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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 1, 3, 13, 19, and 20

RIN 2900-AR77

Update VA Adjudication Regulations To Authorize the Use of Electronic Notification for VA Benefit Claims and Appeals

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations relating to notification of a claims decision in accordance with section 807 of the Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxins Act of 2022 (PACT Act), specifically to permit electronic decision notification between claimants or beneficiaries and VA.

DATES: Comments must be received on or before August 1, 2023.

ADDRESSES: Comments must be submitted through www.regulations.gov. Except as provided below, comments received before the close of the comment period will be available at regulations.gov for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been received: <https://www.regulations.gov>. VA will not post on Regulations.gov public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from

multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking.

FOR FURTHER INFORMATION CONTACT:

Veterans Benefits Administration information: Korrie N. Shivers, Senior Management and Program Analyst; Office of Administrative Review, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461-9700. (This is not a toll-free telephone number.) Board of Veterans' Appeals information: Anthony C. Sciré, Jr., Chief Counsel, Board of Veterans' Appeals, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 632-5277 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: With the transition to electronic claims filing and claims processing, VA modernized how it adjudicates claims for benefits. Section 807 of the PACT Act removed certain legal impediments to electronic notice. Public Law 117-168, 136 Stat 1759, 1805-06. This proposed rule would amend 38 CFR parts 1, 3, 13, 19, and 20 to implement these changes and modernize how an individual receives legally required notice from VA.

Section 807 of the PACT Act defined "notice" as "a communication issued through means (including electronic means) prescribed by the Secretary." Public Law 117-168, 136 Stat 1759, 1806 (codified at 38 U.S.C. 5100(2)). In addition, Congress provided that VA "may provide notice [of a decision affecting the provision of VA benefits] electronically if a claimant (or the claimant's representative) elects to receive such notice electronically." Public Law 117-168, 136 Stat 1759, 1806 (codified at 38 U.S.C. 5104). Therefore, with respect to VA authority to provide notice electronically, Congress created two general categories of notice—decisional notice and nondecisional notice.

I. Decisional Notice

Until recently, Congress had framed the time for appealing a VA benefits decision and the associated finality of that decision in terms of when VA "mailed" the decision. 38 U.S.C. 7105(b)(1)(A), 7105A(a), 7266(a) (2022). Further, decisions on an appeal by the Board of Veterans' Appeals (Board) were required to be mailed to appellants at their last known address. 38 U.S.C. 7104(e)(1) (2022). Thus, to comply with statute, the Secretary and the Board had

to provide decision notice by mail. However, section 807 of the PACT Act removed these references to mailing and added provisions expressly authorizing electronic decision notification if the claimant or representative has elected electronic notice. This proposed rule will outline how VA would implement the electronic notice provisions authorized by section 807 of the PACT Act.

38 U.S.C. 5104(a) requires the Secretary to, "on a timely basis, provide to the claimant (and to the claimant's representative) notice of" benefits decisions. A provision added by section 807 of the PACT Act, 38 U.S.C. 5104(c), allows VA to provide such notice electronically if the claimant or the claimant's representative elects electronic notice. Section 5104 is not specific to one benefit or program. Rather, it generally applies to any decision by an agency of original jurisdiction (AOJ) affecting any benefit furnished by VA to veterans or the dependents or survivors of veterans.

Because section 5104 applies to multiple benefit lines, in implementing the election provision, VA must consider the needs of different benefit lines.

The statute does not indicate the scope of an election to receive electronic notice—that is, whether—an election applies to a recipient of notice (*i.e.*, a claimant or representative) generally or if an election is benefit-or claim-specific. Yet, if recipients were permitted to limit their elections, VA would be required to review each election to see if there were any limitations. This would inevitably lead to the sort of time-intensive clarifications and interpretations that VA has sought to reduce or eliminate through other modernization efforts. *See* Standard Claims and Appeals Forms, 79 FR 57660, 57683 (Sept. 25, 2014). In addition, permitting recipients to limit their elections to either AOJ decisions or Board decisions would essentially double the administrative burden upon VA by requiring VA to track two elections for every recipient. To avoid these results, in implementing the statutory election provisions, VA proposes not to permit recipients to limit their elections of electronic notice. If an individual has elected electronic notice, unless and until that election is revoked, VA may provide any decision notice of an AOJ or Board decision pertaining to any VA benefit via electronic means.

