our proposed rule was proposing to turn benefits that are not needs-based into new needs-based benefits. It is not. This final rule does not apply to VA benefits that are not needs-based. This final rule pertains only to the VA needs-based benefits identified above. The new and revised net worth and asset-transfer rules apply only to current-law pension for veterans and survivors. This benefit is simply called ''pension'' or ''VA pension,'' unless it is necessary to distinguish between current-law pension and previous VA pension programs. Also, if it is necessary to distinguish between veterans and survivors, we may refer to the pension programs as ''veterans pension'' or ''survivors pension.''

We note that a number of commenters referred to pension as ''Aid and Attendance.'' This is a misnomer and can be confusing because a higher ''aid and attendance rate'' may be payable under all of the following VA benefit programs: Pension, parents' DIC, disability compensation, DIC (for surviving spouses), and death compensation. In addition, a veteran who receives disability compensation may receive additional compensation when the veteran has a spouse and the spousal allowance is higher if the spouse meets aid and attendance criteria. The additional ''spousal aid and attendance rate'' is available only to certain compensation beneficiaries and is not available to pension claimants. A ''housebound rate'' that is a lesser amount than the aid and attendance rate may be paid to qualifying individuals who do not qualify at the aid and attendance level. This housebound rate is available to: Veterans and surviving spouses who receive pension; veterans who receive disability compensation; and surviving spouses who receive DIC. The aid and attendance and housebound rates are sometimes collectively called ''special monthly compensation (SMC)'' when the benefit is disability compensation, ''special monthly DIC'' when the benefit is DIC, and ''special monthly pension (SMP)'' when the benefit is pension. We emphasize that this final rule does not apply to disability compensation for veterans or to DIC for surviving spouses or children. It also does not apply to Family Caregiver benefits and General Caregiver benefits authorized by 38 U.S.C. 1720G; those benefits are available to veterans with certain injuries that were incurred in or aggravated in active military, naval, or air service. This final rule only applies to needs-based benefits.

Multiple commenters expressed the belief that, like most pensions, the VA pension benefit is a benefit into which veterans previously paid so it would be available later in life. Others expressed the opinion that VA pension should not be means-tested or that it is or should be available to all veterans. We make no changes based on such comments. Although veterans certainly ''pay into'' VA pension in terms of serving their country during a period of war, VA pension is not a benefit into which veterans previously directly contributed financially. The statutes governing VA pension are found in 38 U.S.C. chapter 15. Under the current pension statutes, pension is a benefit in which the annual amount of the benefit is reduced dollar-for-dollar by annual income received. See 38 U.S.C. 1521, 1541, and 1542. VA calculates annual income by deducting or excluding (not counting) amounts noted in 38 U.S.C. 1503 and other applicable statutes, such as a portion of unreimbursed medical expenses and educational expenses.

Multiple commenters pointed out that VA no longer considers a veteran's net worth when deciding if the veteran is eligible to receive VA hospital, nursing home, or domiciliary care. For this reason, these commenters state or indicate that net worth should not be a factor for pension entitlement. Moreover, several commenters stated that the proposed provisions would cause fewer veterans to qualify for VA hospital care at Priority Groups 4 and 5. We disagree. The VA statutes governing net worth for pension entitlement (38 U.S.C. 1522 and 1543) are different than those governing net worth for hospital care eligibility (38 U.S.C. 1722). Under 38 CFR 17.36(b)(4), Priority Group 4 includes veterans who receive increased pension based on their need for regular aid and attendance or by reason of being permanently housebound. It also includes veterans determined catastrophically disabled by the VA facility where they are examined. Priority Group 5 includes veterans whom the Veterans Health Administration (VHA) determines are unable to defray the expenses of necessary care under 38 U.S.C. 1722(a). 38 CFR 17.36(b)(5). Although VHA assumes that veterans who receive pension meet Priority Group 5 criteria, veterans are not required to receive pension to qualify for Priority Group 5. To the extent that some veterans might not be entitled to pension under this final rule, this does not mean these veterans would not be entitled to VA hospital care at the same priority. VA must consider net worth as an entitlement factor for pension (38 U.S.C. 1522 and 1543); it does not have discretion in this regard as it does for hospital care eligibility. Therefore, we make no changes based on such comments.

C. Discussion of Public Comments Regarding VA's Authority To Promulgate Regulations Governing Requirements for Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits

Numerous commenters questioned VA's authority to promulgate regulations governing the requirements for net worth, asset transfers, and income exclusions in order to qualify for VA's pension program. VA disagrees with these commenters and, therefore, does not make any changes to this rulemaking based on these comments. As discussed in the proposed rule, under 38 U.S.C. 1522 and 1543, VA may not pay pension to a veteran or to a veteran's surviving spouse when the corpus of the individual's estate (and a veteran's spouse's estate, if applicable) is such that, under all the circumstances, including consideration of the individual's income and that of the individual's spouse and dependent children, it is reasonable that the individual consume some part of the estate for his or her maintenance prior to receiving pension.

VA's authority here is derived from 38 U.S.C. 501(a), which permits VA to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by VA and are consistent with those laws. VA may administer the Congressionally-created pension program by formulating policy and enacting rules to fill any gap left, implicitly or explicitly, by Congress. *See Morton* v. *Ruiz,* 415 U.S. 199, 231 (1974). These rules may effect a change in existing law, so long as VA promulgates them through a notice-and-comment procedure and its ''action is reasonable and consistent in light of the statute and congressional intent.'' *Disabled Am. Veterans* v. *Gober,* 234 F.3d 682, 691 (Fed. Cir. 2000). Inasmuch as Congress did not define what is considered reasonable consumption of net worth prior to receiving VA's needs-based pension, this rulemaking promulgates reasonable gap-filling regulations.

As previously stated, sections 1522 and 1543 require VA to deny or discontinue pension when it is reasonable to require the individual to consume some portion of his or her net worth for personal maintenance. We interpret the statutory requirement that a pension claimant must reasonably consume excessive net worth prior to receiving needs-based pension as precluding pension entitlement to an individual who has sufficient net worth for his or her maintenance (over $123,600, for 2018), transfers assets to get below that threshold, and then applies for VA pension leaving the Government to fund his or her maintenance. The text of the statute makes clear that Congress did not intend for claimants who have sufficient assets for self-support to use the pension program as an estate planning tool, under which they may preserve or gift assets to their heirs and shift responsibility for their support to the Government, at the expense of taxpayers. *See also* H.R. Rep. No. 95–1225, at 33 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5583, 5614 (Congress's intent that ''a needs-based system . . . apply only to those veterans who are, in fact, in need'').

Many commenters also pointed out that, in recent years, Congress has failed to implement legislation that would have implemented many of the changes that VA seeks to make in this rulemaking. Such failure does not negate VA's authority to provide reasonable rules in furtherance of Congress's directive for a net worth limitation. 38 U.S.C. 501(a), 1522, 1543. Moreover, VA notes that ''unsuccessful attempts at legislation are not the best of guides to legislative intent.'' *Red Lion Broad. Co.* v. *FCC,* 395 U.S. 367, 381–382 n.11 (1969). The Government Accountability Office (GAO), U.S. Senate Special Committee on Aging, and others have advocated for changes to bolster the integrity of the pension program. *See* Pension Poachers: Preventing Fraud and Protecting America's Veterans, Hearing Before the S. Special Comm. on Aging, S. Hrg. 112–542 (2012); U.S. Government Accountability Office, GAO–12–540, Veterans' Pension Benefits: Improvements Needed to Ensure Only Qualified Veterans and Survivors Receive Benefits (2012). And Congress' contemporaneous statements in enacting the current pension program, discussed above, are clear that this program is a needs-based program intended to serve only those claimants in need. Accordingly, VA declines to make any changes to this rulemaking based on these comments.

D. Discussion of Public Comments Regarding Net Worth Provisions

1. Net Worth Limit and Definition (Proposed § 3.274(a) and (b))

Multiple commenters took issue with our proposal to use a bright-line net worth limit for pension entitlement. Several commenters argued that a bright-line net worth provision is arbitrary and does not take into account age, disability, life expectancy, rate of depletion of assets, liquidity of assets, normal living expenses for healthy dependents, nursing home status, or medical expenses in relation to income. Some commenters proposed alternative net worth calculation and decision methodologies that included these factors. A number of commenters argued that our proposed changes to net worth provisions will make it more difficult for claimants to qualify for pension, and stated their belief that not as many will qualify, causing individuals more stress during a difficult time. Some stated that claimants would essentially have to deplete their net worth to qualify. Some suggested that VA could make exceptions for veterans who are over age 75.

We make no changes based on these comments. As stated in the preamble of the proposed rule, the way that net worth decisions are made now is often inconsistent and arbitrary. *See* 80 FR 3842. According to the GAO, the current regulatory scheme has left adjudicators to their own discretion, leading to inconsistent decisions for similarly situated claimants. *Id.* Having a clear net worth limit promotes consistency and uniformity in decisions. It also reduces the amount of time claim processors have to spend on lengthy, subjective net-worth determinations—freeing them up for other claim-related activities. A clear limit will result in quicker benefits decisions for veterans and the potential for future automation. It also benefits claimants by providing a clear pension entitlement criterion that is easy to understand and apply.

While net worth determinations will no longer take into account life expectancy, rate of depletion of assets, and other factors, it is that multitude of factors that have resulted in inconsistent, and sometimes unfair, decisions. For example, we have reviewed cases in which elderly claimants with short life expectancies have been denied pension with as little as $10,000 of net worth. We have seen claims processors deny pension if assets are projected to last the claimant's lifetime or longer, and others require complete or almost complete spend-down of net worth before granting pension. Accordingly, we decline to create an exception for claimants over 75; in fact, we believe that more pension claims will be granted under these regulations than under the previous regime.

Instead, we believe the best approach moving forward, for both pension claimants and the efficiency of the system, is employing, as the net worth limit, the standard maximum CSRA prescribed by Congress. We have considered the possibility of finding a solution within the current standard, as well as other solutions commenters set forth, but many of them, such as establishing upper and lower limits, would be less favorable to claimants than a net worth limit at the maximum CSRA. We believe that setting the net worth limit at the maximum CSRA—which in 2018 is $123,600—allows more claimants to qualify for the benefit than before. Our impact analysis concurrent with the proposed rule indicated that 1,149 pension denials would have been grants (and only 40 grants would have been denials) if the maximum CSRA had been the net worth limit in fiscal year 2014. *See https://www.va.gov/orpm/RINs_2900_AO.asp* (RIN 2900–AO73).

We understand, as many pointed out, that the CSRA was prescribed by Congress for Medicaid, which is a fundamentally different program than VA pension. But it is a number that was adopted by Congress to prevent the impoverishment of the non-institutionalized spouse of a Medicaid-covered individual. Similarly, we do not desire any net worth limitation that could subject wartime veterans and their survivors to impoverishment. *See* H.R. Rep. 95–1225, at 27 (reflecting Congress' intention to ''assure[ ] a level of assistance'' for veterans and survivors ''that places them above the official poverty line''); 44 FR 45930 (1979). Congress has indicated that individuals with net worth beyond the maximum CSRA are sufficiently protected from impoverishment for Medicaid purposes. It is no stretch, then, for VA to conclude that individuals with net worth beyond the maximum CSRA are sufficiently protected from impoverishment and do not need VA pension. Moreover, using the maximum CSRA allows pension claimants to retain a reasonable portion of their assets to respond to unforeseen events, including medical care.

Multiple commenters stated that VA's proposal to establish the bright-line net worth limit by using the CSRA prescribed by Congress for Medicaid was out of context, *i.e.,* that VA ''cherry picked'' some parts of the Medicaid resource statutes and disregarded others. According to these commenters, VA overlooked the following: (1) Medicaid covers all of the medical expenses of the institutionalized spouse; (2) there are significant differences between States in what assets are countable assets toward the CSRA; (3) the community (non-institutional) spouse is allowed to keep all of his or her income as well as part of the institutionalized spouse's income if the community spouse's income is lower than the spousal allowance; (4) Medicaid does not have a penalty period longer than 60 months; (5) Medicaid does a fairly good job of explaining its rules and making the public aware that transfers made more than 60 months before applying for Medicaid will not create any penalty; (6) Medicaid will allow trusts to be used to reduce net worth; (7) Medicaid allows the purchase of immediate annuities to reduce net worth; (8) Medicaid applies the CSRA only to married claimants, whereas VA would apply it to all claimants, whether married or single, (9) Medicaid allows community spouses to retain net worth greater than the maximum CSRA; and (10) adopting the Medicaid asset limitation for VA purposes is much more limiting and impoverishing in nature than the Medicaid system.

To be clear, these programs are governed by different statutes and serve different purposes. VA pension is a monetary benefit paid to wartime veterans and survivors to supplement their income, based on need. On the other hand, Medicaid is a health insurance program for individuals and families with low income and limited resources. As such, incorporating all of Medicaid's net worth rules into the VA pension program is neither legally required nor sensible. But, because Congress has established a level of net worth sufficient to avoid ''impoverishment'' in administering Medicaid, we find it sensible to employ that Congressional determination for VA pension. Similarly, as further discussed in the proposed rule and later in this supplementary information, we find it sensible to take aspects of the look-back period implemented in Medicaid (per GAO's recommendation) to form a look-back period.

Thus, though we reviewed these comments on Medicaid and made changes in this final rule in response to some of them, we disagree with the comments above that highlighted favorable Medicaid policies, as they overlooked particular rules of VA pension that are also favorable to claimants. For instance, although VA does not pay for medical expenses as Medicaid does, VA does deduct unreimbursed medical expenses that exceed 5 percent of the maximum annual pension rate (MAPR) allowed by Congress, to reduce income for VA purposes. Overall, we did not intend in our proposed rule to equate all aspects of VA pension to Medicaid, or to mimic other aspects of Medicaid provisions, and there is no legal requirement that any particular Medicaid policies or procedures be incorporated into VA pension.

Several commenters stated that the proposed regulations fail to provide for a maintenance income and an asset allowance, as well as an exception for a divestment of gifts and conversion of assets for a community spouse such as those provided by Medicaid rules, and these omissions are likely to result in the impoverishment of community spouses. Several commenters also stated that, under 38 U.S.C. 1522, VA is required to take into account ''all the circumstances'' of a veteran and a veteran's family in evaluating annual income and other real and personal property. Commenters stated or implied that the failure of current regulations, as well as the proposed regulations, to provide for the maintenance needs of a community spouse arguably violates VA's duty to consider ''all the circumstances'' in determining whether it is ''reasonable'' that some part of an institutionalized veteran's estate should be consumed for the veteran's maintenance.

VA makes no changes based on these comments. By selecting the maximum CSRA as the net worth limit and deducting payments for institutionalized care from net worth, we strongly disagree that these regulations do not take into account the needs of community spouses. Indeed, in this final rule, as discussed below, VA has expanded its net worth deductions for payments to care facilities other than nursing homes to ensure that ''all the circumstances'' are considered for situations where the veteran can no longer live at home. Succinctly stated, while the regulations adopted herein might depart from specific Medicaid rules—as a program with a different purpose is permitted to do—they do not leave community spouses unprotected from impoverishment.

One commenter also mentioned that VHA's net worth provisions at 38 CFR 17.111 do not take into account the amount of the maximum CSRA when determining whether a veteran is required to pay a co-payment for VA-provided extended care services. We make no change based on this comment. Noted above in the information pertaining to terminology clarifications, the VA statutes governing net worth for pension entitlement are different from those governing VA hospital care eligibility. Although VA no longer considers net worth when determining a veteran's eligibility for VA hospital care, VA is required to consider net worth when determining pension entitlement. 38 U.S.C. 1522, 1543.

Some commenters said that the bright-line net worth limit does not take into account future increases in costs of care or inflation. To the contrary, proposed and final § 3.274(a) provide for cost-of-living increases in the net worth limit to account for inflation.

Another commenter stated that, if a claimant's deductible medical expenses exceed the claimant's income, the net worth limit does not take this into account. As further discussed below, however, medical expenses affect net worth in two ways: First, a claimant's predictable medical expenses are subtracted from countable income; second, the actual payment of the medical expenses will (other things held constant) reduce assets. Thus, medical expenses exceeding income do affect net worth.

Other commenters noted that the bright-line net worth limit does not take locality differences into account. We first note that the statutory MAPRs under 38 U.S.C. 1521, 1541, and 1542 are fixed and not adjusted by locality. Second, we believe that, in choosing as our net worth limit the maximum CSRA ($123,600 in 2018) rather than the minimum CSRA ($24,720 in 2018) or any amounts within this range, we have adequately accounted for different localities. Thus, we make no changes based on such comments.

Several commenters asserted that our proposed rule regarding the bright-line net worth limit contained faulty reasoning in stating that ''current rules require development of additional information not solicited in the initial [pension] application.'' 80 FR 3842. These commenters pointed out that having insufficient forms is a reason to change forms, not rules. Some of these commenters proposed alternative net worth decision methodologies and form modifications. While their point that rules need not be changed for a problem with forms is certainly valid, our desire to establish a bright-line limit has less to do with forms and more to do with consistency, uniformity, and clarity, as discussed above. Moreover, although some commenters stated that neither pension application nor development forms request information regarding living expenses, a claimant's completion of VA Form 21–8049, Request for Details of Expenses, has been an administrative requirement in order for claims processors to make net worth determinations. Among other things, this form includes monthly living expenses such as housing, food, utilities, clothing, and education. The information requested on this form will no longer be necessary for net worth determinations under this final rule. We further note that VA is amending application forms in conjunction with this final rule to incorporate information previously received on the VA Form 21–8049, as well as other information.

One change that we are making is to the example in proposed § 3.274(b)(4). The final rule uses a more current number (the maximum CSRA for 2018) for the net worth limit and eliminates superfluous language.

2. How Net Worth Decreases (Proposed § 3.274(f))

One commenter noted that proposed § 3.274(f)(1) is overly restrictive in providing that assets could only decrease by spending them on ''[b]asic living expenses'' or educational or vocational rehabilitation. As proposed, the rule could be read to preclude expenditures for items such as vacations, televisions, and sprinkler systems. We agree, and, therefore, we are withdrawing proposed § 3.274(f)(1)(i) and (ii) and revising § 3.274(f)(1) to provide that a claimant may decrease assets by spending them on items or services for which fair market value is received. A claimant could not, of course, spend down assets by purchasing an item whose value VA would still include as an asset—such as a $50,000 painting or gold coins—and this final rule so states. Although a claimant can certainly purchase a $50,000 painting or gold coins, the value of the painting or coins would still be included as an asset. Final paragraph (f)(1) is significantly more liberal than proposed paragraph (f)(1). We note here that, in general, VA does not require receipts or other proofs of purchase to show decreased assets, although it is permitted to request them under 38 U.S.C. 1506(1).

Due to this change and based on our further administrative review, final § 3.274(f) does not include proposed paragraph (f)(3). Proposed paragraph (f)(3) was a provision that erroneously stated that VA would ''deduct'' certain expenses from assets. VA does not deduct the value of future expenses from current assets when determining asset values; rather, VA deducts projected unreimbursed medical expenses from income when the medical expenses are reasonably predictable. Therefore, for example, if a claimant's net worth exceeds the net worth limit in a given year even though projected medical expenses have reduced income to zero, the actual payment of these medical expenses the next year may cause assets to decrease and the claimant to then qualify for pension.

We renumbered proposed paragraphs (f)(4) and (5) as final paragraphs (f)(3) and (4), respectively. We also amended the text of final paragraphs (f)(3) and (4) to reflect the clarification discussed above.

3. Residential Exclusion From Assets (Proposed § 3.275)

Multiple commenters criticized proposed § 3.275(a)(3), claiming that the definition of ''residential lot area'' is too restrictive by limiting the lot area to 2 acres (87,120 sq. ft.). Many commenters stated that claimants living in rural areas would be unfairly penalized because of zoning and other restrictions which would prevent them from being able to sell the excess land. VA disagrees because the definition of ''residential lot area'' includes the provision that the lot cannot exceed 2 acres unless the additional acreage is not marketable. The additional property might not be marketable if, for example, the property is only slightly more than 2 acres, the additional property is not accessible, or there are zoning limitations that prevent selling the additional property. Therefore, lot sizes that exceed 2 acres may still be excluded from the claimant's asset calculation if the additional property is deemed unmarketable. However, VA recognizes that the proposed provision that lots must be ''similar in size to other residential lots in the vicinity of the residence'' may be unnecessarily restrictive for claimants with less than 2 acres, but more acreage than their neighbors. Therefore, the final rule does not include the ''similar in size to other residential lots in the vicinity'' requirement.

Several commenters interpreted the proposed rule to mean that VA would require claimants to sell their residences and/or their land if the residential lot area was greater than 2 acres. We note that when a claimant's residential lot is greater than 2 acres, VA will still exclude the value of the residence and 2 acres worth of property from the claimant's assets. VA is not requiring claimants to sell either their residence or land. VA will only include the value of the additional property in the asset calculation.

One commenter stated that the 2-acre limit would cause claimants to sell their land, which would lead to more development, thus endangering wildlife and harming the environment. As noted above, VA is not requiring any claimant to sell his or her land, nor can we speculate on whether a claimant might do so or for what purpose the land might be used. The concern has been taken into consideration, but we make no change to the final rule based on the comment.

One commenter stated that the rule does not address treatment of property listed for sale. VA excludes the value of the primary residence from net worth (and includes the value of other residences) regardless of whether or not the property is listed for sale. We make no change based on this comment.

Several commenters noted that it is already VA policy to exclude from net worth a claimant's residence and a reasonable lot area and did not agree with VA's decision to place a limit on the lot area VA considers reasonable. As stated in the proposed rule, the limit supports our policy choice to exclude a claimant's primary residence from assets, while at the same time placing a reasonable limit on excluded property to preserve the pension program for veterans and survivors who have an actual need. We make no changes based on such comments.

Many commenters questioned why the residential lot exclusion is based on acreage rather than value. VA clarifies that the purpose of using acreage instead of value is so that claimants who live on small, but valuable land (regardless of what that value is derived from) are not penalized. For example, a claimant could live in a small, meager home in northern Virginia that has been passed down for generations. Even though the house is meager and the lot is small, because property values in northern Virginia have skyrocketed over the last few decades, that claimant might be disadvantaged for not moving to cheaper land. VA further clarifies that the definition of ''residential lot area'' is specifically designed to provide consideration to claimants who live in residences on small but highly valuable lots, as well as claimants who live in residences on large but less valuable (or at least partially unmarketable) lots.

One commenter asked if VA claims adjudicators would require claimants to provide property deeds or other evidence to determine lot size. Under 38 CFR 3.277(a), claims adjudicators always have a right to request that a claimant submit evidence to support entitlement to a benefit. We make no change based on this comment.

Many commenters questioned why proposed § 3.275(b) included the provision that ''[i]f the residence is sold, any proceeds from the sale is an asset except to the extent the proceeds are used to purchase another residence within the same calendar year as the year in which the sale occurred.'' These commenters stated that it is unreasonable to expect claimants to sell a residence and buy a new one in the same year, especially if the sale occurs toward the end of the year. Although we understand their point, 38 U.S.C. 5112(b)(4) requires that changes in net worth be recognized at the close of the calendar year in which the change occurred, and we make no change based on these comments. We note that this provision only applies to home sales after pension entitlement is established. The final rule makes this clear by providing that it only applies ''[i]f the residence is sold after pension entitlement is established.'' If the residence is sold at any time before the date of claim, *i.e.,* within the 3-year look-back period, another residence could be purchased (or funds from the sale could be used to purchase other items or services for fair market value) at any time before the date of claim without penalty or effect.

For residential sales after pension entitlement is established, the rule provides that the residences need to be sold and purchased within the same calendar year because 38 U.S.C. 5112(b)(4) provides that the effective date of reduction or discontinuance of pension due to a change in net worth is the end of the year in which net worth changes. Therefore, for example, if an individual is receiving pension and in July 2017 receives proceeds from the sale of a residence which make net worth excessive, the statutory effective date of discontinuance is December 31, 2017, and VA would discontinue pension as of January 1, 2018. However, if the claimant spends down the funds or purchases another residence before the effective date, VA would not discontinue pension. We understand and recognize the disparity between a person who sells his or her residence in January, for example, versus a person who sells his or her residence in December. However, we are bound by the effective date statute. We note that if an individual sells his or her residence in December 2017, and spends down the net worth or purchases a new residence in February 2018, VA would discontinue pension as of January 1, 2018, and resume pension as of March 1, 2018, assuming entitlement factors continue to be met and the claimant informs VA of the spend-down or purchase before VA's decision regarding the discontinuance becomes final. Of course, these examples assume that the sale of the residence makes net worth excessive; not all residential sales would result in discontinuance.

One commenter stated that the rule is unfair to those who choose to rent—rather than purchase another home—after selling their residence. Others commented more generally that rent (to a care facility or otherwise) should be deducted from net worth. To the extent there is a concern about the effect of selling a residence in order to move into a nursing home or other care facility, we believe that our changes to the deductible medical expense provisions, described below, will alleviate much of this concern. Under final § 3.278(d), amounts paid to a care facility for lodging will often be considered a medical expense, deducted from income pursuant to 38 U.S.C. 1503(a)(8). However, as to the request to deduct other rent payments from net worth, we are unaware of any statutory authority for doing so. While we are continuing our longstanding policy of excluding the value of primary residences from *assets,* it does not follow that we have an obligation or the authority to deduct rent from *income.* To be clear, neither rent payments (to a non-care facility) nor mortgage payments are deducted from income, and money set aside for both rent payments and mortgage payments (prior to being spent) are included as assets. It is only the primary residence's value that is excluded from assets. We make no changes based on such comments.

One commenter asked that a definition of ''proceeds from the sale'' be included. To alleviate any confusion, the final rule refers to ''net proceeds from the sale.'' We believe this change adequately addresses the commenter's concern. The definition is readily available from many sources. The term net proceeds refers to the amount of money a seller receives from the sale. It is the sales price of the residence minus selling costs. Net proceeds do not include payoff of existing mortgages or fees such as brokerage commissions and closing costs.

4. Other Net Worth Matters

One commenter believed that VA's asset calculation methodology was not explained in detail in the proposed regulation. We disagree; proposed and final §§ 3.274 and 3.275 address the types of assets included and excluded in an asset calculation, VA generally accepts the statements of its claimants regarding assets unless there is reason to question them, and VA does not plan to change this practice.

One commenter seemed to have misunderstood proposed § 3.275(b)(1)(i), which provides that VA will not subtract from a claimant's assets the amount of mortgages or other encumbrances on a claimant's primary residence. We clarify here that VA excludes a claimant's primary residence from assets, regardless of the value of the residence. Section 3.275(b)(1)(i) simply means that VA does not subtract mortgages and encumbrances on a primary residence from other assets. For example, assume a claimant owns a primary residence worth $100,000, still owes $20,000 on the residence, and the claimant's only other asset is a $50,000 bank account. Assets for VA purposes would total $50,000 because we exclude the primary residence and do not subtract the mortgage on a primary residence from other assets. Under § 3.275(a), mortgages and encumbrances specific to the mortgaged or encumbered property (that is not the primary residence) are deducted from the value of the property. One commenter relatedly questioned the treatment of liens on a property. Liens qualify as encumbrances. We make no change based on these comments.

Some commenters questioned why the income and assets of any child living in the primary residence must be considered as included in an applicant's net worth. Others stated that VA should not bar a veteran's pension because of a child's net worth, to include an inheritance or job income. We make no change based on these comments because we believe statute governs this issue. Under 38 U.S.C. 1521(h)(1) and 1541(g), a veteran's or surviving spouse's income generally includes a dependent child's income. However, under 38 U.S.C. 1522(a) and 1543(a), a veteran's or surviving spouse's assets do not include a child's assets (though the rate of pension may be impacted by a child's assets, 38 U.S.C. 1522(b) and 1543(a)(2)). Proposed and final § 3.274(b)(3) and (c)(1) and (2) are consistent with statute.

One commenter believed that a veteran's assets should not include the assets of his or her spouse if the spouse and the veteran do not reside together. Again, this issue is addressed by statute and we make no change based on this comment. *See* 38 U.S.C. 1521(h)(2).

Another commenter stated that a surviving child's assets should not include the assets of his or her guardian. We make no changes based on this comment because, by statute, the assets of an individual are included when the child is residing with the individual and the individual is legally responsible for the child's support. *See* 38 U.S.C. 1543(b). The same commenter stated that trust corpus should not be included in a disabled child's assets. As discussed further below, pursuant to final § 3.276(a)(5)(ii), trusts are generally not included as an asset, unless they can be entirely liquidated for the claimant's own benefit.

One commenter believed that assets should not include personal property. We make no changes based on this comment because most general definitions of assets include personal property. We note that, under proposed and final § 3.275(b)(2), VA does not include as an asset the value of personal effects suitable to and consistent with a reasonable mode of life, such as appliances and family transportation vehicles. We further note that this provision is not a change from past practice.

Another commenter stated there should be a clear and defined difference between net worth and liquid net worth. The commenter seemed to believe that VA bases its pension entitlement decisions on liquid assets alone. Normally, we think of a liquid asset as a cash asset or an asset that can easily be converted to cash. Real estate and other types of personal property are considered to be non-liquid assets. Save certain exceptions discussed in this preamble and noted in the final rule, VA does not distinguish between liquid and non-liquid assets when making pension entitlement determinations. A claimant who has $50,000 in a bank account and a claimant who owns property worth $50,000 (that is not his or her primary residence) are both considered to have $50,000 in assets. VA generally accepts as true a claimant's statement regarding the value of his or her assets in the absence of conflicting information. We make no changes based on the comment.

Multiple commenters complained that VA is counting income twice: Once for its net worth determinations and again in the calculation of the pension entitlement rate. Although we are sympathetic with this concern, we are again bound by the pension statutes, and thus make no changes. Sections 1522 and 1543 of 38 U.S.C. require VA to consider the amount of claimants' and certain dependents' income when making net worth determinations. Sections 1521, 1541, and 1542 of 38 U.S.C. then require VA to reduce the MAPRs by the annual income of the claimant and certain dependents. One commenter asked us to provide additional justification; however, we decline to do so because we believe the statute is sufficient. We re-emphasize that a claimant's reasonably predictable projected unreimbursed medical expenses can be deducted from income when calculating a claimant's net worth. Therefore, for many claimants who are paying in-home care or facility expenses for themselves or a dependent, the income component of net worth will be zero, and this issue will not be a concern.

Some commenters appeared to believe that total net worth would have to be spent on the applicant's needs in order to obtain pension, leaving nothing for the needs of the surviving spouse (and child) in the future. As clarified above, a child is not required to consume his or her assets for a parent to qualify for pension. 38 U.S.C. 1522(a) and 1543(a). And, again, we have chosen a net worth limit for pension that enables a claimant to retain a reasonable portion of assets to respond to unforeseen events.

One commenter suggested that the proposed rule makes no provision for small business owners or farmers who own property and have to liquidate assets to provide income for themselves and employees. The commenter questions how small business assets will be calculated if they are sold to pay employees. We believe that our definition of ''fair market value'' covers such a situation and make no change based on the comment. Although an individual might sell an asset for less than its appraised value, depending on the circumstances and in the absence of information showing otherwise, VA could consider such a sale to be a transfer for fair market value and would consider the net proceeds from the sale to be an asset. Distribution of the net proceeds to employees would then decrease that individual's assets.

A commenter asked: If VA determines the need to re-evaluate net worth based on a matching program with the Internal Revenue Service (IRS), how will VA know what unreimbursed medical expenses exist for the many elderly individuals who do not file income taxes? In response to this commenter, at the time a veteran or survivor applies for VA pension, VA uses a claimant's projected unreimbursed medical expenses to calculate the claimant's pension entitlement rate as long as the claimant reports the expenses and the expenses are reasonably predictable. It is the claimant's responsibility to keep VA informed at all times of any changes that affect continued entitlement.

A commenter noted that this rulemaking does not address how VA would treat real property held as a life estate. The commenter asked how VA would treat a life tenant's primary residence if the residence is sold and suggested that VA adopt the IRS's valuation of life estates. Because the proposed rule did not address the treatment of life estates, we are concerned that addressing this issue in the final rule would deprive interested parties the opportunity to meaningfully comment on any related proposal. VA will consider whether to address this issue in a future rulemaking. However, VA is unable to make any changes to this rulemaking based on these comments.

5. Correction of Net Worth Effective-Date Table

In the preamble of our proposed rule, we included an explanatory derivation table to summarize the rather complex effective dates pertaining to net worth. *See* 80 FR 3845. Unfortunately, the table contained two errors. The word ''increase'' in the ''Effective Date'' column in the first row should have been ''decrease.'' Also, the second row of the ''Change from current rule'' column should not have included language regarding a certified statement. We are re-publishing the table with those corrections here, although we now use ''New § 3.274'' and ''Change from Previous Rule'' in the column headings.

TABLE 1—NET WORTH (NW) EFFECTIVE-DATE PROVISIONS DERIVATIONS

New § 3.274	Derived from	Situation	Effective date	Change from previous rule
3.274(g)	3.660(d)	NW has decreased after VA denial, reduction, or discontinuance.	Entitlement from date of NW decrease if information received timely.	No date change. Addition of certified statement requirement.
3.274(h)	3.660(a)(2)	NW has increased and reduction or discontinuance necessary.	End-of-the-year that NW increases.	No date change.
3.274(i)(1)	New Cross-Reference.			
3.274(i)(2)(1)	3.660(d)	Dependent child's NW has decreased and adding the child results in a rate decrease for the veteran or surviving spouse.	End-of-the-year that NW decreases.	No date change
3.274(i)(2)(2)	3.660(c)	Dependent child's NW has increased and removing the child results in a rate increase for the veteran or surviving spouse.	Date of receipt of claim for increased rate based on child's NW increase.	No date change. Claim required for increased rate.

E. Discussion of Public Comments Regarding Asset Transfer Provisions

1. Inclusion of Annuities and Trusts in Definition of ''Transfer for Less Than Fair Market Value'' (Proposed § 3.276(a)(5)(ii))

Multiple commenters expressed that certain types of trusts and annuities should not be included in the definition of ''transfer for less than fair market value.'' We agree that certain annuities and trusts should not be included as a transfer for less than fair market value. Thus, based on a number of comments discussed below, we are revising § 3.276(a)(5)(ii) to provide that a transfer for less than fair market value means a voluntary asset transfer to, or purchase of, any financial instrument or investment that reduces net worth by transferring the asset to, or purchasing, the instrument or investment unless the claimant establishes that he or she has the ability to liquidate the entire balance of the asset for the claimant's own benefit. We also provide that, if the claimant establishes that the asset can be liquidated, the asset is included as net worth.

First, some commenters misunderstood proposed § 3.276(a)(5)(ii), believing that a transfer to any revocable or irrevocable trust would be considered a transfer for less than fair market value. We want to be clear that transfers to annuities or trusts over which a claimant retains control and the ability to liquidate are transfers for fair market value under this final rule and are not subject to a penalty period. Annuities and trusts that can be liquidated for the benefit of the claimant will instead be considered as an asset in net worth calculations. Of course, we would not require claimants to liquidate their assets; we simply would not consider funds over which a claimant still has complete control to have been transferred for less than fair market value. Such funds are assets.

Second, several commenters noted that some transfers to annuities are mandated upon retirement. The conversion of deferred accounts to an immediate annuity is required under some retirement plans. We concur with these comments and final § 3.276(a)(5)(ii) excludes mandatory conversions. This means that we will not count, as a covered asset, the amount transferred to such an annuity, although distributions from the annuity will continue to count as income.

Third, a commenter asked us to explain why annuities and trusts are included in proposed § 3.276(a)(5)(ii) as ''any financial instrument or investment that reduces net worth and would not be in the claimant's financial interest.'' The commenter asked us to explain why annuities and trusts are not in the financial interest of the claimant. We agree that this language is confusing and would be difficult to apply, and it has been removed.

Fourth, one commenter requested we explicitly exclude implied trusts from the definition of a trust by replacing the word ''arrangement'' in § 3.276(a)(5)(ii)(B) with the word ''instrument.'' We agree with this comment, and the final rule uses the word ''instrument'' as suggested.

Several commenters asked why VA seemed to be singling out annuities and further pointed out that bank accounts and stocks are sometimes unwise investments for seniors. As noted in the proposed rule, annuities and trusts are simply two examples of instruments that could possibly be used to restructure a claimant's assets to make it appear that the claimant's net worth is less than it is. This rulemaking is not an attempt to eradicate all unwise investments undertaken by seniors; it is an effort to discourage those who are financially secure from transferring assets to qualify for VA pension. Asset transfers to stocks, bonds, or bank accounts do not reduce net worth at the time of transfer.

One commenter questioned why establishing a trust or annuity was considered a ''less than fair market value'' transfer. That commenter also stated that veterans should not be penalized for establishing trusts or annuities for purposes not related to VA pension. Our response is two-fold. First, these instruments are considered transfers of less than fair market value because they are the primary tools of the over 200 organizations identified by the GAO as manipulating assets to reduce a claimant's net worth. *See* GAO–12–540, at 15–21. The GAO chronicled the misleading marketing strategies, erroneous information, and commissions and fees charged by financial planners that raise significant doubt about considering such instruments fair market value transfers. *Id.* Second, given the changes to proposed § 3.276(a)(5) noted above and the fact that there is no penalty for trusts established on behalf of a child incapable of self-support (§ 3.276(d)), transfers prior to the look-back period (§ 3.276(e)), or claimants whose net worth would have been below the bright-line limit regardless of the transfer (§ 3.276(a)(2)(iii)), we believe that individuals transferring assets for reasons completely unrelated to VA pension will be penalized rarely, if ever.

Many commenters thought that establishing a trust and/or annuity under the proposed regulation would always result in a penalty period. As noted above, that is not the case. Only when assets are transferred during the 3-year look-back period to a trust or annuity that is incapable of being liquidated, and when net worth would have been excessive without such transfer, will a penalty period be assessed based on the portion of the transferred assets that would have made net worth excessive. For example, a veteran transfers $90,000 into an irrevocable trust one year before she claims VA pension. The veteran has $10,000 remaining in a checking account. Because the $90,000 transfer would not have made her net worth excessive, this claimant incurs no penalty period. We expect the asset transfer changes to affect a very small number of pension claimants, while nevertheless, helping bolster the integrity of the program by counteracting the hundreds of financial planners noted in the GAO report that are targeting and enabling those who are not in financial need to transfer assets and qualify for VA pension.

Several commenters expressed confusion regarding how VA would value an annuity. We believe the changes above clarify the issue. If an annuity cannot be liquidated, then the annuity is not considered an asset; however, distributions from the annuity count as income (as further discussed below) and the purchase could warrant a penalty period. If the annuity can be liquidated for the claimant's benefit, the annuity purchase is included as an asset.

One commenter stated that the purchase of an immediate annuity meets the definition of an installment sale. VA's current procedure manual defines an installment sale for pension purposes as any sale in which the seller receives more than the sales price over the course of the transaction. However, there are different types of annuity plans, and the seller (annuitant) might not receive more than the sales price over the course of the transaction, for example, if the plan terminates payments upon the seller's death. Although the commenter draws this comparison to an installment sale in furtherance of his argument that annuity payments should not be treated as income, Congress has spoken explicitly on the question of whether annuity payments are income, as further discussed below. *See* 38 U.S.C. 1503(a) (''all payments of any kind or from any source (including . . . retirement or annuity payments . . .),'' shall be considered income unless expressly excluded by statute). We make no change based on the comment.

Some commenters noted that § 3.276 does not provide a specific exemption for purchase of burial policies or planning for funeral and final expenses. VA would regard the purchase of a burial policy as a fair market value purchase. In addition, VA deducts from income certain family members' final or burial expenses. 38 U.S.C. 1503(a)(3)-(4); 38 CFR 3.272(h). We make no change based on these comments.