At the same time, different benefit lines utilize different claims-processing systems with different capabilities. Were VA precluded from providing

notice by mail to claimants who had elected electronic notice, VA would be unable to accept elections and implement electronic decision notice under section 807 of the PACT Act until every program office had the means to provide notice electronically. Moreover, if there was a question as to whether an individual had in fact elected electronic notice, VA may be unable to provide any notice until that question was resolved, thereby delaying resolution of the claim.

Therefore, VA proposes a single rule that can function flexibly VA-wide. The rule would establish postal mail as the default means of transmitting decision notice. VA would also retain its statutory discretion to provide electronic decision notice in lieu of mailed notice where the recipient has elected electronic notice. Once electronic notice is elected, claimants and representatives will be able to update and/or revoke electronic notice as published in the notice section of the **Federal Register**.

II. Nondecisional Notice

Sections 5104 and 7104, which were amended by the PACT Act, deal only with notices of a “decision.” VA proposes to define the terms “decisional notice” and “nondecisional notice.” VA intends the term “decisional notice” to refer to notice under 38 U.S.C. 5104(a) and 7104(e). VA proposes to define the term “nondecisional notice” as “legally required notice other than decisional notice.”

Thus, where Congress has been silent, VA has discretion to determine the appropriate means of nondecisional notice. Unlike decisional notice, in addressing nondecisional notice, Congress has not placed overarching limitations on VA’s ability to provide nondecisional notice electronically. *Paralyzed Veterans of Am. (“PVA”) v. Sec’y of Veterans Affairs*, 345 F.3d 1334, 1348 (Fed. Cir. 2003). In furtherance of its modernization efforts, where Congress has not prescribed a specific means of notice, VA proposes to eliminate barriers to electronic notice.

III. Mechanics of Notice

Federal agencies that have implemented electronic notice as an alternative to mailed notice have generally done so using one of three models. Under the “access equals delivery” model, posting the notice on a website accessible to the individual entitled to notice satisfies the notice obligation. *Securities Offering Reform*, 70 FR 44722, 44783 (Aug. 3, 2005) (The Securities and Exchange Commission (SEC) adopted an “access equals

delivery” model for providing final prospectuses). Under the “notice and access model,” posting the notice on a website accessible to the individual entitled to notice and sending that individual a communication stating that the notice has been posted satisfies the notice obligation. Amendments to Rules Requiring internet Availability of Proxy Materials, 74 FR 53954, 53955 (Oct. 21, 2009) (SEC adopted a “notice and access” model for delivery of proxy materials); Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, 85 FR 31884, 31921 (May 27, 2020) (Department of Labor (DOL) adopted a “notice and access” model for plan administrators to furnish required notices). Under the “full delivery” model, delivering a copy of the notice document to the individual entitled to notice satisfies the notice obligation. 85 FR at 31921 (DOL permitted plan administrators who did not have websites to email required notices to individuals). Courts have consistently recognized that mailing a notice to an individual’s mailing address satisfies a legal obligation to provide notice. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). Courts have similarly recognized that delivery of a notice document to an individual’s electronic address (as occurs under the full delivery model) is equivalent to mailing. *See e.g. F.T.C. v. PCCare247 Inc.*, No. 12 CIV. 7189 PAE, 2013 WL 841037, at *4 (S.D.N.Y. Mar. 7, 2013) (collecting cases). Courts have also found the “notice and access” model “equivalent” to providing notice by first class mail, *Lee v. SunTrust Mortg., Inc.*, No. 1:12–CV–2823–SCJ, 2012 WL 12884865, at *1 n. 1 (N.D. Ga. Sept. 19, 2012) (describing the notice provided by the court’s electronic filing system “equivalent of service . . . by first class mail, postage prepaid” (ellipsis in original) (internal citation omitted); *accord United States v. Hanrahan*, No. CIV 09–0219 JB/KBM, 2010 WL 2292912, at *1 (D.N.M. Apr. 28, 2010); *see also Stemcor USA, Inc. v. Miracero, S.A. de C.V.*, 66 F. Supp.3d 394, 398 (S.D.N.Y. 2014) (stating that “the notice of electronic filing is the practical cyber-equivalent of physical service of a tangible copy of the filed paper”). Thus, VA believes that either the “full delivery” model or the “notice and access” model are an appropriate alternative to mailing decisional notice.

Both the “full delivery” model and the “notice and access” model would require VA to communicate information directly to a recipient’s electronic address and, at present, VA does not believe that sufficient information

technology capabilities are in place. Therefore, in this rulemaking, VA seeks to (1) propose regulatory amendments that would allow VA to implement a “notice and access” and/or a “full delivery” model of providing notice related to claims for VA benefits if and when VA is prepared to do so.

IV. Specific Regulatory Changes Proposed

A. Part 1—General Provisions

Section 5104(a) requires VA to provide a copy of the decision notice both to the claimant and to the claimant’s representative, if any. Similarly, section 7104(e) requires the Board to provide a copy of the decision notice both to the parties to the appeal and to their representatives, if any. Because representatives may have different needs and different degrees of access to technology than the individuals they represent, VA proposes that a representative’s election be independent from the election of the claimant, appellant or other party the representative represents.

1. Notice to Claimants, Appellants, and Other Parties

Currently, 38 CFR 1.710 governs delivery of benefit payments and correspondence. When this provision was first promulgated in 1988, postal mail was VA’s primary means of providing notice . . . , and accordingly the provision requires notice “directed to the address specified by the claimant.” To facilitate electronic notice, VA proposes to amend the provision to encompass means of transmission other than mail. With advancements in electronic communications, the concept of an “address” is no longer inherently associated with a physical location. Black’s Law Dictionary (11th ed. 2019). Instead, an “address” is simply the designation of “a place where a person or organization may be communicated with,” Merriam-Webster’s Collegiate Dictionary 15 (11th ed. 2008), and whether a person or organization can be communicated with at a particular place depends on the means of communication used and the nature of the communication. For instance, an individual may be able to receive correspondence, but not payments, at a particular electronic address, or vice versa. Thus, an individual may have more than one address for VA purposes. To reflect this, VA proposes to amend the first sentence of § 1.710(a) to read “All correspondence and all checks for benefits payable to claimants under laws administered by the Department of

Veterans Affairs shall be directed to the address specified by the claimant for the means of transmission used.” VA also proposes a revision to the third sentence.

This regulation implements a statutory provision which states that “Benefits under laws administered by the Secretary may not be denied an applicant on the basis that the applicant does not have a mailing address.” 38 U.S.C. 3003(c) (1987) (subsequently redesignated 38 U.S.C. 5126). The legislative history makes clear that the intent of the enactment was to assist individuals who are experiencing homelessness in accessing monetary benefits. It did not relieve veterans of their duty to keep VA informed of their whereabouts or to provide VA with a current mailing address if they have one. *Hyson v. Brown*, 5 Vet. App. 262, 265 (1993). While VA intends to increase its reliance on electronic communications, the decision whether to communicate with a claimant by mail or through electronic means also depends on the resources of the VA office issuing the notice. Thus, VA will continue to communicate with claimants via mail in some circumstances and claimants must accordingly continue to keep VA apprised of their current mailing address. Consistent with the language of the underlying statute, VA proposes to amend the last sentence of paragraph (a) to read “[i]n no event will a claim or payment of benefits be denied because the claimant has no mailing address.” Currently, § 1.710(d) states that, if the claimant has not provided a current mailing address, all correspondence and checks will be delivered to the appropriate Agent Cashier. VA proposes to add language clarifying that this procedure applies in circumstances where notice would otherwise be mailed.

Section 1.710 is the only provision under the undesignated center heading “Homeless Claimants.” VA proposes to amend the undesignated center heading to read “Delivery of Benefit Payments and Correspondence To Claimants.”

VA also proposes to add § 1.711 titled “Furnishing required notice.”

In paragraph (a) of the new section, VA proposes to define relevant terms. VA regulations use words like “writing” and “notice” with respect to information provided by VA as well as information provided by third parties. To make clear that the definitions in this paragraph are only intended to apply to notice provided by VA and not submissions to VA required to be in writing, VA proposes to include language reflecting that limitation.

In section 807 of the PACT Act, Congress distinguished notice of “a decision . . . affecting the provision of benefits to a claimant,” 38 U.S.C. 5104, from other types of legally required notice. While VA has broad flexibility to determine whether to send many types of notice electronically, 38 U.S.C. 5100(2), VA’s authority to send decision notice electronically is limited to situations where the claimant, beneficiary or representative has elected to receive decisional notice electronically. 38 U.S.C. 5104(c). To reflect this distinction, VA proposes to define the terms “decisional notice” and “nondecisional notice.” VA intends the term “decisional notice” to refer to notice under 38 U.S.C. 5104(a) and 7104(e). VA proposes to define the term “nondecisional notice” as “legally required notice other than decisional notice.”