2. Presumption Regarding Asset Transfers (Proposed § 3.276(c))

Many commenters expressed concerns with the presumption and the ''clear and convincing'' standard of evidence VA proposed in § 3.276(c). *See* 80 FR 3860. Several commenters stated that the evidentiary standard set forth in proposed § 3.276(c) conflicted with the standard permitted by 38 U.S.C. 5107(b). Section 5107(b), commonly known as the ''benefit of the doubt'' rule, states that ''[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, [VA] shall give the benefit of the doubt to the claimant.'' After further consideration, we agree that a claimant should not be subject to the ''clear and convincing'' standard when attempting to prove that an asset transfer was the result of fraud, misrepresentation, or unfair business practice. Accordingly, final § 3.276(c) is retitled and revised to simply state that VA will not consider an asset as a ''covered asset'' if the transfer was the result of fraud, misrepresentation, or unfair business practice related to the sale or marketing of financial products or services for purposes of establishing entitlement to VA pension; it also provides examples of evidence that will support the exception. This revision preserves the ''benefit of the doubt'' for claimants. We thank the commenters for their input on this issue.

3. Exception for Trust Established for Child Incapable of Self-Support (Proposed § 3.276(d))

Multiple commenters requested that we expand the trust exception to children disabled after age 18, as well as children of the surviving spouse (and not the veteran). We decline to do so. Statute defines ''child'' for VA purposes to include children of the veteran who became permanently incapable of self-support before their 18th birthday, not after. *See* 38 U.S.C. 101(4)(A); *see also* 38 CFR 3.57(a). Nevertheless, as noted above, many transfers to any child will result in no penalty period. Only when assets are transferred or gifted during the 3-year look back period, and the asset would have made net worth excessive, will a penalty period be calculated based on the portion of the transferred assets that would have made net worth excessive. For example, a surviving spouse establishes a $90,000 trust for the surviving spouse's disabled child (who is not the veteran's child) one year before the surviving spouse claims VA pension. The surviving spouse has $20,000 remaining in a checking account. Because the $90,000 transfer would not have made the surviving spouse's net worth excessive, no penalty period is assessed. As noted above, we expect the asset transfer changes will affect a very small portion of pension claimants.

One commenter expressed the belief that the exception should apply where distributions from the trust to a veteran or spouse are used for care rendered to the incapable child, shelter, and other expenses. We have considered the suggestion, but ultimately believe that the language of proposed § 3.276(d)(2) more precisely executes the goal of this limited exception. Therefore, no change is warranted.

Some commenters stated that VA should overturn a VA precedential General Counsel opinion, VAOPGCPREC 33–97, to conform to special needs trust laws at 42 U.S.C. 1396p(d)(4)(A) and (C). VA declines to make any changes based on this comment. The statute cited by the commenters pertains to the treatment of certain special needs trusts under SSI law. The statute does not apply to VA. Another commenter asked that VA ''exempt'' transfers to any trusts allowed under SSI law. As explained above and in the supplementary information to the proposed rule, SSI employs a significantly lower net worth limit than VA will be using and VA need not implement the exact same limits and exceptions as other needs-based programs governed by separate statutes.

Multiple commenters requested that we provide a general hardship exclusion. One commenter noted that there are times when individuals sell assets under market value because they have to find liquidity and a means of meeting their obligations. We interpret this comment to mean that if, for example, an individual had property appraised at $10,000, the individual might be required to sell the property for $6,000 because no buyer could be found to purchase the property at the appraised value. We believe that our definition of ''fair market value'' would adequately cover this situation, and VA would consider such a sale to be a transfer for fair market value. More generally, VA does not agree that a general hardship exclusion should be included because (1) it would result in inconsistent benefit decisions, and (2) all pension claimants are under hardship, considering the very nature of this needs-based benefit. Therefore, we make no changes based on such comments.

4. Penalty Period Calculation and Length (Proposed § 3.276(e))

Multiple commenters pointed out an error in our proposed penalty period calculation that resulted in significantly longer penalty periods for surviving spouses and surviving children as compared to veterans, as well as longer penalty periods for single veterans as compared to married veterans. Many commenters stated that the proposed penalty period was discriminatory and violated the Constitution. We proposed to use a claimant-specific MAPR as a divisor when calculating a claimant's penalty period. We agree that our proposal would have produced unfair and undesirable results and are grateful to all of those who identified this error. We have amended proposed § 3.276(e); final § 3.276(e)(1) uses a single divisor for all claimants, which will result in equal penalty periods for equal amounts of precluded asset transfers regardless of the type of claimant. The single divisor is the MAPR in effect on the date of the pension claim at the aid and attendance level for a veteran with one dependent. As stated in the proposed rule, we divide that amount by 12 and drop the cents. We chose this rate because most of VA's pension claimants qualify at the aid and attendance level and because a higher divisor results in a shorter penalty period. The penalty period calculation example at final § 3.276(e)(4) reflects the single divisor. One commenter asked the purpose of using the benefit amount to calculate the penalty period. Although the commenter was possibly referring to our mistake in using the claimant-specific MAPR for penalty period calculations, we note that the purpose of the penalty period calculation is to approximate the number of months that a claimant could have used the assets for his or her own needs rather than disposing of them.

Many commenters wrote that a penalty period of up to 10 years is excessive, essentially resulting in a ''permanent'' denial for most claimants due to their age and life expectancy at the time of application. Some commenters suggested that VA set a maximum of 36 months as the penalty period. Based on the comments we received, we decided to shorten the maximum penalty period to 5 years. Under proposed and final § 3.276(e)(2), a penalty period begins on the first day of the month that follows the last asset transfer. Therefore, having a maximum 36 month penalty period would result in no penalty if the asset transfer occurred 3 years before the date of the pension claim. Instead, we think a 5 year maximum provides the appropriate balance of protecting the integrity of the pension program, while avoiding the ''permanent'' denials that could have resulted with a 10-year maximum penalty, given the age of many pension claimants. We further emphasize that, under proposed and final § 3.276(e), only that portion of assets that would have made net worth exceed the bright-line limit is subject to penalty. We appreciate the public comments on this issue.

5. Penalty Period Recalculations (Proposed § 3.276(e)(5))

Numerous commenters requested that the time limit for curing asset transfers be amended and that VA allow partial cures. We agree that our proposal did not allow adequate time to cure asset transfers and did not allow enough time for claimants to notify VA of the cure. We also agree that partial cures are acceptable and should constitute a basis for recalculation. We have amended proposed § 3.276(e)(5) to allow claimants 60 days following a penalty period decision notice to cure or partially cure a transfer and allow 90 days following a penalty period decision notice to notify VA of the cure. We are grateful to all of those who suggested these changes.

6. Other Comments Regarding Proposed § 3.276, Asset Transfers and Penalty Periods

Several commenters asked why we are making changes regarding asset transfers when the impact analysis for the proposed rule stated that only 1 percent of claimants transfer assets. VA is making these changes to protect the integrity of the pension program and to counteract the hundreds of organizations targeting elderly veterans and spouses with financial schemes that wrest away these individuals' own assets for the promise of qualifying for VA pension. *See* GAO 12–540. VA believes that the changes are an important improvement over past practices, regardless of the number of claimants that have transferred assets in the past. We note that the 1 percent of claimants estimated to transfer assets before claiming pension was simply an estimate—nevertheless, whether that estimate is high or low, maintaining the regulatory status quo would only serve to condone these financial schemes noted by GAO, which are reported to charge seniors up to $10,000 in fees for these transfers and then leave these individuals locked out from their assets, potentially ineligible for Medicaid for a period of time, and exceedingly vulnerable to unforeseen events.

Multiple commenters expressed concern that the asset transfer provisions would be applied retroactively. In order to ease this concern, paragraphs (a)(7) and (b) of final § 3.276 explicitly state that VA will not ''look back'' to a time before the effective date of the final rule. VA will disregard asset transfers made before that date.

One commenter stated that claims are already being denied under these asset-transfer provisions. We are unaware of such cases; however, we note that VA's previous asset-transfer provision at 38 CFR 3.276(b) did state that VA would not regard certain asset transfers as a reduction of net worth. For example, VAOPGCPREC 33–97, mentioned above, states that VA should include trust assets in net worth calculations if the trust assets are available for use for the claimant's support. This applied to pre-claim transfers as well, although 38 CFR 3.276(b) did not so state. This would also be true under this final rule and we make no change based on the comment.

Many commenters were concerned that any transfer of assets such as a gift to family members or charitable donations would cause VA to impose a penalty period. Not all gifts and charitable donations are prohibited or will result in a penalty period. Only when assets are transferred or gifted during the 3-year look back period, and the asset would have caused or partially caused net worth to be excessive, will a penalty period, not to exceed 5 years, be calculated based on the portion of the transferred assets that would have made net worth excessive. For example, a veteran gives $90,000 to charity one year before she claims VA pension, and she has $10,000 remaining in a checking account. Because the $90,000 amount transferred would not have made net worth excessive, no penalty period is assessed. Again, we expect the asset transfer changes will affect a very small portion of pension claimants, while bolstering the integrity of the program.

Multiple commenters expressed concern that a look-back period would delay claims processing and would create undue stress and hardship if claimants have to provide VA with 3 years' worth of bank statements and other documentation. VA generally will not require 3 years' worth of documentation from claimants, but will only require additional documentation in some instances. VA will use matching programs with other government agencies to determine whether an asset transfer constituted transfer of a covered asset. In accordance with § 3.277(a), VA may in its discretion require documentation. This requirement for document production is permissive on the part of VA. Not every case will warrant such documentation. We make no changes based on such comments.

One commenter asked how VA would determine the uncompensated value of an asset under § 3.276, and who within VA will make these determinations. The commenter also wanted to know if VA will conduct application review conferences like Medicaid, and if so, who will conduct the conferences. VA has no plans to conduct application review conferences under this final rule. Rather, VA adjudicators will render determinations on value based on the best available information, though they will generally accept, as true, statements that claimants make on their application forms, unless there is reason to question the statements. We make no change based on the comment.

One commenter stated that VA does not have educated staff members who are able to estimate property values and that the rulemaking gives VA claims processors the ability to approve or disapprove pension claims based on the claims processor's personal assumption of value. We disagree. Final § 3.276(a)(4) defines ''fair market value'' 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, and further states that VA will use the best available information to determine fair market value, such as inspections, appraisals, public records, and the market value of similar property, if applicable. We believe the final rule makes it clear that VA does not rely on the personal assumptions of a claims processor to value assets and, as previously mentioned, claims processors have the authority, under 38 U.S.C. 1506 and 38 CFR 3.277(a), to request additional information when a claimant's estimate of property values is suspect. VA declines to make any changes based on the comment.

One commenter took issue with our proposal to use the best available information to determine fair market value, such as inspections, appraisals, public records, and market value of similar property, if applicable. The commenter apparently interpreted this to mean that VA would be hiring third parties to provide such information. This interpretation is not accurate, and VA has no intention of hiring non-governmental employees to research property values. As indicated above, the use of independent sources to assist VA in determining asset values, when necessary, is longstanding VA policy authorized by statute and regulation, and no change is warranted based on the comment.

One commenter stated that applicants for DIC should not have to disclose asset transfers on VA Form 21P–534, Application for Dependency and Indemnity Compensation, Survivors Pension and Accrued Benefits by a Surviving Spouse or Child (Including Death Compensation if Applicable). The commenter also expressed belief that DIC and survivors pension applications should be separate forms. As stated above, in the information regarding needs-based benefits, this final rule applies only to needs-based benefits; and DIC for surviving spouses and children is not a needs-based benefit. We also understand the commenter's view that DIC and survivors pension should be separate applications; however, 38 U.S.C. 5101(b)(1) provides that, for surviving spouses and children, a claim for DIC must also be considered a claim for survivors pension, and a claim for survivors pension must also be considered a claim for DIC. (Either claim must also be considered a claim for accrued benefits.) Accordingly, we make no changes based on this comment.

One commenter noted our mistake in the preamble of the proposed rule, with respect to the beginning date of the penalty period. In the preamble, we said, ''[u]nder proposed § 3.276(e)(2), the penalty period would begin on the date that would have been the payment date of an original or new pension award if the claimant had not transferred a covered asset and the claimant's net worth had been within the limit.'' 80 FR 3849. This was an error because proposed § 3.276(e)(2) actually provided that the penalty period would begin on the first day of the month that follows the date of the last transfer. 80 FR 3861. No changes are necessary in this regard because the proposed regulatory text correctly stated the rule and is more advantageous to claimants than the erroneous preamble statement.

F. Discussion of Public Comments Regarding Deductible Medical Expense Provisions

We received almost 300 comments that pertained to our proposed medical expense provisions. Many predicted dire consequences if the proposed regulations were to be implemented, including forcing claimants into nursing homes and onto Medicaid, thus increasing costs to taxpayers, creating unfunded mandates to States, affecting small businesses (such as care facilities), and forcing seniors to avoid seeking care or taking prescribed medications due to lack of affordability. Based on some of these comments as well as our own internal administrative review, this final rule reflects a number of changes from the proposed rule that we believe will allay most, if not all, of the commenters' concerns.

1. Deductible Medical Expenses for In-Home Care Attendants, Care Facilities Other Than Nursing Homes, and Custodial Care

Statute permits VA to deduct amounts paid by a veteran, veteran's spouse, or surviving spouse or by or on behalf of a veteran's child for unreimbursed medical expenses, to the extent that such amounts exceed 5 percent of the maximum annual rate of pension (including any amount of increased pension payable on account of dependents, but not including any amount of pension payable because a person is in need of regular aid and attendance or because a person is permanently housebound) payable to such veteran, surviving spouse, or child. *See* 38 U.S.C. 1503(a)(8). For parents' DIC purposes, VA ''may provide by regulation for the exclusion from income under [section 1315] of amounts paid by a parent for unusual medical expenses.'' 38 U.S.C. 1315(f)(3).

Neither statute defines ''medical expenses.'' As we mentioned in the preamble of the proposed rule, there is currently no regulation that adequately defines ''medical expenses'' for VA purposes—*i.e.,* for purposes of the medical expense deduction from countable income for VA needs-based benefit calculations. *See* 80 FR 3850. VA's primary guidance on the topic was issued in October 2012 as Fast Letter 12–23, Room and Board as a Deductible Unreimbursed Medical Expense. Multiple commenters mentioned this fast letter in their comments, discussed further below.

2. Definitions for Medical Expense Deduction Purposes

We received many comments pertaining to our definitions of various terms, including custodial care, health care provider, ADLs, and IADLs. We first defined a health care provider to mean an individual licensed by a State or country to provide health care in the State or country in which the individual provides the health care, as well as a nursing assistant or home health aide who is supervised by such a licensed health care provider. Some commenters asked us to remove the supervision or licensing requirements. We make no changes based on these comments. In our view, it is essential that health care providers be appropriately licensed. To the extent these comments are based on confusion regarding when VA requires an attendant to be a health care provider, we note here that in-home attendants are not often required to be health care providers. Paragraph (d) of final § 3.278, discussed below, makes this clear.

Numerous commenters urged us to expand our definition of ADLs. Some commenters suggested that we use the definition of ADLs from the Medicare Benefit Policy Manual which is referenced in Fast Letter 12–23. The Medicare Benefit Policy Manual, which provides that custodial care is not covered under Medicare, describes activities of daily living as including, for example, ''assistance in walking, getting in and out of bed, bathing, dressing, feeding, and using the toilet, preparation of special diets, and supervision of medication that usually can be self-administered.'' Medicare Benefit Policy Manual, Chapter 16— General Exclusions from Coverage, *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/bp102c16.pdf* (last visited Feb. 2018). The purpose of this particular reference in the Medicare Benefit Policy Manual is to describe custodial care, in general terms, rather than to define ADLs. This reference does not distinguish between ADLs and IADLs. We reviewed 33 regulations in the Code of Federal Regulations that pertained to ADLs. Ten of these were in VA's title 38. The other 23 were in titles 7, 20, 24, 29, 32, 42, and 45. We also reviewed other sources. A 1963 study limited ADLs to ''bathing, dressing, going to the toilet, transferring, continence, and feeding.'' Sidney Katz, et al., ''Studies of Illness in the Aged, The Index of ADL: A Standardized Measure of Biological and Psychosocial Function,'' Journal of the Am. Med. Assoc., Vol. 185, No. 12, 914–919 (Sept. 21, 1963). The IADLs were added later. Since that time, health, insurance, and governmental agencies have used these definitions for various purposes. There is now considerable variation between sources with respect to the activities included as an ADL. After further consideration, we have added, in § 3.278(b)(2), ''ambulating within the home or living area'' to our list of ADLs. This addition is consistent with the U.S. Census Bureau's Survey of Income and Program Participation, which lists the following ADLs: ''difficulty getting around inside the home, getting in/out of a bed/chair, bathing, dressing, eating, and toileting.'' *https://www.census.gov/topics/health/disability.html* (last visited Feb. 2018). Other governmental regulations also include mobility or ambulation to some extent. *See* 7 CFR 1944.252; 32 CFR 728.4(h); 38 CFR 51.120(b)(1); 38 CFR 52.2; 38 CFR 71.15; 42 CFR 409.44(c)(1)(iv); 42 CFR 483.25(c).

Several commenters asked us in particular to define ''handling medications'' as an ADL instead of an IADL. Although we decline to do this, we note here that there is a difference between ''medication administration'' and other sorts of assistance with taking medications such as medication reminders. Medication administration, if performed by a health care provider, would be a health care expense under § 3.278(c)(1). A medication reminder from a provider who is not a health care provider would not be a medical expense unless the individual requires custodial care and the provisions of final § 3.278(d) apply.

Many commenters also urged us to include IADLs in the definition of ADLs or, similarly, to include IADLs alone as medical expenses. We note that the final rule liberalizes the circumstances in which payment for assistance with IADLs constitutes a medical expense, as discussed below. We believe this obviates the commenters' concerns without the need for changing definitions in this regard. We have, however, made one change to our list of IADLs based on our further administrative review. In the proposed rule, we proposed to exclude as an IADL, and as a medical expense under proposed paragraph (e)(5), fees paid to a VA-appointed fiduciary. *See* 80 FR 3850. Upon further review, we have determined that no statute precludes the use of such fees as an IADL. Therefore, we removed the last sentence of proposed § 3.278(b)(3), ''Managing finances does not include services rendered by a VA-appointed fiduciary.'' In addition, we removed proposed paragraph (e)(5), which provided that fees for VA-appointed fiduciary services are not medical expenses. We also amended the introductory paragraph of § 3.278(e) to refer to paragraphs (e)(1) through (4) instead of (e)(1) through (5).

We received a number of comments regarding our definition of ''custodial care'' and we have made changes. The commenters believed that the proposed rule unfairly excluded, as a medical expense, payments for the care of individuals with dementia. Many of these commenters said that such individuals would no longer qualify, because they may not require assistance with two ADLs. Other comments stated that physical disorders should be included. We agree. Final § 3.278(b)(4)(ii) includes physical, developmental, and cognitive disorders along with mental disorders.

Further, we received several comments from individuals who were concerned that the language used in proposed § 3.278(b)(4)(ii) (requiring ''regular . . . [s]upervision because an individual . . . is unsafe if left alone'') was too limiting. These commenters seemed to read the proposed rule to say that the disabled individual could never be left alone under any circumstances. To avoid such misunderstandings, final § 3.278(b)(4)(ii) now includes supervision ''to protect the individual from hazards or dangers incident to his or her daily environment,'' the same phrase used in 38 CFR 3.352(a).