To make clear that the term “address” is not limited to physical locations and that an individual may have more than one valid “address” on record at one time, VA proposes to state that “address means a place, specified by an individual where the individual is able to receive communications through a particular means. The term includes postal addresses, telephone numbers, email addresses, and unique identifiers associated with VA web-based systems.”

Congress did not use consistent terminology in the statutes governing decision notice. Section 5104 requires notice to a “claimant” while section 7104 requires notice to an “appellant” or “other party.” Because § 1.711 applies to both types of decisions, VA proposes to define the term addressee to encompass all of these individuals.

VA proposes to define “writing” as “words, symbols or marks intentionally recorded on something tangible, such as paper, computer, electronic storage device, or any other medium.”

To accommodate the “notice and access” option, VA proposes to define the term “alert” as “a communication informing the addressee that a notice is available through a VA web-based system,” and to define “notice content” as “the information VA is required to communicate to the addressee.”

Where VA is required to provide direct notice to a specific claimant, VA satisfies that obligation by sending the notice to the claimant’s latest address of record. However, VA is concerned the term “latest” can be read to imply a claimant or beneficiary only has one “address” at any point in time. If VA is authorized to communicate with claimants and beneficiaries through more than one means, an individual

may have more than one valid “address” on record with VA at any one time. Thus, in § 1.711(b), VA proposes to state: “Where notice is directed to a specific addressee, VA satisfies its notice obligation by transmitting, to the addressee’s last address of record for the means of transmission used, either (1) the required notice content, or (2) an alert.”

While Congress has limited VA’s authority to provide decisional notice electronically to instances where the individual has elected electronic notice, Congress has not imposed a similar restriction with respect to nondecisional notice. *PVA*, 345 F.3d at 1348. VA accordingly has discretion to determine the appropriate means of nondecisional notice. To account for these flexibilities, in paragraph (c), VA proposes to state “Except as otherwise provided, nondecisional notice may be transmitted orally or in writing.” Whenever VA provides notice through oral communication with a claimant, it will be reflected in the claimant’s file.

In § 1.711(d), VA proposes to include additional information regarding how VA will furnish decisional notice. VA’s current practice is to provide decisional notice to claimants, beneficiaries, and representatives through postal mail. For individuals who do not elect electronic decisional notice, VA does not propose to change its existing practice. For individuals who do elect electronic decisional notice, for the reasons explained in Section I of this rulemaking, VA proposes to retain its discretion to determine whether a specific decision notice will be sent by postal mail or electronic means.

Regarding elections and revocations, VA proposes to state that an addressee elects electronic decision notice and revokes a prior election by selecting the appropriate option within a VA web-based system that solicits such elections and revocations. To accommodate technological advances, VA also proposes to state that other means of electing electronic decision notice and revoking an election may be prescribed by the Secretary and published in the notice section of the **Federal Register**.

2. Notice to Representatives

As for providing decision notices to representatives, currently, the first sentence of 38 CFR 1.525(d) requires VA to supply copies of adjudication notices to representatives while the second sentence describes a representative’s authority to continue to act following the claimant’s death. Because these two sentences concern two distinct topics, VA proposes to redesignate the second sentence of 38 CFR 1.525(d) as 38 CFR

1.525(f). VA also proposes to amend paragraph (d) to reflect the same principles reflected in § 1.711 of this part. In addition, VA proposes to include the following language in paragraph (d): “The election of electronic decision notice or revocation thereof by a representative receiving notice pursuant to this paragraph is independent of any election or revocation thereof by the claimant.”

B. Part 3—Adjudication

1. Definition of Notice

VA proposes to amend current 38 CFR 3.1, which contains the definitions applicable to VA’s pension, compensation, and dependency and indemnity compensation benefit programs.

In current paragraph (q) of § 3.1 the term “notice” is defined as “written notice sent to a claimant or payee at his or her latest address of record.” 38 CFR 3.1(q). When the same requirements apply to a particular class of persons or things, defining that class at the beginning of the part or section may shorten and simplify the regulations. However, an overly broad definition may have the opposite effect, increasing complexity by requiring a number of exceptions and exclusions.

When the definition of “notice” was first added to part 3 in 1962, much of the communication technology that is ubiquitous today—internet, email, cell phones, voicemail, fax—either did not exist or was not widely available for consumer use. The U.S. Postal Service, however, was an effective means to reach the vast majority of claimants and beneficiaries. Because postal mailing requires the identification of a specific postal address and, often, a specific recipient, these identifiers would have been common characteristics of notices sent by VA by mail.

However, the association between these characteristics and the concept of “notice” provided by VA has loosened over time. VA has an obligation to notify a claimant of the information and evidence necessary to substantiate a claim. However, because claimant-specific notice is not required, it is often possible for VA to meet this obligation by including the information on claim forms. 79 FR 57660, 57676–77 (Sept. 25, 2014). Moreover, for certain types of notice, Congress has required that a claimant or representative elect electronic notice before VA provides electronic notice, while, for other types of notice, Congress has left the question of whether to use electronic notice to VA’s discretion, without regard to whether the recipient has specifically

elected to receive notice electronically. Therefore, situations may arise in which a particular claimant or beneficiary receives certain notices electronically and others by mail. Given the number of potential variations, VA proposes to remove the definition of “notice” from § 3.1(q).

2. References to “Latest Address of Record”

Several other sections in 38 CFR part 3 require VA to transmit notice to the claimant’s “latest address of record.” If VA is authorized to communicate with claimants and beneficiaries through more than one means, an individual may have more than one valid “address” on record with VA at any one time. Section 807 of the PACT Act removed the reference to “latest address of record” from 38 U.S.C. 5112(b)(6), an effective date provision applicable to reductions and discontinuances “by reason of change in law or administrative issue, change in interpretation of a law or administrative issue, or, for compensation purposes, a change in service-connected or employability status or change in physical condition.” 38 U.S.C. 5112(b)(6). In light of the statutory change, VA proposes to remove the equivalent language from the regulations implementing that statutory provision. The affected regulatory provisions are 38 CFR 3.105(d), 3.105(e), 3.105(g) and 3.114(b). The “latest address of record” language also appears in §§ 3.105(f), 3.105(h) and 3.905(b). In those instances, the language is not statutory. VA also proposes to amend these provisions to reflect that an individual may have more than one valid address on record with VA at any one time.

3. References to “Letter” and “Mail”

To facilitate electronic notice, VA proposes to remove references to “mail” and “letter” that are solely a feature of VA’s regulations. Specifically, VA proposes to replace the term “in letters” with “when,” in § 3.150(b), replace the term “mailing” with “issuance” in § 3.1010(f)(3) and to replace the term “mails” with “issues” in § 3.2600(b).

4. Decisional Notice

Current § 3.103(a) states “Every claimant has the right to written notice of the decision made on his or her claim,” 38 CFR 3.103(a), and subsequent paragraphs also state that VA will provide decisional notice in writing. VA is not proposing to change its current practice of providing documentable decisional notice, and VA does not propose to begin relying on oral

communications for decision notice. However, to prevent any possible ambiguity regarding whether the ordinary meaning of “written” includes communication by electronic means, VA proposes to add the following sentence in a new paragraph (g): “VA will furnish the written notice described in paragraph (f) in accordance with §§ 1.525(d)(5) and 1.711(d) of this chapter.”

Current § 3.103(f) states “[w]ritten notification must include in the notice letter or enclosures or a combination thereof” certain specified elements. The words “letter” and “enclosure” are typically associated with physical mailing. To allow for electronic notice, VA proposes to amend the language to read “The notice document or enclosures or attachments or a combination thereof must include”.

5. Computation of Time Limits

Once VA provides notice, then any applicable timelines, requests for information and/or other deadlines will start as of the date of notice. Currently, VA regulations reflect this, stating “[i]n computing the time limit for any action required of a claimant or beneficiary, . . . [t]he first day of the specified period . . . shall be the date of mailing of notification to the claimant or beneficiary of the action required and the time limit therefor. The date of the letter of notification shall be considered the date of mailing for purposes of computing time limits.” 38 CFR 3.110. For mailed notice, the courts have made clear that the date on which VA provides notice is the date on which the notice, “correctly addressed, stamped with the proper postage,” was “delivered . . . into the custody of the U.S. Postal Service.” *Davis v. Brown*, 7 Vet. App. 298, 303 (1994). VA is presumed to have taken these steps on the date appearing on the notice letter, *Miley v. Principi*, 366 F.3d 1343, 1347 (Fed. Cir. 2004), and, if these steps are taken, the addressee is presumed to receive the notice. *Anania v. McDonough*, 1 F.4th 1019, 1022 (Fed. Cir. 2021).