On that point, several commenters appeared to confuse the purpose of proposed § 3.278 with the purpose of 38 CFR 3.351 and 3.352(a). One commenter stated that proposed § 3.278 conflicts with and ''amends'' § 3.352. To be clear, §§ 3.351 and 3.352(a) provide the criteria for determining whether an individual is housebound, or requires aid and attendance, as well as the compensation or pension rate to apply; those regulations apply to both needs-based and non-needs-based benefits, and do not address income calculations or deductions. The purpose of § 3.278 is quite different because it describes medical expenses that can be deducted from income for pension, parents' DIC, and section 306 pension. (These are the only VA needs-based benefits for which deductible medical expenses may be used to reduce income.) Because the purpose of § 3.278 differs from that of §§ 3.351 and 3.352(a), it is not essential for § 3.278 to precisely mirror §§ 3.351 and 3.352(a). Nevertheless, there is some value in consistent terminology across part 3, and the changes in this final rule to proposed § 3.278(b)(4)(ii) provide that.

One commenter believed that needing regular assistance with only one ADL could constitute custodial care. We make no change based on this comment. We continue to believe that two ADLs is appropriate, particularly given the fact that we have expanded the definition of ADLs to include an additional ADL and have added additional types of disorders to the definition of custodial care. The final definition of custodial care, § 3.272(b)(4), is regular (i) assistance with two or more ADLs, or (ii) supervision because an individual with a physical, mental, developmental, or cognitive disorder requires care or assistance on a regular basis to protect the individual from hazards or dangers incident to his or her daily environment. Combined with the further changes discussed below, if an individual is shown to require regular assistance to be protected from hazards or dangers incident to his or her daily environment due to a physical, mental, developmental, or cognitive disorder, then assistance with ADLs or IADLs from an in-home care attendant or within a care facility is a medical expense.

Multiple commenters discussed the wide variation among States with respect to ''assisted living facility,'' ''independent living facility,'' and other facility types, both in terms of the type of care provided and licensure requirements. We agree with the commenters who emphasized that the medical expense deduction should be contingent on the sort of care the disabled individual is receiving in the facility and the necessity for the individual to be there—not the name of the facility. For this reason, we have revised the term and definition used for these facilities. The term proposed at § 3.278(b)(8), ''Assisted living, adult day care, or similar facility,'' is now ''[c]are facility other than a nursing home'' and defined in final § 3.278(b)(7) to mean ''a facility in which a disabled individual receives health care or custodial care under the provisions of paragraph (d) of this section.'' Such a facility must be licensed if facilities of that type are required to be licensed in the State or country in which the facility is located. The regulation also provides that a facility that is residential must be staffed 24 hours per day with care providers and that the providers do not have to be licensed health care providers.

Our proposed definition at § 3.278(b)(8) required residential facilities to be staffed 24 hours per day with ''custodial care providers.'' Several commenters urged us to clarify whether such providers were required to be licensed health care providers. The final rule, in § 3.278(b)(7), does not use the term ''custodial care provider'' and, as noted above, clarifies that these providers do not have to be licensed health care providers.

We made two additional changes to the definitions section; these are discussed in the information pertaining to institutional forms of care.

3. Institutional Forms of Care and Fast Letter 12–23

As mentioned above, in October 2012, VA issued Fast Letter 12–23 to its field stations in order to clarify and address inconsistencies that had arisen in VA's procedures manual, particularly with respect to when room and board in a facility could be considered a deductible medical expense. Numerous commenters wrote that Fast Letter 12–23 was more liberal in many respects than the proposed rule and urged us to incorporate these aspects of the fast letter in this final rule. We agree and have significantly revised § 3.278(d)(3) in the following ways:

The title of the paragraph is now ''Care facilities other than nursing homes'' instead of ''Assisted living, adult day care, and similar facilities,'' consistent with final § 3.278(b)(7). By not mentioning any particular facility type in the title, we hope to avoid the impression that we are not allowing payments made to certain facilities based on the name of the facility. As mentioned above, we are focusing on the care that the individual receives within the facility and the need for the individual to be in the facility rather than the facility name.

Final paragraph (d)(3) provides clearly that care ''in a facility'' may be provided by the facility, contracted by the facility, obtained from a third-party provider, or provided by family or friends. Many commenters urged us to make this clarification. This provision is consistent with Fast Letter 12–23, although the fast letter did not address family or friends. Fast Letter 12–23 spoke only to contracts that a claimant made with third-party providers. However, we heard from a number of commenters telling us that their loved one needed to live in a facility to receive care provided by a third party or by family or friends and we agree that this is reasonable.

One commenter expressed extreme dismay that we would permit third-party contractors to provide the care, believing this would lead to ''warehousing'' veterans in non-government facilities. We disagree. We believe that it is appropriate to allow veterans and their survivors to receive care in a facility or from a provider of their choice. We make no changes based on the comment.

The ''general rule,'' now found at paragraph (d)(3)(ii), simply provides that payments for health care provided by a health care provider are medical expenses. We stress that this rule applies to all individuals in a care facility, including those who do not need A&A, are not housebound, do not require custodial care, and do not need to be in a protected environment. We moved assistance with ADLs to final § 3.278(d)(3)(iii), which now incorporates IADLs and is discussed below. We note that this general rule is, in fact, no different from § 3.278(c)(1), which simply states that payments to a health care provider for services performed within the scope of the provider's professional capacity are medical expenses.

Final paragraph (d)(3)(iii) incorporates the intent of Fast Letter 12–23 by stating that the provider does not need to be a health care provider, and that payments for assistance with ADLs and IADLs are medical expenses, if the disabled individual is receiving health care or custodial care in the facility and either: (A) Needs A&A or is housebound; or (B) a physician, physician assistant, certified nurse practitioner, or clinical nurse specialist states in writing that, due to a physical, mental, developmental, or cognitive disorder, the individual has a need to be in a protected environment. This is a liberalization from proposed paragraph (d)(3), which would have required a veteran or a surviving spouse (or parent for parents' DIC purposes) to be in need of A&A or to be housebound in order for VA to consider certain medical expenses as deductible; the physician's or physician assistant's statement option was only for dependents and other relatives. Fast Letter 12–23, however, permits the ''physician's statement'' option for veterans and surviving spouses as well. We determined that the ''physician's statement'' option should be permitted for veterans and surviving spouses because not doing so could mean that veterans and surviving spouses might be subject to a higher level of disability requirement than their dependents and relatives for their ADL and IADL assistance payments to be authorized as medical expenses. Also regarding the ''physician's statement'' option, which previously only included physicians and physician assistants, this final rule expands this option to include certified nurse practitioners and clinical nurse specialists as well. We recognize that a claimant's primary medical provider may not be a physician or physician assistant.

On this issue, one commenter stated that the rule should be modified to eliminate the need for a statement from a physician or physician assistant that ''due to physical or mental disability, the qualified relative requires the health care services or custodial care that the in-home attendant provides.'' The commenter opined this is burdensome and potentially demeaning to a person with disabilities. However, as another commenter pointed out, there are two groups of individuals who avail themselves of the services provided by independent living (or similar) facilities: Those who are there for convenience and those who are there for necessity. We agree with this latter comment; VA must have a way to distinguish between these groups. We do not believe the requirement for a statement is overly burdensome, particularly inasmuch as we have expanded qualified signers of such statements to physicians, physician assistants, certified nurse practitioners, and clinical nurse specialists. The requirement is in no way intended to be demeaning.

We have amended proposed paragraph (d)(3)(i)(B) to now provide, in final paragraph (d)(3)(iv), that payments for meals and lodging, as well as payments for other facility expenses not directly related to health or custodial care, are medical expenses when either of the following are true: (A) The facility provides or contracts for health care or custodial care for the disabled individual; or (B) a physician, physician assistant, certified nurse practitioner, or clinical nurse specialist states in writing that the individual must reside in the facility (or a similar facility) to separately contract with a third-party provider to receive health care or custodial care or to receive (paid or unpaid) health care or custodial care from family or friends. This change is consistent with Fast Letter 12–23; however, as noted above, we are including family and friends.

Final paragraphs (d)(3)(iii) and (iv) also differ from proposed paragraph (d)(3)(i)(B) by eliminating the proposed ''primary reason'' requirement. The proposed rule stated that medical expenses included all payments to the facility when the ''primary reason'' for the individual to be in the facility was to receive health care or custodial care. We agree with the many commenters who said the proposed provision was too restrictive. We believe these liberalizing changes satisfy the commenters' concerns.

Consistent with our revisions to paragraph (d)(3) described above as well as to our revisions to paragraph (d)(2) described below, we have made two additional changes to the definitions section. First, we have removed proposed § 3.278(b)(5), the definition for ''qualified relative,'' and renumbered § 3.278(b) accordingly. Under this final rule, it is no longer necessary to define a qualified relative. We previously proposed, at 80 FR 3850, to define a qualified relative because we were distinguishing between (A) veterans, surviving spouses, and parents' DIC claimants, versus (B) other individuals, when it came to the ''physician's statement'' option. We no longer need the definition because under this final rule, as noted above, we have liberalized the requirements to allow any disabled individual to utilize the type of physician's statement that had been proposed solely for qualified relatives. We emphasize that the deletion of the definition of ''qualified relative'' in no way limits the scope of the individuals whose medical expenses VA may deduct.

Second, we added a definition of ''needs A&A or is housebound'' as final § 3.278(b)(8), to simplify the rest of the regulation and to account for another type of individual whom VA may determine to need aid and attendance. As briefly mentioned above, in the section titled ''Terminology Clarifications Regarding VA Pension and Other VA Needs-Based Benefits,'' VA pays a higher disability compensation (*i.e.,* service-connected) rate to veterans when the veteran's spouse needs aid and attendance. Usually, disability compensation is a greater benefit than pension but sometimes it is not. VA generally pays the greater benefit automatically, but veterans always have the option of choosing whether they wish to receive pension or compensation. It may be the case that a veteran who is entitled to compensation may have a spouse who needs aid and attendance and that veteran may have chosen to receive pension instead of compensation. (Veterans must have service-connected conditions rated at least 30 percent disabling to receive additional compensation for dependents. *See* 38 U.S.C. 1115.) These spouses were not included in the proposed rule but they are included in VA's procedures manual and should be here, as well. Therefore, our definition of ''needs A&A or is housebound'' refers to a disabled individual who meets the criteria in § 3.351 for needing regular aid and attendance (A&A) or being housebound and is a veteran; surviving spouse; parent (for parents' DIC purposes); or spouse of a living veteran with a service-connected disability rated at least 30 percent disabling, who is receiving pension.

Consistent with these changes, this final rule does not include proposed § 3.278(e)(3), which previously stated that VA does not consider payments for meals and lodging to facilities that do not provide health care services or custodial care to be medical expenses. Instead, final § 3.278(d)(3)(iv)(B) allows for those payments to be medical expenses if specified individuals attest that the individual must reside in the facility to separately contract with a third-party provider to receive health care or custodial care or to receive such care from family and friends.

4. In-Home Care

Numerous commenters expressed their opinion that our proposal, at § 3.278(d)(2), to limit the deductible hourly rate for in-home attendants was a bad idea for many reasons: (1) It is patently unfair to set a national average as a limit, so there must be a geographical component; (2) using an average does not take into consideration overtime or holiday time; (3) there was no cap proposed on facility costs; (4) the proposed limit was far too low and based on an outdated source (the MetLife Mature Market Institute no longer produces its Market Survey of Long-Term Care Costs); and (5) the authorizing statute (38 U.S.C. 1503(a)(8)) does not permit VA to set a limit on the medical expense amount.

While we disagree with this comment regarding our authority, we agree with many of the other commenters, and the final rule does not include a limit to the hourly rate of in-home care. We have also removed the last sentence of proposed § 3.278(d)(2), which referred to the website where VA would publish the hourly rate limit. Several commenters suggested alternative in-home care limits such as the Genworth Cost of Care Survey or using 150 percent of the limit we proposed. We make no changes based on these suggestions because we have removed the in-home care hourly rate limit at this time, and we will consider whether we should revisit the issue in a future rulemaking.

One commenter urged us to ''consider adding language to the final rule that would ensure greater protection for veterans to ensure they are not open to potential liability through the employment of a registry model of home care.'' They urged us to require that all home care providers employ their home care workforce and thus train, bond, and withhold taxes for their employees. They went on to point out that some home care providers are simply staffing agencies that link a senior or disabled individual with an independent contractor who comes into the home without the training or insurance needed to provide real protections for the claimant. They believe VA should require the home care provider to employ their workforce rather than using independent contractors in an effort to eliminate the burden of potential liability. We decline to implement such a requirement at this time. We do not believe that this type of provision would be a logical outgrowth of our proposed rule.

The final rule, regarding in-home attendants, is much simpler than the proposed rule, consistent with the changes we made to the care facility provisions, and for many of the same reasons:

(1) The final rule at § 3.278(d)(2) provides that payments for assistance with ADLs and IADLs by an in-home attendant are medical expenses, as long as the attendant provides the disabled individual with health care or custodial care. The proposed rule would not have considered payments for IADLs to be a medical expense for a veteran or surviving spouse (or parent for parents' DIC) unless the claimant needed A&A or was housebound and providing health care or custodial care was the ''primary responsibility'' of the attendant.

(2) The final rule at § 3.278(d)(2)(i) and (ii) provides that the attendant must be a health care provider, unless the disabled individual needs A&A or is housebound, or a physician, physician assistant, certified nurse practitioner, or clinical nurse specialist states in writing that due to a physical, mental, developmental, or cognitive disorder, the individual requires the health care or custodial care that the in-home attendant provides. The proposed rule did not permit a ''doctor's statement'' option for veterans, surviving spouses, or parents' DIC claimants.

5. Other Deductible Medical Expense Matters

Numerous commenters urged us to provide a ''grandfathering provision'' for our proposed changes to institutional care and in-home care provisions. Although we do not believe that the final rule necessitates such a provision, we are providing one because we have no desire or intent to harm or displace any person. We do not want to take a chance that previous guidance might have been interpreted more liberally than this final rule, in any individual case. Some commenters, who were residing in independent living facilities, expressed hesitation to submit a medical expense deduction claim for eyeglasses, for example, for fear that VA would re-consider and disallow their existing care facility expenses. We want to allay any concern or fear in this regard. Therefore, the final rule provides, in an introductory paragraph of final § 3.278(d), that paragraph (d), which pertains to institutional forms of care and in-home care, applies with respect to unreimbursed medical expense claims for institutional forms of care or in-home care received on or after October 18, 2018 that VA has not previously granted. Previous medical expense grants pertaining to institutional or in-home care made before that date would continue unless the claimant moves to a different facility or employs a different in-home attendant or in-home care agency.

In paragraph (c) of proposed § 3.278, we provided that ''[g]enerally, medical expenses for VA needs-based benefit purposes are payments for items or services that are medically necessary or that improve a disabled individual's functioning.'' One commenter pointed out that such a provision effectively restricts payments for medical expenses when no improvement is anticipated, such as hospice care. To clarify this provision, final § 3.278(c) provides that medical expenses for VA needs-based benefit purposes are payments for items or services ''that are medically necessary; that improve a disabled individual's functioning; or that prevent, slow, or ease an individual's functional decline.''

The same commenter noted that we had not included payments for Medicare Part A in § 3.278(c)(5). Most individuals in the U.S. qualify for free Part A benefits; however, a small number purchase this benefit. Although § 3.278(c)(5) would not have prohibited deducting Part A payments as a medical expense, we agree that for the sake of clarity and completeness Part A payments should be included, and we have added it in the final rule.

One commenter requested that we include, as a medical expense, any expense made necessary due to a claimant's medical condition or disability, such as a heated blanket to regulate body temperature for a veteran with quadriplegia; cranberry juice to prevent urinary tract infections for a veteran with a spinal cord injury; or home modifications to allow disabled individuals to live safely in the community. We make no changes based on this comment. Although we are sympathetic and understand the impetus behind this suggestion, it is longstanding VA policy not to consider such expenses to be deductible medical expenses. VA's procedures manual provides, ''Mechanical and electronic devices that compensate for disabilities are deductible medical expenses to the extent that they represent expenses that would not normally be incurred by nondisabled persons. Do not allow a medical expense deduction for equipment that would normally be used by a nondisabled person, such as an air conditioner or automatic transmission.'' M21–1MR, V.iii.1.G.43.k (May 20, 2011). We believe this policy is consistent with common understanding of medical expenses and have decided to continue that policy.

One commenter found it unjust that proposed paragraph (c)(4) does not take into consideration higher mileage rates in certain geographical areas when calculating mileage for medical purposes. As previously stated in this document, statutory MAPRs are also not adjusted by locality. For its mileage rates, VA uses the privately owned vehicle mileage reimbursement rates provided by the U.S. General Services Administration, which we believe is a reasonable and fair standard. We make no changes based on the comment.

G. Discussion of Public Comments Regarding Income and/or Income and Asset Exclusions

We now address comments we received regarding exclusions from income or income and assets (or ''corpus of the estate'' for parents as dependents and section 306 pension). In 38 CFR part 3, there are currently three regulations that address exclusions from income, §§ 3.261, 3.262, and 3.272, and this rulemaking adds a fourth, § 3.279. There are also currently three regulations that address exclusions from assets, §§ 3.261, 3.263, and 3.275, and this rulemaking adds a fourth, § 3.279. The reason for so many regulations is that sometimes a statutory exclusion is written in such a way that the exclusion applies to all VA needs-based benefits; however, sometimes a statutory exclusion is written in such a way that the exclusion applies only to some VA needs-based benefits. Sections 3.261 and 3.262 apply only to: (1) Parents as dependents for compensation purposes; (2) parents' DIC; and (3) section 306 pension and old-law pension, which are VA's previous and largely obsolete pension programs. Section 3.263, also largely obsolete, applies only to parents as dependents for compensation purposes and to section 306 pension. Sections 3.272 and 3.275 apply only to current-law pension. Section 3.279 will apply to all VA needs-based benefits (parents as dependents, parents' DIC, section 306 pension, old-law pension, and pension under the current law). This part of the preamble applies to all comments we received on exclusions regardless of where the exclusion is listed.

1. Changes to Exclusions

One commenter noted that our proposed rules did not contain a general statutory exclusion, *i.e.,* a ''catch all'' to state that regardless of whether or not an exclusion is listed in the applicable regulation, VA will exclude any type of payment that is excluded by statute. We agree that such a general exclusion is necessary and the final rule amends §§ 3.261, 3.262, 3.263, 3.272, and 3.275 to provide one, and we have added one to final § 3.279.

Two commenters noted that we failed to list in § 3.279 that Federal income tax refunds are excluded income. They are also excluded from resources (*i.e.,* assets) for one year after receipt. We have made this addition to final §§ 3.261, 3.262, and 3.272, and final § 3.279 lists this exclusion at paragraph (e)(1). We have also renumbered proposed § 3.279(e)(1) through (8) as final § 3.279(e)(2) through (9), respectively.

This final rule does not include proposed § 3.272(k), under which only the interest component of annuity payments would have counted as income in certain situations. *See* 80 FR 3857. One commenter stated that 38 U.S.C. 1503 does not permit VA to count a partial payment. The same commenter stated that, as written, the proposed addition would be very difficult to implement because often it is impossible to calculate the amount of interest in an annuity payment due to varying types of annuities. Other commenters argued there is no way to determine the interest component of an annuity. Additional commenters questioned why income from an annuity purchase worthy of a penalty would only count in part. Although some commenters liked the exclusion, commenters also noted confusion and conflict between this exclusion and the proposed net worth and asset transfer provisions.

On further review, proposed § 3.272(k) was in conflict with several VA precedential General Counsel opinions, which provide that distributions from individual retirement accounts (IRAs) and annuities are income for purposes of VA's needs-based benefits. *See* VAOPGCPREC 2–2010, VAOPGCPREC 1–97, VAOPGCPREC 1–93, and VAOPGCPREC 23–90. As noted in those opinions, 38 U.S.C. 1503(a) provides that ''all payments of any kind or from any source (including . . . retirement or annuity payments . . .),'' shall be considered income unless expressly excluded by statute. In consideration of the comments received and the rationale contained in the Office of the General Counsel opinions, this final rule does not include proposed § 3.272(k). Final § 3.272(k) was previously proposed as § 3.272(r). Final § 3.272(r) consists of the income tax return exclusion discussed above.