However, these principles are not limited to correspondence sent by mail. The presumption that VA mailed a letter on the date appearing on the letter is just one circumstance in which the courts have applied the presumption of regularity. “The presumption of regularity provides that, in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties.” *Miley*, 366 F.3d at 1347. When *Miley* was decided, the statute governing appeals of initial VA

decisions stated that appeals must be initiated “within one year from the date of mailing of notice of the result of initial review or determination.” *Id.* at 1344. Section 807 of the PACT Act changed the statutory duty such that VA is authorized to provide decision notices by means other than mail but did not alter the operation of the presumption of regularity. Therefore, if the statute permits electronic notice, the presumption that VA will dispatch the notice in accordance with the applicable statute will apply to notices sent electronically. The presumption of receipt is also not limited to mail. Rather, it applies to any reliable means of communication—the postal service, fax, email, etc.—by which a communication is “properly dispatched”. *Kennell v. Gates*, 215 F.3d 825, 829 (8th Cir. 2000). Therefore, the presumption of receipt would also apply to notices sent electronically. Consistent with the scope of these presumptions, VA proposes to amend 38 CFR 3.110(b) to extend the principles currently applicable to mailed notice to notice provided by other means.

With respect to its electronic filing system, courts have concluded that notice has been accomplished and the required deadlines begin to run from the date the court transmits the “Notice of Electronic Filing” rather than the date the individual retrieves the document from the electronic court filing system. See *McNaney v. Sampson & Morris Grp., Inc.*, No. 2:21–CV–1809, 2022 WL 1017388, at *4 (W.D. Pa. Apr. 5, 2022). VA proposes to apply the same principle when notice is provided via alerts pursuant to proposed §§ 1.525(d) and 1.711.

C. Part 13 Fiduciary Activities

VA proposes to amend part 13 to align current regulations with the PACT Act.

1. Definition of Written Notice

Currently, 38 CFR 13.20 defines the term “written notice” to mean “that VA will provide to the beneficiary and the beneficiary’s representative and legal guardian, if any, a written decision in a fiduciary matter that is appealable under § 13.600. Such notice will include: (1) A clear statement of the decision, (2) The reason(s) for the decision, (3) A summary of the evidence considered in reaching the decision, and (4) The necessary procedures and time limits to initiate an appeal of the decision.” This definition, which applies to all of part 13, is specific to decisional notice. However, elsewhere in part 13, the term “written notice” is used to refer to things other than notice of a decision. See 38 CFR 13.230(g)(2)

(requiring “written notice” when a bond is furnished or adjusted at the beneficiary’s expense); 13.300(a)(3) (requiring “written notice” of periodic onsite reviews); 13.510(c) (requiring VA to provide “written notice” to the beneficiary of a fiduciary’s request to withdraw). Therefore, VA proposes to relocate the material pertaining to content of the notice to § 13.600 and to remove the remainder of the definition.

2. Notice of Decisions That Are Appealable to the Board

In part 13, appeals to the Board are specifically addressed in § 13.600. Therefore, VA proposes a new § 13.600(b)(3) which will state “notice of a decision that is appealable to the Board pursuant to paragraph (a) of this section will be transmitted in accordance with §§ 1.525(d)(5) and 1.711(d) of this chapter.”

3. References to “Mail”

As explained in Section I of this rulemaking, section 807 of the PACT Act removed the reference to mailing as the trigger for the commencement of the period to file a Notice of Disagreement (NOD). Consistent with this statutory change, VA proposes to amend § 13.400(d)(1)(ii) by replacing “mailed” with “issued.”

In addition, consistent with the reasoning in Section IV.B.3 of this rulemaking regarding impediments to electronic notice that are solely regulatory, VA proposes to amend § 13.300(c)(3) by replacing “mails” with “issues” and to amend § 13.400(d)(1)(i) by replacing “mailed” with “issued”.

D. Part 19 Board of Veterans’ Appeals: Legacy Appeals Regulations

VA proposes to amend part 19, subparts B and C, to reflect the option for the agency of original jurisdiction (AOJ) to issue notice to a claimant by electronic means pursuant to this rulemaking. Section 807 of the PACT Act removed the reference to mailing as the trigger for the commencement of the period to file a NOD. Consistent with this statutory change, VA proposes to amend §§ 19.24(b)(3)(ii), 19.26(b) and (c)(1)(ii), and 19.52 to remove language referring to the mailing of notice of an AOJ decision and replace it with language referring more generally to the issuance of notice of an AOJ decision. In addition, currently, the part 19 regulatory provisions addressing the period to appeal an AOJ decision use “one-year” and “1-year” interchangeably. For consistency, VA proposes to replace “1-year” with “one year.”

Consistent with the reasoning in Section IV.B.3 of this rulemaking, VA proposes to amend § 19.26(b) to remove the references to “mail” and “letter”. Currently, paragraph (b)(2) states “For written contacts, VA will mail a letter requesting clarification to the claimant and send a copy to his or her representative and fiduciary, if any.” This language merely repeats VA’s general practice regarding written notice. See 38 CFR 1.525(d), 1.710(a). Therefore, rather than merely replacing the terms “mail” and “letter,” VA proposes to remove paragraph (b)(2) in its entirety. VA proposes to consolidate the introductory text of paragraph (b) and the text of paragraph (b)(1) into a single paragraph.

VA also proposes to amend § 19.52 to address computation of time limits when the pertinent notice is furnished electronically. Where a time limit runs from the date of electronic notice, VA proposes to apply the same principles described in Section IV.B.5 of this rulemaking. While section 807 of the PACT removed the reference to mailing as the trigger for the commencement of the period to file a NOD, the reference to mailing as the trigger for the commencement of the period to file a Substantive Appeal in response to a Statement of the Case remains unchanged. Thus, VA only proposes to amend the portions of § 19.52 that concern the time limit for filing a NOD.

F. Part 20 Board of Veterans’ Appeals: Rules of Practice

1. Decisional Notice

Through the PACT Act, Congress authorized VA to provide electronic notice of a Board decision on an appeal if the appellant or their representative elects to receive electronic notice. With respect to the election, Congress used the same language with respect to Board decisions as it did with respect to AOJ decisions. Therefore, VA proposes to implement the provisions as a single election. In part 20, § 20.801 applies to decisions under the modernized review system, § 20.903 to decisions under the legacy system, and § 20.1405(f) to decisions on claims motions to revise Board decisions based on of clear and unmistakable error. To implement the election provision, at the end of each section, VA proposes to add the following or similar language: “Notice of a decision will be transmitted in accordance with §§ 1.525(d)(5) and 1.711(d) of this chapter.” In addition, VA proposes to remove the last sentence of § 20.1409(a), as it is duplicative of language VA proposes to add to § 20.1405(f).

2. Computation of Time Limits

Section 20.110 addresses computation of time limits. Paragraph (b) contains language similar to § 3.110(a). However, whereas § 3.110(a) applies to “the time limit for any action required of a claimant or beneficiary,” § 20.110(b) applies to “the time limit for filing a written document.” Unlike part 3, part 20 includes provisions applicable to circumstances where a representative is not acting on behalf of a claimant. *See* 38 CFR 20.6 (Withdrawal of services by a representative). Thus, the part 20 rule governing time limits is not limited to actions by a claimant, beneficiary, or appellant. However, there is nothing about the principle underlying the rule that limits it to filing of written documents. To more accurately reflect the scope, in § 20.110(b), VA proposes to replace the words “filing a written document” with the words “for any action by a party or representative”.

Unlike § 3.110, § 20.110 does not currently address how the first day of the time period is determined. Rather, in part 20, the applicable rule is repeated in the sections establishing specific time periods. Because each of these provisions apply the same standard for determining the first day of the time period, VA proposes to state the standard in new § 20.110(c) and to remove it from other sections in part 20. Proposed § 20.110(c) would contain the same principles as § 3.110(b). In addition, VA proposes to remove the corresponding language from §§ 20.104(c), 20.203(b), 20.402, 20.404, 20.502, 20.503, 20.804(c), 20.908(a), 20.908(b)(1), 20.1002(c)(2), 20.1305(a), 20.1305(d), 20.1405(e), 20.1408.

3. References to “Letter,” “Mail,” “Stamped,” and “Last Address of Record”

As explained in Section I of this rulemaking, section 807 of the PACT Act removed the reference to mailing as the trigger for the commencement of the period to file a Notice of Disagreement (NOD). Consistent with this statutory change, VA proposes to amend §§ 20.202, 20.203(b), 20.402, 20.502(a) by replacing variations of “mail” with variations of “issue.”

Consistent with the reasoning in Section IV.B.3 of this rulemaking regarding impediments to electronic notice that are solely regulatory, VA proposes to replace variations of the term “mail” with variations of “issue” in §§ 20.104(c), 20.709(h)(3), 20.714, 20.715(a)(2), 20.1002(c)(2), 20.1100(a), 20.1305(a), 20.1305(d), 20.1408, and 20.1409(a). VA also proposes to remove references to “letter” in

§§ 20.711(b)(2)(i), 20.1002(c)(2), 20.1305(a), and 20.1305(d). In § 20.1405(e), to make clear that the pertinent time period runs from the date the Board provides the party a copy of the General Counsel opinion rather than the date the General Counsel provided the opinion to the Board, VA proposes to replace “of mailing” with “a copy of the opinion was furnished”.