Final § 3.279 includes some corrections and a clarification, in addition to the ''catch all'' statutory exclusion of paragraph (a), and the income tax return exclusion of paragraph (e)(1). We have changed the title of paragraph (a) from ''Scope of section'' to ''Statutory exclusions not countable'' because we believe the new title is more descriptive. Final paragraphs (c)(1), (2), and (3) use the term ''assets'' in the first column rather than the term ''net worth'' as proposed. Using the previous term was an oversight. The actual statutory language at 25 U.S.C. 1407 and 1408 is ''income or resources''; however, VA terminology for resources is now assets.

Several commenters noted that our proposed rule did not include a statutory exclusion found at 38 U.S.C. 1503(a)(5). The statute excludes reimbursements for loss; Public Law 112–154 added it to 38 U.S.C. 1503 in August 2012. We thank the commenters for pointing this out and have added this exclusion as final § 3.272(s). We note that we informed our field stations of the exclusion soon after the law change.

2. Other Comments Pertaining to Exclusions

Several commenters referred to a statement we made in the preamble of the proposed rule that VA counts distributions from IRAs as income. *See* 80 FR 3854. These commenters opined that counting the distributions from IRAs as income penalizes those who have saved money in an IRA more than those who have, for example, saved their money in a bank account or certificate of deposit. Although we understand this concern, our rulemaking may not contradict the precedential General Counsel opinions mentioned above, which came to their conclusion after a thorough analysis of the legislative history of the pension program. One commenter specifically argued that the principal of an IRA should not count as an asset. However, 38 CFR 3.263(b) defines net worth as all real and personal property owned by the claimant, except the claimant's dwelling (single family unit), including a reasonable lot area, and personal effects suitable to and consistent with the claimant's reasonable mode of life, which would include funds in an IRA. Once the principal in an IRA is accessible without penalty, it would count as an asset that would be reduced with any distributions, and any distributions from that account would count as income. Therefore, we make no changes based on such comments.

One commenter noted that our proposed rule did not amend § 3.272(e) to incorporate the decision of the United States Court of Appeals for Veterans Claims (Veterans Court) in *Osborn* v. *Nicholson,* 21 Vet. App. 223 (2007), which held that interest received from the redemption of a Series EE U.S. Savings Bond is excludable from income in determining annual income for improved pension (*i.e.,* current-law pension) purposes. VA is bound by *Osborn and has* issued a precedential General Counsel opinion, VAOPGCPREC 2–2010, addressing the Veterans Court's holding. But we decline to explicitly incorporate that holding into § 3.272(e) at this time, because (1) that paragraph's current language and *Osborn* are not in conflict, and (2) such an amendment in the final rule would deprive interested parties the opportunity to meaningfully comment.

One commenter took issue with the income exclusions located at proposed § 3.279(c)(1), (2), (3), and (6). These exclude from income payments to American Indians of up to $2,000 per year received from Tribal Judgment Fund distributions, interests in trust or restricted lands, or per capita distributions, as well as cash payments to Alaska Natives of up to $2,000 per year received from the Alaska Native Claims Settlement Act. The commenter disagreed with the $2,000 cap on such payments. We make no change based on this comment because the $2,000 cap is statutory. *See* 25 U.S.C. 1407, 1408; 43 U.S.C. 1626(c).

One commenter stated that there should not be a cap on the exclusion at proposed § 3.272(r), which incorporates a statutory income exclusion found at 38 U.S.C. 1503(a)(11). The exclusion, now incorporated in this final rule at § 3.272(k), provides that VA will exclude up to $5,000 per year that a State or municipality pays to a veteran as a veterans' benefit due to injury or disease. Because the statute specifically provides for the $5,000 cap, no change is warranted based on the comment.

One commenter opined that our proposed exclusion at § 3.279(b)(1) is erroneous because it ''is inconsistent with 25 U.S.C. 1408'' and because ''relocation payments under 25 U.S.C. 1408 are treated as assets.'' We make no change because the statute cited, section 1408, pertains to interests of American Indians in trusts or restricted lands and is listed in § 3.279(c)(2), where we note such payments are excluded from income (up to $2,000 per year) and assets.

However, the commenter goes on to quote from 42 U.S.C. 4636, which is the basis of the relocation payment exclusion listed at § 3.279(b)(1). To the extent the commenter is suggesting that payments issued pursuant to section 4636 should be excluded from assets, we disagree. The statute's plain language, including its title, is clear that payments pursuant to section 4636 are excluded from income only. In addition, when Congress does not want a payment to be considered as either income or as an asset, Congress will instruct that the payment shall not be considered as either income or resources. An example of this is 42 U.S.C. 10602(c) (reclassified as 34 U.S.C. 20102(c)), which uses all three terms (income, resources, and assets). Because Congress did not exclude relocation payments from resources or assets, we make no changes based on this comment.

One commenter opined that payments received under the Workforce Investment Act of 1998 (29 U.S.C. chapter 30) should not be considered an asset. This payment type is listed as an income exclusion at proposed and final § 3.279(d)(1). Although the authority for this exclusion, 29 U.S.C. 2931(a)(2), has been moved to 29 U.S.C. 3241(a)(2), the statutory text still only excludes these payments from income, not assets. Therefore, the only change we make here is to update the statutory citation.

Similarly, the same commenter stated that payments to AmeriCorps participants, listed as an exclusion from income at § 3.279(d)(2), should not be considered an asset for the annualization period in which the payment is received. Since the statutory authority for this exclusion, 42 U.S.C. 12637(d), does not authorize the exclusion of these payments from assets, we make no changes based on this comment.

The same commenter expressed the opinion that, if a payment type is excluded from income, then it should be excluded as an asset during the annualization period in which it is received. We understand the commenter's point of view; however, absent statutory authority, there is no reason to suppose that excluding a payment from income necessarily equates to excluding that payment from assets during the annualization period in which the payment is received. Indeed, if that was Congress' intent, Congress would have made its intent known. In 26 U.S.C. 6409, for example, Congress plainly stated that the refund payment is not to be considered income and is not to be considered a resource for the annualization period of receipt. No such statement is present for the statutes pertaining to AmeriCorps or Workforce Investment payments. Without an instruction from Congress, we decline to subtract certain types of payments, once received, from assets. To the extent this commenter believes this practice constitutes double-counting, we disagree. Double counting would be including a payment as income and assets in the year of receipt; these payments are being excluded from income, but included as assets. The income exclusion still benefits the claimant inasmuch as it affects his or her pension rate. 38 U.S.C. 1521.

One commenter stated that, due to the fact that payments from the Retired Serviceman's Family Protection Plan are excluded from income, Survivor Benefit Plan payments should likewise be excluded from income. The Retired Serviceman's Family Protection Plan was the Department of Defense (DoD) survivor program that was in effect before September 21, 1972, which was replaced by the Survivor Benefit Plan. Payments under the Retired Serviceman's Family Protection Plan are specifically excluded under 10 U.S.C. 1441. There is no similar statutory exclusion for the Survivor Benefit Plan in 10 U.S.C. chapter 73 or in any other statute. *See* 10 U.S.C. 1450(h). Therefore, we make no change based on this comment.

The same commenter stated that life insurance payouts provided under the Servicemembers' Group Life Insurance (SGLI) and Veterans' Group Life Insurance (VGLI) should be excluded. Under 38 U.S.C. 1503(a)(12), the lump-sum proceeds of any life insurance policy on a veteran are excluded—but only for survivors pension purposes. This exclusion is currently located at § 3.272(x) and, as proposed, will be relocated to § 3.272(q) by this final rule. Given the statute, we make no change based on this comment.

This commenter also stated that death transitional payments such as death gratuities or ''transitioning child allowances'' should be excluded. The death gratuity is a payment that DoD pays when a service member dies on active duty. Congress has provided for the exclusion of the death gratuity for parents' DIC purposes at 38 U.S.C. 1315(f)(1)(A). It was previously called the ''six months' death gratuity'' and is listed as an exclusion in § 3.261(a)(12). However, there is no statutory authority to exclude death gratuity payments from current-law survivors pension, so we make no change based on this comment. We note that it would be extremely rare for a survivor to receive a death gratuity payment and also receive VA survivors pension. When a service member dies on active duty, his or her survivor is generally entitled to receive DIC from VA, which is a greater benefit than survivors pension. As previously discussed, DIC for surviving spouses and children is not a needs-based benefit and is not part of this final rule.

Likewise, we believe the ''transitioning child allowance'' that the commenter mentions is the additional DIC amount paid to a surviving spouse under 38 U.S.C. 1311(f) when the surviving spouse has a child or children under the age of 18. A surviving spouse receiving DIC and the ''transitioning child allowance'' would not receive VA pension, see 38 U.S.C. 5304(a), and therefore there would be no need for the suggested exclusion for the ''transitioning child allowance.'' We make no changes based on this comment.

The same commenter noted that proposed § 3.279(e)(7) would exclude from income and assets the amount of student financial assistance received under Title IV of the Higher Education Act of 1965. The commenter stated that this exclusion should cover VA education benefits. We note that under 38 U.S.C. 1503(a)(9), educational and vocational rehabilitation expenses for books, fees, tuition, and materials are deductible from income for pension purposes, as are transportation fees in certain situations. Therefore, if a veteran uses his or her education benefit to pay for school and supplies (or allowable transportation fees), then the amounts paid would be deducted. Similarly, when a VA educational benefit is payable directly to the school, VA considers it received by the veteran and then paid to the school, so VA does not count it as income. However, if the educational benefit includes a stipend to pay for living expenses or dormitory fees, then such payments are countable income for pension. Thus, while there is no statute that excludes all VA education benefits, portions of educational expenses will not count as income. VA regulations note this exclusion at § 3.272(i).

The same commenter also noted that payments ''under the Atomic Commission appear to be missing from the list of exclusions.'' We believe the commenter is referring to payments under the Radiation Exposure Compensation Act of 1990, which are excluded from income for current-law pension, parents' DIC, and parents as dependents for compensation purposes. Such payments are not excluded from income for section 306 or old-law pension purposes; therefore, the exclusion is not listed in § 3.279. Rather, this exclusion is listed in the portions of §§ 3.261 and 3.262 that apply to parents' DIC and parents as dependents, and it is listed in §§ 3.272 and 3.275 for current-law pension. Therefore, no change is necessary based on this comment.

The same commenter questioned our proposal to remove the statutory exclusion of payments received under the Medicare transitional assistance program and any savings associated with the Medicare prescription drug discount card, saying our explanation was confusing. These programs no longer exist. *See* 42 U.S.C. 1395w–141(a)(2)(C). Therefore, we decline to incorporate them into proposed § 3.279. While there are undoubtedly payments listed in § 3.279 that individuals no longer receive, the drug card program was not actually a ''payment'' in the common use of the word, and the statute specifically provides that the program has ended. We do not believe we are disadvantaging any VA claimant by not listing this exclusion in 38 CFR part 3. The statute for the new program, the Medicare coverage gap discount program, does not address the program's effect on other Federal programs. *See* 42 U.S.C. 1395w–114a. The program impacts the price of prescription drugs; it is not a payment that individuals receive. The only impact the program could have on those receiving VA needs-based benefits is to possibly decrease an individual's unreimbursed medical expenses. In any case, as noted, the statutory authority for the Medicare coverage gap discount program does not include any exclusionary language, as did the previous program. Therefore, we have not included information about the new program in final § 3.279, and we make no changes based on the comment.

One commenter expressed the belief that child support payments should not be countable income for VA pension purposes. We decline to make any change based on this comment. Section 1503 of 38 U.S.C. provides that all payments of any kind or from any source count unless excluded, and there is no statute that excludes these payments.

3. Distribution and Derivation Tables for Exclusions

As an aid to readers of this supplementary information, we are providing the following distribution and derivation tables. Table 2 is a derivation table for the ''chart'' portion of new § 3.279. It lists the provisions in previous § 3.272 that were the basis for new § 3.279. Provisions that are new to part 3 are listed as new. The derivation table providing this information in the proposed rule had one error that has been corrected here.

Tables 3 and 4 are distribution and derivation tables for previous and revised § 3.272. We note here that ''previous § 3.272'' is current until the effective date of this final rule.

TABLE 2—SECTION 3.279 DERIVATION FROM PREVIOUS § 3.272

New § 3.279	Derived from previous § 3.272 (or "New")
3.279(b)(1)	New.
3.279(b)(2)	3.272(v).
3.279(b)(3)	3.272(p).
3.279(b)(4)	New.
3.279(b)(5)	3.272(o).
3.279(b)(6)	3.272(u).
3.279(b)(7)	New.
3.279(c)(1)	New.
3.279(c)(2)	3.272(r).
3.279(c)(3) through (c)(5)	New.
3.279(c)(6)	3.272(t)
3.279(c)(7) through (d)(2)	New.
3.279(d)(3)	3.272(k).
3.279(e)(1) through (e)(9)	New.

TABLE 3—PREVIOUS § 3.272 DISTRIBUTION

Previous § 3.272	Distributed to or no change in location
3.272(a) through (j)	No change.
3.272(k)	3.279(d)(3).
3.272(l) through (n)	No change.
3.272(o)	3.279(b)(5).
3.272(p)	3.279(b)(3).
3.272(q)	3.272(o).
3.272(r)	3.279(c)(2).
3.272(s)	3.272(p).
3.272(t)	3.279(c)(6).
3.272(u)	3.279(b)(6).
3.272(v)	3.279(b)(2).
3.272(w)	Removed.
3.272(x)	3.272(q).

TABLE 4—SECTION 3.272 DERIVATION

Revised § 3.272	Derived from, no change, or "new"
3.272(a) through (f)	No change.
3.272(g), last sentence	New.
3.272(h) through (j)	No change.
3.272(k)	New.
3.272(l) through (n)	No change.
3.272(o)	Previous 3.272(q).
3.272(p)	Previous 3.272(s).
3.272(q)	Previous 3.272(x).
3.272(r)	New.
3.272(s)	New.
3.272(t)	New.

H. Discussion of Public Comments Regarding Other Matters

1. Other Regulatory Changes

One commenter stated that the supplementary information in our proposal pertaining to Medicaid-covered nursing home care for veterans, surviving spouses, and surviving children was so ''vague and convoluted as to be unintelligible.'' *See* 80 FR 3855. Although we make no changes based on the comment, we are providing additional information here for clarity. This final rule, consistent with the proposed rule, amends 38 CFR 3.551(i) and 3.503 to implement statutory changes to 38 U.S.C. 5503(d). This statute, which provides for a reduced pension rate where a pension recipient is receiving Medicaid-covered nursing home care, previously applied only to veterans and surviving spouses with no dependents, but was amended in 2010 to apply also to surviving children. 38 U.S.C. 5503(d)(5)(B). This statutory change will now be reflected in § 3.551(i). The proposed and final rule also amends the effective-date provision of § 3.503 to state that VA does not create overpayments in such cases unless there is the willful concealing of information, consistent with 38 U.S.C. 5503(d)(4). Finally, because of the multiple changes to the expiration date of section 5503(d), as proposed, final 38 CFR 3.551(i) references the statute rather than stating the specific date. We proposed to do this to avoid multiple future changes in the regulation.

One commenter took issue with our proposal to amend 38 CFR 3.277(c)(2) to replace the word ''shall'' with the permissive word ''may'' with respect to annual Eligibility Verification Reports (EVRs). *See* 80 FR 3849. The commenter believed this change would allow VA to ''target'' certain individuals, leading to a ''Big Brother'' mentality. We make no changes based on this comment because the change simply reflects the statutory terminology of 38 U.S.C. 1506. VA does not currently require annual EVRs from any pension recipient; Congress has given VA discretionary authority to require or not to require them.

One commenter expressed concern regarding that discretion, stating that an adjudicator may withhold payment if there is an appearance of fraud. Although there remains some discretion when it comes to individual adjudicators discerning fraud, we believe this rulemaking generally provides clearer guidance for pension entitlement decisions than existed previously, which will promote consistent benefit decisions, streamline processes, and constitute an important improvement over past practices. We make no change based on the comment.

2. Costs, Savings, and Time

One commenter suggested this final rule will increase annual reporting forms and reviewing documents from the past, which would lead to higher administrative costs. As stated, VA has no plans to require annual EVRs or increase the number of documents to be submitted and reviewed; thus, VA makes no changes based on this comment.

One commenter stated that VA has wasted significant amounts of time on requests for information on income matches, and elderly claimants must spend money on accountants to review records for years in which EVRs were filed. As stated, VA is not requiring annual EVRs, so we anticipate no reporting burden on all pension recipients. VA conducts income matches with the IRS and the Social Security Administration before awarding pension benefits, which reduces VA reliance on self-reported and unverified information from claimants. VA is moving toward a more streamlined claims process, which will benefit pension claimants and VA alike.

One commenter questioned if VA has considered the costs associated with this rulemaking, as well as the other requirements discussed by Executive Orders 12866 and 13563. As we stated in the proposed rule, VA's impact analysis, which includes the costs associated with this rulemaking, is published on *https://www.va.gov/ORPM/RINs_2900_AO.asp* (RIN2900–AO73). Our discussion of Executive Orders 12866 and 13563 is below.

A few commenters mentioned a November 2013 Congressional Budget Office (CBO) cost estimate for a Senate bill introduced in the 113th Congress, S. 944, which, among other things, would have enacted a 3-year look-back period for VA pension. Commenters noted that the CBO estimate showed a cost and questioned why our impact analysis for the proposed rule showed a savings. Although we are not obligated to compare the two estimates, we first note that the CBO cost estimate was based on its assumption that VA would have to hire 70 additional claims processors. VA does not believe that additional claims processors will be required; in fact, we believe that somewhat fewer claims processors will be needed, given the bright-line net worth limit implemented here that was not present in S. 944. Those personnel will be re-directed to other mission-critical activities. Second, to the extent the CBO and our impact analysis have different estimates regarding the savings to be gained through a look-back period, we reiterate here that the impetus for the look back is preserving the integrity of the pension program—consistent with Congress' directive that pension be reserved for those with financial need—not a specific desire to ''save money'' in the pension program.

One commenter noted that GAO reported that VA's asset transfer provisions would cost taxpayers more money and increase the need for additional claims processors. We make no change based on the comment; we found no evidence of GAO making such a statement and, as stated above, we do not believe more claims processors will be required under this final rule.

One commenter suggested that VA should commission an independent study to weigh administrative expense against savings. VA has completed a cost benefit analysis that analyzed the costs and savings of this rule, is not required to complete an independent study, and declines to do so.

One commenter requested that VA consult with additional professionals before implementing this rule, specifically the National Governors Association (NGA), with regard to the effect of this rule on State Medicaid budgets. We thank the commenter for the suggestion and appreciate the input; however, VA declines to consult with the NGA at this time. VA has considered the recommendations of GAO with regard to ensuring the integrity of the pension program, has heard from a variety of interested parties through the notice and comment process coincident with this rulemaking and believes that no further consultation is necessary for implementation. Another commenter recommended that we consult with additional professionals, because this rule would cause significant internal cost to VA, to include adding claims processors. We make no change based on the comment. Again, we disagree that more claims processors will be necessary, we have completed a cost benefit analysis, and we do not believe further consultation is necessary for implementation.

Several commenters stated that VA is cutting benefits to save money, instead of helping claimants receive pension benefits. However, VA is not cutting benefits; as stated, we believe that more claimants will qualify for pension under this final rule. One commenter stated that, instead of taking away veterans' benefits, legislators should assess financial penalties for those who defer military service, which the commenter argued should cover the cost of VA and our veterans' needs as well as pay the national war debt. As stated, VA is not taking away any veterans' benefits. We make no changes based on these comments.

Several commenters expressed concern that this rulemaking would discourage claimants from applying for VA pension benefits, that the rulemaking would result in unnecessary delays, and that more appeals would result. VA disagrees with these comments. VA is streamlining its claims process to increase efficiency and decrease claims processing times. VA believes that this rule provides clearer pension entitlement criteria that will encourage claimants to apply for pension and decrease appeals. Therefore, VA does not make any changes to this rulemaking based on these comments.

Several commenters referred to a purported VA estimate of an extra 30 minutes per applicant to process claims. These commenters stated that it will take more time to review 36 months of financial documents. VA does not anticipate adding an additional 30 minutes to the processing time for each application and will generally not request 36 months of financial documents. We believe the processing time for pension claims will decrease with a bright-line net worth limit and other aspects of this final rule. The Paperwork Reduction Act section of the proposed rule did state that the ''[e]stimated respondent burden'' for VA Form 21P–8416 would be 30 minutes per form (consistent with past versions of VA Form 21P–8416), but it never stated that this rulemaking would require VA claims processors to spend 30 additional minutes on each claim. We make no change based on these comments.

3. Applicability, Effective Date, and Related Matters

A commenter asked how VA would treat applicants who have a claim pending on the effective date of this final rule. As explained above in the information pertaining to asset transfers, VA will not review asset transfers that occurred before the effective date of this final rule. Moreover, as explained above in the information pertaining to medical expense definitions, the new provisions pertaining to institutional forms of care or in-home care will only apply to claimants who move to a different institution or change in-home providers. In addition, if a claimant is receiving pension on the effective date of this final rule, although his or her net worth exceeds the net worth limit under final § 3.274(a), the claimant will continue to receive pension, unless he or she loses pension for another reason. If a claimant has a pension application pending on the effective date of this final rule, VA will advise claims processors not to deny pension if the claimant's net worth is below the net worth limit under final § 3.274(a). However, an administrative determination will still be required under the previous provisions when a claimant's net worth exceeds the net worth limit. The income and asset exclusions, in final § 3.279, that we are incorporating in regulations have been statutory law for some time, and we have applied them since enacted; explicitly noting them in regulation now provides the public with one location for all the exclusions. Similarly, the Medicaid nursing home provisions in final §§ 3.551(i) and 3.503 chronicle in regulations provisions that VA has been applying since October 13, 2010, in accordance with section 606 of the Veterans Benefits Act of 2010, Public Law 111–275.

One commenter suggested that veterans of World War II or the Korean Conflict, as well as their surviving spouses, should be grandfathered in as a class of potential claimants, and all pension recipients should be exempt. We make no change based on this comment. It is unclear why those two groups in particular—or even all current recipients—should be exempt from the new rules, especially when the new rules will benefit many elderly claimants. Another commenter expressed concern that this rulemaking would permit VA to audit every claim and deny those already receiving benefits. This is not the case; VA has no intention of systematically denying benefits to claimants who are currently receiving pension benefits. Therefore, we make no change based on such comments.

Numerous commenters asked VA to extend the comment period. Consistent with existing Executive Orders, VA provided a comment period of 60 days. *See* E.O. 12866 section 6(a), 58 FR 51735, 51735 (1993) (''[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.''); E.O. 13563 section 2(b), 76 FR 3821, 3821–22 (2011) (''To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.''). VA received over 850 comments. The comments were from current and prospective VA pension claimants, individuals from the estate and financial planning industry, and others. Given the number of comments received from such a wide range of individuals, VA found that extending the comment period would not likely result in any additional information VA has not already considered in issuing this final rule. Therefore, VA declined to extend the comment period.

Several commenters stated that these rules should not be effective until one year or longer after date of publication. These commenters, however, failed to identify a compelling reason for such an extension, and we do not believe that the final rules are so onerous as to require such a delayed effective date.

4. Notice and Outreach

One commenter stated that the proposed rule contained an incorrect telephone number. The phone numbers listed in the proposed rule are the correct numbers to VA's Office of Regulation Policy and Management and Pension and Fiduciary Service. Therefore, no change to this rulemaking is warranted based on this comment.

One commenter noted that this rulemaking does not appear on the Office of Management and Budget's (OMB's) website and asked why VA has not submitted this rulemaking for review as required by Executive Orders 12866 and 13563. VA did submit this rulemaking for OMB review, and this rulemaking appears on OMB's *www.reginfo.gov* site.

One commenter stated that VA failed to provide notice of the proposed rule on social media. Another commenter believed that VA should mail out notice of the proposed rule to all veterans. One commenter requested a Senate hearing on this rulemaking. In issuing this rulemaking, VA complied with the procedural requirements of the Administrative Procedure Act. 5 U.S.C. 551–559. Section 553(b) requires that a proposed rule be published in the **Federal Register**. As previously stated, on January 23, 2015, VA published the proposed rule in the **Federal Register**. The Administrative Procedure Act does not require any agency to provide notice of a proposed rule on social media or to mail a copy of the proposed rule to the public. The Administrative Procedure Act also does not require a Senate hearing. Therefore, no change to this rulemaking is warranted based on these comments.

One commenter suggested further outreach and collaboration, and another commenter wondered how VA would make the public aware of the new eligibility requirements. Again, VA published the proposed rule in the **Federal Register** and gave a 60-day comment period. *See* 80 FR 3840. VA received over 850 comments from a wide range of individuals. VA will update its website and issue press releases to ensure the public is aware of this final rule. Therefore, no change to this rulemaking is warranted based on this comment.

Several commenters mentioned that VA should focus on outreach programs to make veterans more aware of VA pension instead of focusing on ''taking it away.'' As noted above, VA disagrees that this rule focuses on taking away veteran's benefits. Moreover, VA publishes benefit information at *http://www.benefits.va.gov,* which provides information regarding all VA benefits available to veterans, their dependents, and survivors. Information specific to VA pension is currently found at *http://www.benefits.va.gov/pension.* VA is constantly attempting to provide outreach to veterans, consistent with the statutory authority for outreach found at 38 U.S.C. chapter 63. Inasmuch as this final rule does not pertain to chapter 63, we make no changes to the rule based on the comments pertaining to this matter.

Several commenters seemed to believe that VA is amending its pension program through an Executive Order. VA is amending its regulations through the rulemaking process that is governed by the Administrative Procedure Act. *See* 5 U.S.C. 551–559. In the preamble to the proposed rule and in this document, VA addressed Executive Orders 12866 and 13563, but these orders are not the authority for issuing regulations. Therefore, no change to this rulemaking is warranted based on these comments.

One commenter wanted to know what is being done to make sure claims are granted properly now and in the future. VA is continuously working with regional office personnel to make sure claims are processed properly. We make no change based on this comment.

5. Accreditation, Financial Advisors, and Related Matters

A few commenters seemed to think that this rulemaking would eliminate the involvement of attorneys and financial advisors from assisting VA claimants in applying for VA benefits. A few commenters stated that VA should regulate how financial advisors and organizations are allowed to assist veterans with their claims for VA benefits. While these comments pertain more to VA's accreditation program than its pension program, it is important to note that VA does regulate those who assist on veterans' claims through its rules pertaining to accreditation. 38 CFR

14.626–14.636. In order to assist ''in the preparation, presentation, and prosecution of claims for VA benefits,'' an individual must be accredited by VA. 38 CFR 14.629(b)(1). VA does not accredit individuals for the purpose of promoting their separate business interests, such as marketing financial products. Accreditation is granted solely for the purpose of assisting VA claimants with their claims for VA benefits. *See* 38 CFR 14.626. Those who are accredited are held to standards of conduct prohibiting fraud, deception, and other unlawful or unethical conduct. 38 CFR 14.632. While VA cannot predict the effect of this final rule on the number of financial advisors assisting with claims, there is no reason to believe that it will impact the number of VA accredited representatives available to assist with claims. No change to this rulemaking is warranted based on these comments.

Several commenters suggested that VA should focus on ensuring that VA accredited representatives are competent and preventing unaccredited individuals from assisting VA claimants and charging for their services. One commenter noted that States have the authority to investigate those individuals who sell unsuitable financial products to consumers. Others expressed similar sentiment that VA should focus on pension poaching organizations, rather than ''penalizing'' claimants. VA takes the accreditation of representatives very seriously and, as noted above, has implemented regulatory provisions governing the accreditation program (outside of this rulemaking). *See* 38 CFR 14.626–14.636; *see, e.g.,* 73 FR 29852 (2008). VA does not recognize an unaccredited individual as a claimant's representative. If VA determines that an unaccredited individual is assisting claimants with applications for VA benefits, VA notifies such individual to cease the unlawful practice. If VA determines that an accredited individual is improperly charging a fee or violating its standards of conduct, VA may suspend or cancel the individual's accreditation. *See* 38 CFR 14.633.

If individuals fail to cease an unlawful practice, VA will report to Federal, State, or local agencies or offices that enforce unauthorized practice, unfair business practice, or consumer or senior fraud laws. Over the past year, VA has enhanced its coordination with the U.S. Department of Justice, the Federal Trade Commission, and State Attorney General offices to combat ''pension poaching'' and other scams targeting veterans and their family members. VA coordination with enforcement agencies is the best response to unauthorized or unlawful practices in this realm. This rulemaking does not in any way detract from these efforts; therefore, VA is not making any changes to this rulemaking based on these comments.

Several commenters stated that this rulemaking would make applying for pension benefits more difficult. The commenters believed the more difficult application process would drive claimants to seek out advice from consultants and estate planning attorneys, which would increase abuse. To prevent such abuse, one commenter recommended allowing VA accredited agents and attorneys to charge fees for assisting with a claimant's initial application. VA disagrees that this rulemaking makes applying for pension benefits more difficult. With this rulemaking, VA is providing additional guidance on the qualifying criteria and allowable medical expenses beyond what is currently available. Claimants have the option to seek assistance from VA accredited representatives, and we see no reason why VA claimants will have a more difficult time finding representation. Moreover, VA is bound by the statutory prohibition of representatives charging fees at the time of initial application. 38 U.S.C. 5904(c). Therefore, VA does not make any changes to this rulemaking based on these comments.

6. Outside the Scope

Several commenters made statements regarding their own claim for benefits. These comments are outside the scope of this rulemaking, and, therefore, VA makes no changes based on these comments. One commenter spoke in support of equitable relief for claimants who encounter unique situations, citing an example of a claimant who inherited money from a child and lost pension entitlement even though the claimant used the money to pay the child's burial expenses and distributed the remainder to siblings. While we do note that equitable relief is available for certain cases under 38 U.S.C. 503, this comment is outside the scope of this rulemaking; therefore, VA makes no change to the final rule based on it.

One commenter asked that VA consider providing in its pension award letters a break-down of VA pension benefits between the portion considered to be basic pension and the portion considered to be the additional A&A allowance for purposes of reporting income to State and local agencies. This comment is outside the scope of this rulemaking, which does not pertain to decision award letters; therefore, VA makes no change to the final rule based on it.

I. Technical Corrections

We are making a technical correction to § 3.262(t) to include the authority citation, which was inadvertently omitted from the proposed rule.

We are making a technical correction to § 3.270. The proposed revisions to § 3.270 were stated incorrectly in the proposed rule. *See* 80 FR 3857. Section 3.270 is a regulation that tells readers which sections apply to current-law pension and which sections apply to VA's other needs-based benefits. The error pertained to a distinction between the word ''to'' and the word ''through.'' For example, the previous heading for paragraph (a) was ''Sections 3.250 to 3.270.'' This meant § 3.250 and up to (but not including) § 3.270 apply to VA's older programs. We erroneously proposed to amend the paragraph title as ''Sections 3.250 through 3.270 and sections 3.278 through 3.279.'' This was an error because § 3.270 describes the applicability but does not itself apply to any benefit. Similarly, the previous heading for paragraph (b) was ''Sections 3.271 to 3.300.'' We erroneously proposed to amend the heading to ''Sections 3.271 through 3.300.'' Section 3.300, ''Claims based on the effects of tobacco products,'' does not pertain to any needs-based benefit. This final rule clarifies that §§ 3.250 through 3.263 and §§ 3.278 through 3.279 apply to benefit programs that were in effect before January 1, 1979, and §§ 3.271 through 3.279 apply to current-law pension.

We are making a technical correction to §§ 3.274(a) and 3.278(c)(4) to insert the VA website address where VA will publish the net worth limit and the privately owned vehicle mileage reimbursement rate. The proposed rule simply used a placeholder for a to-be-determined VA website address. Moreover, we inadvertently omitted headers in proposed §§ 3.274(b)(1), 3.275(b)(1) and (b)(2); this final rule corrects those omissions.

We are making a technical correction to proposed § 3.274(e), which as proposed included a heading at § 3.274(e)(3). On review, the information contained in proposed § 3.274(e)(3) was more appropriate as a note to paragraph (e), and we have re-designated it accordingly. Therefore, final § 3.274(e) does not include the introductory language, ''[e]xcept as provided in paragraph (e)(3) of this section,'' because final § 3.274 does not contain a paragraph (e)(3). Moreover, final § 3.274(f)(3) and (4) have been slightly altered, in a non-substantive way, for readability.

Final § 3.275(b)(1)(ii)(B) and (C) are slightly different than proposed in order to conform to final § 3.278. Final § 3.275(b)(1)(ii)(B) refers to ''[a] care facility other than a nursing home'' instead of ''[a]n assisted living or similar residential facility that provides custodial care,'' to accord with the new title of § 3.278(d)(3). Final § 3.275(b)(1)(ii)(C) refers to ''[t]he home of a family member for health care or custodial care'' instead of ''[t]he home of a family member for custodial care'' to accord with the new language of § 3.278(d)(2).

Proposed § 3.276(b) mistakenly referenced § 3.277(b) as VA's authority to obtain additional documentation necessary to determine the annual income and the value of the corpus of the estate. That authority is actually in § 3.277(a), and final § 3.276(b) corrects this mistake. We also updated the examples in paragraphs (a)(3) and (4) of proposed (now final) § 3.276.

We are making a technical correction to § 3.278(b)(1) by changing the proposed conjunction between (i) and (ii). We are spelling out the acronym ''aka'' used in proposed § 3.279(a), and making a technical correction to § 3.279(e)(9) to correctly refer to subchapter I instead of subchapter 1 as the authority for excluding as income annuities received under the Retired Serviceman's Family Protection Plan.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid OMB control number. *See also* 5 CFR 1320.8(b)(3)(vi).

In the proposed rule, we stated that proposed 38 CFR 3.276 and 3.278 constitutes a collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). We also noted in the proposed rule that VA submitted a copy of the proposed rule to OMB for its review of the collection of information, and requested public comments on the collection of information provisions contained in 38 CFR 3.276 and 38 CFR 3.278.

VA received a comment stating that neither the pension application nor development forms request information regarding living expenses. A claimant's completion of VA Form 21–8049, Request for Details of Expenses (OMB Control number 2900–0161), has been an administrative requirement for claims processors to make net worth determinations. VA agrees with the comment that some of the information requested on this form will no longer be necessary for net worth determinations. Therefore, VA determined the information collection from VA Form 21P–8049, Request for Details of Expenses (OMB control number 2900–0107), is no longer necessary and VA will discontinue use of the form. The discontinuance of this form will be pursued through a separate administrative action. Considering the last PRA approval usage and the discontinuation of the form, there will be an estimated decrease in burden hours by 5,700 and an annual incremental information burden cost savings of $136,002.00.

Under 38 CFR 3.276, the collections of information are currently approved by OMB under the assigned OMB control numbers 2900–0001, 2900–0002 and 2900–0004. Specifically, under 38 CFR 3.276, claimants would be required to report to VA whether they have transferred assets within the 3 years prior to claiming pension or anytime thereafter and if so, information about those assets.

Prior to the creation of the Fully Developed Claims (FDC) program, all initial applications for Veterans Compensation and/or Pension claims had to be filed using VA Form 21–526 (OMB Control Number 2900–0001). In the administration of the FDC program, VA created two new, streamlined forms: VA Form 21–526EZ for Veterans Compensation claims (now under OMB Control Number 2900–0747) and VA Form 21P–527EZ for Veterans Pension claims (now under OMB Control Number 2900–0002). The creation and use of those two forms has resulted in the obsolescence of VA Form 21–526. Therefore, VA is pursuing discontinuance of VA Form 21–526.

For VA Form 21P–527EZ (OMB control number 2900–0002), VA estimates 839 new claimants/respondents in 2018, which represents the Veteran portion of the total caseload impacted by provisions under 38 CFR 3.276. The estimated completion time remains 30 minutes. VA therefore estimates the total incremental information collection burden costs to claimants/respondents to be $14,409.28 (592 burden hour × $24.34 per hour).

For VA Form 21P–534EZ (OMB control number 2900–0004), VA estimates 1,617 new claimants/respondents in 2018, which represents the survivor portion of the total caseload impacted by the provisions under 38 CFR 3.276. The completion time for VA Form 21P–534EZ remains 30 minutes. VA therefore estimates the total incremental information collection burden costs to claimants/respondents to be $16,648.56 (684 burden hour × $24.34 per hour).

Under 38 CFR 3.278, the collections of information are currently approved by OMB under the assigned OMB control numbers 2900–0161. Specifically, under proposed 38 CFR 3.278, claimants would be required to submit information pertaining to their medical expenses. Certain claimants would also be required to submit evidence that they need custodial care or assistance with activities of daily living.

We are adding a parenthetical statement after the authority citations in the amendatory language of this final rule to all of the sections containing information collections, so that the control numbers are displayed for each information collection.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule will directly affect only individuals and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the final regulatory flexibility analysis requirements of section 604.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action'' requiring review by OMB, unless OMB waives such review, as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined to be a significant regulatory action under Executive Order 12866 because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order. VA's revised impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at *http://www.va.gov/orpm* by following the link for 'VA Regulations Published.

This rule is considered an Executive Order 13771 deregulatory action. The estimated cost savings of the rule, expressed in 2016 dollars and discounted back to the 2016 equivalent, is $0.0937 million.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this final rule are 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the **Federal Register** for publication electronically as an official document of the Department of Veterans Affairs. Jacquelyn Hayes-Byrd, Acting Chief of Staff, Department of Veterans Affairs, approved this document on June 4, 2018, for publication.

Dated: September 9, 2018.

Michael P. Shores,

Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Pensions, Veterans.

For the reasons set forth in the preamble, VA amends 38 CFR part 3 as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

■ 1. The authority citation for part 3, subpart A, continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

■ 2. Amend the table in § 3.261(a) as follows:

■ a. Remove entries (35) through (37) and (39) through (42).

■ b. Redesignate entry (38) as entry (35).

■ c. Revise newly redesignated entry (35).

■ d. Add entries (36) and (37).

The revision and additions read as follows:

§ 3.261 Character of income; exclusions and estates.

* * * * *

(a) * * *

Income	Dependency (parents)	Dependency and indemnity compensation (parents)	Pension: old-law (veterans, surviving spouses and children)	Pension: section 306 (veterans, surviving spouses and children)	See—
*	*	*	*	*	*
(35) Income received under Section 6 of the Radiation Exposure Compensation Act (Pub. L. 101–426).	Excluded	Excluded	Included	Included	§ 3.262(t)
(36) Income received from income tax returns	Excluded	Excluded	Excluded	Excluded	§ 3.262(u)
(37) Other amounts excluded from income by statute	Excluded	Excluded	Excluded	Excluded	§ 3.262(v) § 3.279

* * * * *

■ 3. Amend § 3.262 as follows:

■ a. Add a sentence to the end of paragraph (l) introductory text.

■ b. Remove paragraphs (s), (u), (v), (x), (y), (z), and (aa).

■ c. Redesignate paragraphs (t) and (w) as paragraphs (s) and (t), respectively.

■ d. Revise newly redesignated paragraph (t).

■ e. Add new paragraphs (u) and (v).

The additions and revision read as follows:

§ 3.262 Evaluation of income.

* * * * *

(l) * * * For the definition of what constitutes a medical expense, see § 3.278, Deductible medical expenses.

* * * * *

(t) *Radiation Exposure Compensation Act.* For the purposes of parents' dependency and indemnity compensation and dependency of parents under § 3.250, there shall be excluded from income computation payments under Section 6 of the Radiation Exposure Compensation Act of 1990.

(Authority: 42 U.S.C. 2210 note)

(u) *Income tax returns.* VA will exclude from income payments from income tax returns. See § 3.279(e)(1).

(Authority: 26 U.S.C. 6409)

(v) *Statutory exclusions.* Other amounts excluded from income by statute. See § 3.279. VA will exclude from income any amount designated by statute as not countable as income, regardless of whether or not it is listed in this section or in § 3.279.

■ 4. Amend § 3.263 as follows:
■ a. Remove paragraphs (e), (f), (g), (h), and (i).
■ b. Add new paragraph (e).

The addition reads as follows:

§ 3.263 Corpus of estate; net worth.

* * * * *

(e) VA will exclude from the corpus of estate or net worth any amount designated by statute as not countable as a resource. See § 3.279.

* * * * *

§ 3.270 [Amended]

■ 5. Amend § 3.270 as follows:
■ a. In the heading to paragraph (a) by removing ''3.250 to 3.270'' and adding in its place ''3.250 through 3.263 and 3.278 through 3.279.''
■ b. In the note to paragraph (a) by removing ''§§ 3.250 to 3.270'' and adding in its place ''§§ 3.250 through 3.263 and 3.278 through 3.279''.
■ c. In the heading to paragraph (b) by removing ''3.271 to 3.300'' and adding in its place ''3.271 through 3.279.''

■ 6. Amend § 3.271 by adding paragraph (i) to read as follows:

§ 3.271 Computation of income.

* * * * *

(i) *Waiver of receipt of income.* Potential income that is not excludable under § 3.272 or § 3.279 but is waived by an individual is included as countable income of the individual. However, if an individual withdraws a claim for Social Security benefits, after a finding of entitlement to those benefits, in order to maintain eligibility for unreduced Social Security benefits upon reaching a particular age, VA will not regard this potential income as having been waived and will therefore not count it.

(Authority: 38 U.S.C. 1503(a))

■ 7. Amend § 3.272 as follows:
■ a. Add a sentence to the end of paragraph (g) introductory text.
■ b. Remove paragraphs (k), (o), (p), (r), (t), (u), (v), and (w).
■ c. Add new paragraph (k).
■ d. Redesignate paragraphs (q), (s), and (x) as paragraphs (o), (p), and (q), respectively.
■ e. Revise the authority citation in newly redesignated paragraph (q).
■ f. Add new paragraphs (r), (s), and (t).

The additions and revision read as follows:

§ 3.272 Exclusions from income.

* * * * *

(g) * * * For the definition of what constitutes a medical expense, see § 3.278, Deductible medical expenses.

* * * * *

(k) *Veterans' benefits from States and municipalities.* VA will exclude from income payments from a State or municipality to a veteran of a monetary benefit that is paid as a veterans' benefit due to injury or disease. VA will exclude up to $5,000 of such benefit in any annualization period.

(Authority: 38 U.S.C. 1503(a)(11))

* * * * *

(q) * * *

(Authority: 38 U.S.C. 1503(a)(12))

(r) *Income tax returns.* VA will exclude from income payments from income tax returns. See § 3.279(e)(1).

(Authority: 26 U.S.C. 6409)

(s) *Reimbursements for loss.* VA will exclude from income payments described in 38 U.S.C. 1503(a)(5).

(Authority: 38 U.S.C. 1503(a)(5))

(t) *Statutory exclusions.* Other amounts excluded from income by statute. See § 3.279. VA will exclude from income any amount designated by statute as not countable as income, regardless of whether or not it is listed in this section or in § 3.279.

■ 8. Revise § 3.274 to read as follows:

§ 3.274 Net worth and VA pension.

(a) *Net worth limit.* For purposes of entitlement to VA pension, the net worth limit effective October 18, 2018 is $123,600. This limit will be increased by the same percentage as the Social Security increase whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of title II of the Social Security Act (42 U.S.C. 415(i)). VA will publish the current limit on its website at *www.benefits.va.gov/pension/.*

(b) *When a claimant's or beneficiary's net worth exceeds the limit.* Except as provided in paragraph (h)(2) of this section, VA will deny or discontinue pension if a claimant's or beneficiary's net worth exceeds the net worth limit in paragraph (a) of this section.

(1) *Net worth.* Net worth means the sum of a claimant's or beneficiary's assets and annual income.

(2) *Asset calculation.* VA will calculate a claimant's or beneficiary's assets under this section and § 3.275.

(3) *Annual income calculation.* VA will calculate a claimant's or beneficiary's annual income under § 3.271, and will include the annual income of dependents as required by law. *See* §§ 3.23(d)(4), 3.23(d)(5), and 3.24 for more information on annual income included when VA calculates a claimant's or beneficiary's pension entitlement rate. In calculating annual income for this purpose, VA will subtract all applicable deductible expenses, to include appropriate prospective medical expenses under § 3.272(g).

(4) *Example of net worth calculation.* For purposes of this example, presume the net worth limit is $123,600. A claimant's assets total $117,000 and annual income is $9,000. Therefore, adding the claimant's annual income to assets produces net worth of $126,000. This amount exceeds the net worth limit.

(c) *Assets of other individuals included as claimant's or beneficiary's assets*—(1) *Claimant or beneficiary is a veteran.* A veteran's assets include the assets of the veteran as well as the assets of his or her spouse, if the veteran has a spouse.

(2) *Claimant or beneficiary is a surviving spouse.* A surviving spouse's assets include only the assets of the surviving spouse.

(3) *Claimant or beneficiary is a surviving child.* (i) If a surviving child has no custodian or is in the custody of an institution, the child's assets include only the assets of the child.

(ii) If a surviving child has a custodian other than an institution, the child's assets include the assets of the child as well as the assets of the custodian. If the child is in the joint custody of his or her natural or adoptive parent and a stepparent, the child's assets also include the assets of the stepparent. *See* § 3.57(d) for more information on child custody for pension purposes.

(d) *How a child's net worth affects a veteran's or surviving spouse's pension entitlement.* VA will not consider a child to be a veteran's or surviving spouse's dependent child for pension purposes if the child's net worth exceeds the net worth limit in paragraph (a) of this section.

(1) *Dependent child and potential dependent child.* For the purposes of this section—

(i) ''Dependent child'' refers to a child for whom a veteran or a surviving spouse is entitled to an increased maximum annual pension rate.

(ii) ''Potential dependent child'' refers to a child who is excluded from a veteran's or surviving spouse's pension award solely or partly because of this paragraph (d). References in this section to ''dependent child'' include a potential dependent child.

(2) *Dependent child net worth.* A dependent child's net worth is the sum of his or her annual income and the value of his or her assets.

(3) *Dependent child asset calculation.* VA will calculate the value of a dependent child's assets under this section and § 3.275. A dependent child's assets include the child's assets only.

(4) *Dependent child annual income calculation.* VA will calculate a dependent child's annual income under § 3.271, and will include the annual income of the child as well as the annual income of the veteran or surviving spouse that would be included if VA were calculating a pension entitlement rate for the veteran or surviving spouse.

(e) *When VA calculates net worth.* VA calculates net worth only when:

(1) VA has received—

(i) An original pension claim;

(ii) A new pension claim after a period of non-entitlement;

(iii) A request to establish a new dependent; or

(iv) Information that a veteran's, surviving spouse's, or child's net worth has increased or decreased; and

(2) The claimant or beneficiary meets the other factors necessary for pension entitlement as provided in § 3.3(a)(3) and (b)(4).

Note to Paragraph (e). If the evidence shows that net worth exceeds the net worth limit, VA may decide the pension claim before determining if the claimant meets other entitlement factors. VA will notify the claimant of the entitlement factors that have not been established.

(f) *How net worth decreases.* Net worth may decrease in three ways: Assets can decrease, annual income can decrease, or both assets and annual income can decrease.

(1) *How assets decrease.* A veteran, surviving spouse, or child, or someone acting on their behalf, may decrease assets by spending them on any item or service for which fair market value is received unless the item or items purchased are themselves part of net worth. *See* § 3.276(a)(4) for the definition of ''fair market value.'' The expenses must be those of the veteran, surviving spouse, or child, or a relative of the veteran, surviving spouse, or child. The relative must be a member or constructive member of the veteran's, surviving spouse's, or child's household.

(2) *How annual income decreases. See* §§ 3.271 through 3.273.

(3) *Example 1.* For purposes of this example, presume the net worth limit is $123,600 and the maximum annual pension rate (MAPR) is $12,000. A claimant has assets of $115,000 and annual income of $9,000. Adding annual income to assets produces a net worth of $124,000, which exceeds the net worth limit. However, the claimant is a patient in a nursing home and pays annual unreimbursed nursing home fees of $29,000. Reasonably predictable unreimbursed medical expenses are deductible from annual income under § 3.272(g) to the extent that they exceed 5 percent of the applicable MAPR. VA subtracts the projected expenditures that exceed 5 percent of the applicable MAPR (here, $28,400) from annual income, which decreases annual income to zero. The claimant's net worth is now $115,000; therefore, net worth is within the limit to qualify for VA pension.

(4) *Example 2.* For purposes of this example, presume the net worth limit is $123,600 and the MAPR is $12,000. A claimant has assets of $123,000 and annual income of $9,500. Adding annual income to assets produces a net worth of $132,500, which exceeds the net worth limit. The claimant pays reasonably predictable annual unreimbursed medical expenses of $9,000. Unreimbursed medical expenses are deductible from annual income under § 3.272(g) to the extent that they exceed 5 percent of the applicable MAPR. VA subtracts the projected expenditures that exceed 5 percent of the applicable MAPR (here, $8,400) from annual income, which decreases annual income to $1,100. This decreases net worth to $124,100, which is still over the limit. VA must deny the claim for excessive net worth.

(g) *Effective dates of pension entitlement or increased entitlement after a denial, reduction, or discontinuance based on excessive net worth*—(1) *Scope of paragraph.* This paragraph (g) applies when VA has:

(i) Discontinued pension or denied pension entitlement for a veteran, surviving spouse, or surviving child based on the veteran's, surviving spouse's, or surviving child's excessive net worth; or

(ii) Reduced pension or denied increased pension entitlement for a veteran or surviving spouse based on a dependent child's excessive net worth.

(2) *Effective date of entitlement or increased entitlement.* The effective date of entitlement or increased entitlement is the day net worth ceases to exceed the limit. For this effective date to apply, the claimant or beneficiary must submit a certified statement that net worth has decreased and VA must receive the certified statement before the pension claim has become finally adjudicated under § 3.160. This means that VA must receive the certified statement within 1 year after its decision notice to the claimant concerning the denial, reduction, or discontinuance unless the claimant appeals VA's decision. Otherwise, the effective date is the date VA receives a new pension claim. In accordance with § 3.277(a), VA may require the claimant or beneficiary to submit additional evidence as the individual circumstances may require.

(h) *Reduction or discontinuance of beneficiary's pension entitlement based on excessive net worth*—(1) *Effective date of reduction or discontinuance.* When an increase in a beneficiary's or dependent child's net worth results in a pension reduction or discontinuance because net worth exceeds the limit, the effective date of reduction or discontinuance is the last day of the calendar year in which net worth exceeds the limit.

(2) *Net worth decreases before the effective date.* If net worth decreases to the limit or below the limit before the effective date provided in paragraph (h)(1) of this section, VA will not reduce or discontinue the pension award on the basis of excessive net worth.

(i) *Additional effective-date provisions for dependent children*—(1) *Establishing a dependent child on veteran's or surviving spouse's pension award results in increased pension entitlement.* When establishing a dependent child on a veteran's or surviving spouse's pension award results in increased pension entitlement for the veteran or surviving spouse, VA will apply the effective-date provisions in paragraphs (g) and (h) of this section.

(2) *Establishing a dependent child on veteran's or surviving spouse's pension award results in decreased pension entitlement.* (i) When a dependent child's non-excessive net worth results in decreased pension entitlement for the veteran or surviving spouse, the effective date of the decreased pension entitlement rate (*i.e.,* VA action to add the child to the award) is the end of the year that the child's net worth decreases.

(ii) When a dependent child's excessive net worth results in increased pension entitlement for the veteran or surviving spouse, the effective date of the increased pension entitlement rate (*i.e.,* VA action to remove the child from the award) is the date that VA receives a claim for an increased rate based on the child's net worth increase.

(Authority: 38 U.S.C. 1522, 1543, 5110, 5112)

■ 9. Revise § 3.275 to read as follows:

§ 3.275 How VA determines the asset amount for pension net worth determinations.

(a) *Definitions pertaining to assets*—(1) *Assets.* The term *assets* means 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, less the amount of mortgages or other encumbrances specific to the mortgaged or encumbered property. VA will consider the terms of the recorded deed or other evidence of title to be proof of ownership of a particular asset. *See also* § 3.276(a)(4), which defines ''fair market value.''

(2) *Claimant.* (i) Except as provided in paragraph (a)(2)(ii) of this section, for the purposes of this section and § 3.276, *claimant* means a pension beneficiary, a dependent spouse, or a dependent or potential dependent child as described in § 3.274(d), as well as a veteran, surviving spouse, or surviving child pension applicant.

(ii) For the purpose of paragraph (b)(1) of this section, *claimant* means a pension beneficiary or applicant who is a veteran, a surviving spouse, or a surviving child.

(3) *Residential lot area.* For purposes of this section, *residential lot area* means the lot on which a residence sits that does not exceed 2 acres (87,120 square feet), unless the additional acreage is not marketable.

(b) *Exclusions from assets.* Assets do not include the following:

(1) *Primary residence.* The value of a claimant's primary residence (single-family unit), including the residential lot area, in which the claimant has an ownership interest. VA recognizes one primary residence per claimant. If the residence is sold after pension entitlement is established, any net proceeds from the sale is an asset except to the extent the proceeds are used to purchase another residence within the same calendar year as the year in which the sale occurred.

(i) *Personal mortgage not deductible.* VA will not subtract from a claimant's assets the amount of any mortgages or encumbrances on a claimant's primary residence.

(ii) *Claimant not residing in primary residence.* Although rental income counts as annual income as provided in § 3.271(d), VA will not include a claimant's primary residence as an asset even if the claimant resides in any of the following as defined in § 3.278(b):

(A) A nursing home or medical foster home;

(B) A care facility other than a nursing home; or

(C) The home of a family member for health care or custodial care.

(2) *Personal effects.* Value of personal effects suitable to and consistent with a reasonable mode of life, such as appliances and family transportation vehicles.

(3) *Radiation Exposure Compensation Act payments.* Payments made under section 6 of the Radiation Exposure Compensation Act of 1990.

(Authority: 42 U.S.C. 2210 (note))

(4) *Ricky Ray Hemophilia Relief Fund payments.* Payments made under section 103(c) and excluded under section 103(h)(2) of the Ricky Ray Hemophilia Relief Fund Act of 1998.

(Authority: 42 U.S.C. 300c–22 (note))

(5) *Energy Employees Occupational Illness Compensation Program payments.* Payments made under the Energy Employees Occupational Illness Compensation Program.

(Authority: 42 U.S.C. 7385e(2))

(6) *Payments to Aleuts.* Payments made to certain Aleuts under 50 U.S.C. App. 1989c–5.

(Authority: 50 U.S.C. App. 1989c–5(d)(2))

(7) *Statutory exclusions.* Other amounts excluded from assets by statute. See § 3.279. VA will exclude from assets any amount designated by statute as not countable as a resource, regardless of whether or not it is listed in this section or in § 3.279.

(Authority: 38 U.S.C. 1522, 1543)

■ 10. Revise § 3.276 to read as follows:

§ 3.276 Asset transfers and penalty periods.

(a) *Asset transfer definitions.* For purposes of this section—

(1) *Claimant* has the same meaning as defined in § 3.275(a)(2)(i).

(2) *Covered asset* means an asset that—

(i) Was part of a claimant's net worth;

(ii) Was transferred for less than fair market value; and

(iii) If not transferred, would have caused or partially caused the claimant's net worth to exceed the net worth limit under § 3.274(a).

(3) *Covered asset amount* means the monetary amount by which a claimant's net worth would have exceeded the limit due to the covered asset alone if the uncompensated value of the covered asset had been included in net worth.

(i) *Example 1.* For purposes of this example, presume the net worth limit under § 3.274(a) is $123,600. A claimant's assets total $115,900 and his annual income is zero. However, the claimant transferred $30,000 by giving it to a friend. If the claimant had not transferred the $30,000, his net worth would have been $145,900, which exceeds the net worth limit. The claimant's covered asset amount is $22,300, because this is the amount by which the claimant's net worth would have exceeded the limit due to the covered asset.

(ii) *Example 2.* For purposes of this example, presume the net worth limit under § 3.274(a) is $123,600. A claimant's annual income is zero and her total assets are $125,000, which exceeds the net worth limit. In addition, the claimant transferred $30,000 by giving $20,000 to her married son and giving $10,000 to a friend. The claimant's covered asset amount is $30,000 because this is the amount by which the claimant's net worth would have exceeded the limit due to the covered assets alone.

(4) *Fair market value* means 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. VA will use the best available information to determine fair market value, such as inspections, appraisals, public records, and the market value of similar property if applicable.

(5) *Transfer for less than fair market value* means—

(i) Selling, conveying, gifting, or exchanging an asset for an amount less than the fair market value of the asset; or

(ii) A voluntary asset transfer to, or purchase of, any financial instrument or investment that reduces net worth by transferring the asset to, or purchasing, the instrument or investment unless the claimant establishes that he or she has the ability to liquidate the entire balance of the asset for the claimant's own benefit. If the claimant establishes that the asset can be liquidated, the asset is included as net worth. Examples of such instruments or investments include—

(A) *Annuities. Annuity* means a financial instrument that provides income over a defined period of time for an initial payment of principal.

(B) *Trusts. Trust* means a legal instrument 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 grantor's own benefit or for the benefit of another individual.

(6) *Uncompensated value* means the difference between the fair market value of an asset and the amount of compensation an individual receives for it. In the case of a trust, annuity, or other financial instrument or investment described in paragraph (a)(5)(ii) of this section, *uncompensated value* means the amount of money or the monetary value of any other type of asset transferred to such a trust, annuity, or other financial instrument or investment.

(7) *Look-back period* means the 36-month period immediately preceding the date on which VA receives either an original pension claim or a new pension claim after a period of non-entitlement. This definition does not include any date before October 18, 2018.

(8) *Penalty period* means a period of non-entitlement, calculated under paragraph (e) of this section, due to transfer of a covered asset.

(b) *General statement of policy pertaining to pension and covered assets.* VA pension is a needs-based benefit and is not intended to preserve the estates of individuals who have the means to support themselves. Accordingly, a claimant may not create pension entitlement by transferring covered assets. VA will review the terms and conditions of asset transfers made during the 36-month look-back period to determine whether the transfer constituted transfer of a covered asset. However, VA will disregard asset transfers made before October 18, 2018. In accordance with § 3.277(a), for any asset transfer, VA may require a claimant to provide evidence such as a Federal income tax return transcript, the terms of a gift, trust, or annuity, or the terms of a recorded deed or other evidence of title.

(c) *Exception for transfers as a result of fraud or unfair business practice.* An asset transferred as the result of fraud, misrepresentation, or unfair business practice related to the sale or marketing of financial products or services for purposes of establishing entitlement to VA pension will not be considered a covered asset. Evidence supporting this exception may include, but is not limited to, a complaint contemporaneously filed with State, local, or Federal authorities reporting the incident.

(d) *Exception for transfers to certain trusts.* VA will not consider as a covered asset an asset that a veteran, a veteran's spouse, or a veteran's surviving spouse transfers to a trust established on behalf of a child of the veteran if:

(1) VA rates or has rated the child incapable of self-support under § 3.356; and

(2) There is no circumstance under which distributions from the trust can be used to benefit the veteran, the veteran's spouse, or the veteran's surviving spouse.

(e) *Penalty periods and calculations.* When a claimant transfers a covered asset during the look-back period, VA will assess a penalty period not to exceed 5 years. VA will calculate the length of the penalty period by dividing the total covered asset amount by the monthly penalty rate described in paragraph (e)(1) of this section and rounding the quotient down to the nearest whole number. The result is the number of months for which VA will not pay pension.

(1) *Monthly penalty rate.* The monthly penalty rate is the maximum annual pension rate (MAPR) under 38 U.S.C. 1521(d)(2) for a veteran in need of aid and attendance with one dependent that is in effect as of the date of the pension claim, divided by 12, and rounded down to the nearest whole dollar. The monthly penalty rate is located on VA's website at *www.benefits.va.gov/pension.*

(2) *Beginning date of penalty period.* When a claimant transfers a covered asset or assets during the look-back period, the penalty period begins on the first day of the month that follows the date of the transfer. If there was more than one transfer, the penalty period will begin on the first day of the month that follows the date of the last transfer.

(3) *Entitlement upon ending of penalty period.* VA will consider that the claimant, if otherwise qualified, is entitled to benefits effective the last day of the last month of the penalty period, with a payment date as of the first day of the following month in accordance with § 3.31.

(4) *Example of penalty period calculation.* VA receives a pension claim in November 2018. The claimant's net worth is equal to the net worth limit. However, the claimant transferred covered assets totaling $10,000 on August 20, 2018, and September 23, 2018. Therefore, the total covered asset amount is $10,000, and the penalty period begins on October 1, 2018. Assume the MAPR for a veteran in need of aid and attendance with one dependent in effect in November 2018 is $24,000. The monthly penalty rate is $2,000. The penalty period is $10,000/ $2,000 per month = 5 months. The fifth month of the penalty period is February 2019. The claimant may be entitled to pension effective February 28, 2019, with a payment date of March 1, 2019, if other entitlement requirements are met.

(5) *Penalty period recalculations.* VA will not recalculate a penalty period under this section unless—

(i) The original calculation is shown to be erroneous; or

(ii) VA receives evidence showing that some or all covered assets were returned to the claimant before the date of claim or within 60 days after the date of VA's notice to the claimant of VA's decision concerning the penalty period. If covered assets are returned to the claimant, VA will recalculate or eliminate the penalty period. For this exception to apply, VA must receive the evidence not later than 90 days after the date of VA's notice to the claimant of VA's decision concerning the penalty period. Once covered assets are returned, a claimant may reduce net worth at the time of transfer under the provisions of § 3.274(f).

(Authority: 38 U.S.C. 1522, 1543, 1506(1))

(The Office of Management and Budget has approved the information collection requirement in this section under control numbers 2900–0002, and 2900–0004.)

§ 3.277 [Amended]

■ 11. Amend § 3.277(c)(2) introductory text by removing "shall" and adding in its place "may".

■ 12. Add § 3.278 to read as follows:

§ 3.278 Deductible medical expenses.

(a) *Scope.* This section identifies medical expenses that VA may deduct from countable income for purposes of three of its needs-based programs: Pension, section 306 pension, and parents' dependency and indemnity compensation (DIC). Payments for such medical expenses must be unreimbursed to be deductible from income.

(b) *Definitions.* For the purposes of this section—

(1) *Health care provider* means:

(i) An individual licensed by a State or country to provide health care in the State or country in which the individual provides the health care. The term includes, but is not limited to, a physician, physician assistant, psychologist, chiropractor, registered nurse, licensed vocational nurse, licensed practical nurse, and physical or occupational therapist; or

(ii) A nursing assistant or home health aide who is supervised by a licensed health care provider as defined in paragraph (b)(1)(i) of this section.

(2) *Activities of daily living (ADLs)* mean basic self-care activities and consist of bathing or showering, dressing, eating, toileting, transferring,

and ambulating within the home or living area. *Transferring* means an individual's moving himself or herself from one position to another, such as getting in and out of bed.

(3) *Instrumental activities of daily living (IADLs)* mean independent living activities, such as shopping, food preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes.

(4) *Custodial care* means regular:

(i) Assistance with two or more ADLs; or

(ii) Supervision because an individual with a physical, mental, developmental, or cognitive disorder requires care or assistance on a regular basis to protect the individual from hazards or dangers incident to his or her daily environment.

(5) *Nursing home* means a facility defined in § 3.1(z)(1) or (2). If the facility is not located in a State, the facility must be licensed in the country in which it is located.

(6) *Medical foster home* means a privately-owned residence, recognized and approved by VA under 38 CFR 17.73(d), that offers a non-institutional alternative to nursing home care for veterans who are unable to live alone safely due to chronic or terminal illness.

(7) *Care facility other than a nursing home* means a facility in which a disabled individual receives health care or custodial care under the provisions of paragraph (d) of this section. A facility must be licensed if facilities of that type are required to be licensed in the State or country in which the facility is located. A facility that is residential must be staffed 24 hours per day with care providers. The providers do not have to be licensed health care providers.

(8) *Needs A&A or is housebound* refers to a disabled individual who meets the criteria in § 3.351 for needing regular aid and attendance (A&A) or being housebound and is a:

(i) Veteran;

(ii) Surviving spouse;

(iii) Parent (for parents' DIC purposes); or

(iv) Spouse of a living veteran with a service-connected disability rated at least 30 percent disabling, who is receiving pension.

(c) *Medical expenses for VA purposes.* Generally, medical expenses for VA needs-based benefit purposes are payments for items or services that are medically necessary; that improve a disabled individual's functioning; or that prevent, slow, or ease an individual's functional decline. Medical expenses may include, but are not limited to, the payments specified in paragraphs (c)(1) through (7) of this section.

(1) *Care by a health care provider.* Payments to a health care provider for services performed within the scope of the provider's professional capacity are medical expenses. Cosmetic procedures that a health care provider performs to improve a congenital or accidental deformity or related to treatment for a diagnosed medical condition are medical expenses.

(2) *Medications, medical supplies, medical equipment, and medical food, vitamins, and supplements.* Payments for prescription and non-prescription medication procured lawfully under Federal law, as well as payments for medical supplies or medical equipment, are medical expenses. Medically necessary food, vitamins, and supplements as prescribed or directed by a health care provider authorized to write prescriptions are medical expenses.

(3) *Adaptive equipment.* Payments for adaptive devices or service animals, including veterinary care, used to assist a person with an ongoing disability are medical expenses. Medical expenses do not include non-prescription food, boarding, grooming, or other routine expenses of owning an animal.

(4) *Transportation expenses.* Payments for transportation for medical purposes, such as the cost of transportation to and from a health care provider's office by taxi, bus, or other form of public transportation are medical expenses. The cost of transportation for medical purposes by privately owned vehicle (POV), including mileage, parking, and tolls, is a medical expense. For transportation in a POV, VA limits the deductible mileage rate to the current POV mileage reimbursement rate specified by the United States General Services Administration (GSA). The current amount can be obtained from *www.gsa.gov* or on VA's website at *www.benefits.va.gov/pension/.* Amounts by which transportation expenses set forth in this paragraph (c)(4) exceed the amounts of other VA or non-VA reimbursements for the expense are medical expenses.

(i) *Example.* In February 2013, a veteran drives 60 miles round trip to a VA medical center and back. The veteran is reimbursed $24.90 from the Veterans Health Administration. The POV mileage reimbursement rate specified by GSA is $0.565 per mile, so the transportation expense is $0.565/mile * 60 miles = $33.90. For VA needs-based benefits purposes, the unreimbursed amount, here, the difference between $33.90 and $24.90, is a medical expense.

(ii) [Reserved]

(5) *Health insurance premiums.* Payments for health, medical, hospitalization, and long-term care insurance premiums are medical expenses. Premiums for Medicare Parts A, B, and D and for long-term care insurance are medical expenses.

(6) *Smoking cessation products.* Payments for items and services specifically related to smoking cessation are medical expenses.

(7) *Institutional forms of care and in-home care.* As provided in paragraph (d) of this section.

(d) *Institutional forms of care and in-home care.* This paragraph (d) applies with respect to claims for a medical expense deduction for institutional forms of care or in-home care received on or after October 18, 2018 that VA has not previously granted.

(1) *Hospitals, nursing homes, medical foster homes, and inpatient treatment centers.* Payments to hospitals, nursing homes, medical foster homes, and inpatient treatment centers (including inpatient treatment centers for drug or alcohol addiction), including the cost of meals and lodging charged by such facilities, are medical expenses.

(2) *In-home care.* Payments for assistance with ADLs and IADLs by an in-home attendant are medical expenses as long as the attendant provides the disabled individual with health care or custodial care. Payments must be commensurate with the number of hours that the provider attends to the disabled person. The attendant must be a health care provider unless—

(i) The disabled individual needs A&A or is housebound; or

(ii) A physician, physician assistant, certified nurse practitioner, or clinical nurse specialist states in writing that, due to a physical, mental, developmental, or cognitive disorder, the individual requires the health care or custodial care that the in-home attendant provides.

(3) *Care facilities other than nursing homes.* (i) Care in a facility may be provided by the facility, contracted by the facility, obtained from a third-party provider, or provided by family or friends.

(ii) Payments for health care provided by a health care provider are medical expenses.

(iii) The provider does not need to be a health care provider, and payments for assistance with ADLs and IADLs are medical expenses, if the disabled individual is receiving health care or custodial care in the facility and—

(A) The disabled individual needs A&A or is housebound; or

(B) A physician, physician assistant, certified nurse practitioner, or clinical nurse specialist states in writing that, due to a physical, mental, developmental, or cognitive disorder, the individual needs to be in a protected environment.

(iv) Payments for meals and lodging (and other facility expenses not directly related to health care or custodial care) are medical expenses if:

(A) The facility provides or contracts for health care or custodial care for the disabled individual; or

(B) A physician, physician assistant, certified nurse practitioner, or clinical nurse specialist states in writing that the individual must reside in the facility (or a similar facility) to separately contract with a third-party provider to receive health care or custodial care or to receive (paid or unpaid) health care or custodial care from family or friends.

(e) *Non-medical expenses for VA purposes.* Payments for items and services listed in paragraphs (e)(1) through (4) of this section are not medical expenses for VA needs-based benefit purposes. The list is not all-inclusive.

(1) *Maintenance of general health.* Payments for items or services that benefit or maintain general health, such as vacations and dance classes, are not medical expenses.

(2) *Cosmetic procedures.* Except as provided in paragraph (c)(1) of this section, cosmetic procedures are not medical expenses.

(3) *Meals and lodging.* Except as provided in paragraph (d) of this section, payments for meals and lodging are not medical expenses.

(4) *Assistance with IADLs.* Except as provided in paragraph (d) of this section, payments for assistance with IADLs are not medical expenses.

CROSS REFERENCES: For the rules governing how medical expenses are deducted, see § 3.272(g) (regarding pension) and § 3.262(l) (regarding section 306 pension and parents' DIC).

(Authority: 38 U.S.C. 501(a), 1315(f)(3), 1503(a)(8), 1506(1))

(The Office of Management and Budget has approved the information collection requirement in this section under control numbers 2900–0002, 2900–0004, and 2900–0161.)

■ 13. Add § 3.279 to read as follows:

§ 3.279 Statutory exclusions from income or assets (net worth or corpus of the estate).

This section sets forth payments that Federal statutes exclude from income for the purpose of determining entitlement to any VA-administered benefit that is based on financial need. Some of the exclusions also apply to assets (pension), also known as net worth or the corpus of the estate (section 306 pension and parents as dependents for compensation). VA will exclude from income or assets any amount designated by statute as not countable as income or resources, regardless of whether or not it is listed in this section.

Program or payment	Income	Assets (corpus of the estate)	Authority
(a) COMPENSATION OR RESTITUTION PAYMENTS:			
(1) *Relocation payments.* Payments to individuals displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended.	Excluded	Included	42 U.S.C. 4636.
(2) *Crime victim compensation.* Amounts received as compensation under the Victims of Crime Act of 1984 unless the total amount of assistance received from all federally funded programs is sufficient to fully compensate the claimant for losses suffered as a result of the crime.	Excluded	Excluded	42 U.S.C. 10602(c).
(3) *Restitution to individuals of Japanese ancestry.* Payments made as restitution under Public Law 100–383 to an individual of Japanese ancestry who was interned, evacuated, or relocated during the period of December 7, 1941, through June 30, 1946, pursuant to any law, Executive Order, Presidential proclamation, directive, or other official action respecting these individuals.	Excluded	Excluded	50 U.S.C. App. 1989b–4(f).
(4) *Victims of Nazi persecution.* Payments made to individuals because of their status as victims of Nazi persecution.	Excluded	Excluded	42 U.S.C. 1437a note.
(5) *Agent Orange settlement payments.* Payments made from the Agent Orange Settlement Fund or any other fund established pursuant to the settlement in the In Re Agent Orange product liability litigation, M.D.L. No. 381 (E.D.N.Y.).	Excluded	Excluded	Sec. 1, Public Law 101–201.
(6) *Chapter 18 benefits.* Allowances paid under 38 U.S.C. chapter 18 to a veteran's child with a birth defect.	Excluded	Excluded	38 U.S.C. 1833(c).
(7) *Flood mitigation activities.* Assistance provided under the National Flood Insurance Act of 1968, as amended.	Excluded	Excluded	42 U.S.C. 4031.
(b) PAYMENTS TO NATIVE AMERICANS:			
(1) *Indian Tribal Judgment Fund distributions.* All Indian Tribal Judgment Fund distributions excluded from income and assets while such funds are held in trust. First $2,000 per year of income received by individual Indians under the Indian Tribal Judgment Funds Use or Distribution Act in satisfaction of a judgment of the United States Court of Federal Claims excluded from income.	Excluded	Excluded	25 U.S.C. 1407.
(2) *Interests of individual Indians in trust or restricted lands.* Interests of individual Indians in trust or restricted lands excluded from assets. First $2,000 per year of income received by individual Indians that is derived from interests in trust or restricted lands excluded from income.	Excluded	Excluded	25 U.S.C. 1408.
(3) *Per Capita Distributions Act.* First $2,000 per year of per capita distributions to members of a tribe from funds held in trust by the Secretary of the Interior for an Indian tribe. All funds excluded from income and assets while funds are held in trust.	Excluded	Excluded	25 U.S.C. 117b, 25 U.S.C. 1407.
(4) *Submarginal land.* Income derived from certain submarginal land of the United States that is held in trust for certain Indian tribes.	Excluded	Excluded	25 U.S.C. 459e.
(5) *Old Age Assistance Claims Settlement Act.* Up to $2,000 per year of per capita distributions under the Old Age Assistance Claims Settlement Act.	Excluded	Excluded	25 U.S.C. 2307.
(6) *Alaska Native Claims Settlement Act.* Any of the following, if received from a Native Corporation, under the Alaska Native Claims Settlement Act: (i) Cash, including cash dividends on stocks and bonds, up to a maximum of $2,000 per year; (ii) Stock, including stock issued as a dividend or distribution;	Excluded	Excluded	43 U.S.C. 1626(c).

Program or payment	Income	Assets (corpus of the estate)	Authority
(iii) Bonds that are subject to the protection under 43 U.S.C. 1606(h) until voluntarily and expressly sold or pledged by the shareholder after the date of distribution;			
(iv) A partnership interest;			
(v) Land or an interest in land, including land received as a dividend or distribution on stock;			
(vi) An interest in a settlement trust.			
(7) *Maine Indian Claims Settlement Act.* Payments received under the Maine Indian Claims Settlement Act of 1980.	Excluded	Excluded	25 U.S.C. 1728.
(8) *Cobell Settlement.* Payments received under *Cobell* v. *Salazar,* Civil Action No. 96–1285 (TFH) (D.D.C.).	Excluded for one year.	Excluded for one year.	Sec. 101, Public Law 111–291.
(c) WORK–RELATED PAYMENTS:			
(1) *Workforce investment.* Allowances, earnings, and payments to individuals participating in programs under the Workforce Investment Act of 1998.	Excluded	Included	29 U.S.C. 3241(a)(2).
(2) *AmeriCorps participants.* Allowances, earnings, and payments to AmeriCorps participants under the National and Community Service Act of 1990.	Excluded	Included	42 U.S.C. 12637(d).
(3) *Volunteer work.* Compensation or reimbursement to volunteers involved in programs administered by the Corporation for National and Community Service, unless the payments are equal to or greater than the minimum wage. The minimum wage is either that under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 *et seq.*) or that under the law of the State where the volunteers are serving, whichever is greater.	Excluded	Excluded	42 U.S.C. 5044(f).
(d) MISCELLANEOUS PAYMENTS:			
(1) *Income tax refunds.* Income tax refunds, including the Federal Earned Income Credit and advance payments with respect to a refundable credit.	Excluded	Excluded for one year.	26 U.S.C. 6409.
(2) *Food stamps.* Value of the allotment provided to an eligible household under the Food Stamp Program.	Excluded	Excluded	7 U.S.C. 2017(b).
(3) *Food for children.* Value of free or reduced-price for food under the Child Nutrition Act of 1966.	Excluded	Excluded	42 U.S.C. 1780(b).
(4) *Child care.* Value of any child care provided or arranged (or any amount received as payment for such care or reimbursement for costs incurred for such care) under the Child Care and Development Block Grant Act of 1990.	Excluded	Included	42 U.S.C. 9858q.
(5) *Services for housing recipients.* Value of services, but not wages, provided to a resident of an eligible housing project under a congregate services program under the Cranston-Gonzalez National Affordable Housing Act.	Excluded	Included	42 U.S.C. 8011(j)(2).
(6) *Home energy assistance.* The amount of any home energy assistance payments or allowances provided directly to, or indirectly for the benefit of, an eligible household under the Low-Income Home Energy Assistance Act of 1981.	Excluded	Excluded	42 U.S.C. 8624(f).
(7) *Programs for older Americans.* Payments, other than wages or salaries, received from programs funded under the Older Americans Act of 1965, 42 U.S.C. 3001.	Excluded	Included	42 U.S.C. 3020a(b).
(8) *Student financial aid.* Amounts of student financial assistance received under Title IV of the Higher Education Act of 1965, including Federal work-study programs, Bureau of Indian Affairs student assistance programs, or vocational training under the Carl D. Perkins Vocational and Technical Education Act of 1998.	Excluded	Excluded	20 U.S.C. 1087uu, 2414(a).
(9) *Retired Serviceman's Family Protection Plan annuities.* Annuities received under subchapter I of the Retired Serviceman's Family Protection Plan.	Excluded	Included	10 U.S.C. 1441.

(Authority: 38 U.S.C. 501(a))

■ 14. Amend § 3.503 by adding paragraph (c) to read as follows:

§ 3.503 Children.

* * * * *

(c) *Medicaid-covered nursing home care (§ 3.551(i)).* (1) Last day of the calendar month in which Medicaid payments begin, last day of the month following 60 days after issuance of a prereduction notice required under § 3.103(b)(2), or the earliest date on which payment may be reduced without creating an overpayment, whichever date is later; or

(2) If the child or the child's custodian willfully conceals information necessary to make the reduction, the last day of the month in which that willful concealment occurred.

(Authority: 38 U.S.C. 501, 1832, 5112(b), 5503(d))

■ 15. Amend § 3.551 by revising paragraph (i) to read as follows:

§ 3.551 Reduction because of hospitalization.

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(i) *Certain beneficiaries receiving Medicaid-covered nursing home care.* This paragraph (i) applies to a veteran without a spouse or child, to a surviving spouse without a child, and to a surviving child. Effective November 5, 1990, and terminating on the date provided in 38 U.S.C. 5503(d)(7), if such a beneficiary is receiving Medicaid-covered nursing home care, no pension or survivors pension in excess of $90 per month will be paid to or for the beneficiary for any period after the month in which the Medicaid payments begin. A beneficiary is not liable for any pension paid in excess of the $90 per month by reason of the Secretary's inability or failure to reduce payments, unless that inability or failure is the result of willful concealment, by the beneficiary, of information necessary to make that reduction.

(Authority: 38 U.S.C. 5503)

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§ 3.660 [Amended]

■ 16. Amend § 3.660(d) by removing ''§§ 3.263 or 3.274'' and adding in its place ''§ 3.263''.

[FR Doc. 2018–19895 Filed 9–17–18; 8:45 am]

BILLING CODE 8320–01–P