In §§ 20.1100(a) and 20.1409(a), VA proposes to replace language stating that the date of the Board decision will be “stamped” on the decision with language stating that that the date will appear on the decision notice. These provisions, which address finality and determining the finality of a Board decision based on the date on the decision notice, align with current practice regarding AOJ decisions.

Consistent with the reasoning in Section IV.B.1 of the rulemaking, VA proposes to add the phrase “for the means of transmission used” after the phrase “last address of record” in §§ 20.406, 20.505, and 20.1408.

Executive Order 12866, 13563, and 14094

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 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is a significant regulatory action under Executive Order 12866 as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would 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). VA believes the impact to be minimal because, as stated in the preamble, VA is merely adding an additional method of VA notice delivery and implementing statutory provisions allowing claimants and representatives to elect to receive electronic decision notice, if they so choose. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements to 5 U.S.C. 606 and 604 do not apply.

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 aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This proposed rule contains no provision constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

List of Subjects

38 CFR Part 1

Administrative practice and procedure, Archives and records, Cemeteries, Claims, Courts, Crime, Flags, Freedom of information, Government contracts, Government employees, Government property, Infants and children, Inventions and patents, Parking, Penalties, Postal service, Privacy, Reporting and recordkeeping requirements, Seals and insignia, Security measures, Wages.

38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

38 CFR Part 13

Surety bonds, Trusts and trustees, Veterans.

38 CFR Parts 19 and 20

Administrative practice and procedure, Claims, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this

document on April 6, 2023, 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.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons set forth in the preamble, VA proposes to amend 38 CFR parts 1, 3, 13, 19, and 20 as follows:

PART 1—GENERAL PROVISIONS

■ 1. The authority citation for part 1 is continues to read as follows:

Authority: 38 U.S.C. 5101, and as noted in specific sections. 38 U.S.C. 1751–1754 and 7331–7334. Sections 1.500 to 1.527 issued under 72 Stat. 1114, 1236, as amended; 38 U.S.C. 501, 5701.

■ 2. Amend § 1.525 by revising paragraph (d) and adding paragraph (f) to read as follows:

§ 1.525 Inspection of records by or disclosure of information to recognized representatives of organizations and recognized attorneys.

* * * * *

(d)(1) For purposes of VA's obligations to provide notice to representatives under laws affecting the provision of benefits to veterans or the dependents or survivors of veterans:

Address means a place, specified by the claimant's representative where the claimant's representative is able to receive communications through a particular means.

Alert means a communication informing the addressee claimant's representative that a notice is available through a VA web-based system.

Claimant's representative means any person holding power of attorney, a recognized attorney who has filed the requisite declaration, or the accredited representative of a recognized organization holding power of attorney.

Decisional notice means notice of a determination affecting the provision of benefits to a claimant or beneficiary.

Nondecisional notice means legally required notice other than decisional notice.

Notice content means the information VA is required to communicate to the claimant's representative.

Writing means words, symbols or marks intentionally recorded on something tangible, such as paper, computer, electronic storage device, or any other medium.

(2) The claimant's representative shall be supplied with a copy of each notice

to the claimant respecting the adjudication of the claim.

(3) Where notice is directed to the claimant's representative, VA satisfies its obligation by transmitting, to the representative's latest address of record for the means of transmission used, either:

- (i) The required notice content, or
- (ii) An alert.

(4) Except as otherwise provided, nondecisional notice may be transmitted orally or in writing.

(5) With respect to decisional notice:

(i) In cases where the claimant's representative has not elected to receive decisional notice electronically, VA will mail the notice content.

(ii) In cases where the claimant's representative has elected to receive decisional notice electronically, VA will either:

(A) Transmit either of the communications described in paragraph (d)(3) of this section through electronic means; or

(B) Mail the notice content.

(6) A claimant's representative elects to receive decisional notice electronically by selecting the electronic decision notice option within a VA web-based system that solicits such elections, or through other means prescribed by the Secretary and published in the notice section of the **Federal Register**.

(7) A claimant's representative revokes a prior election to receive decisional notice electronically by making the appropriate selection in a VA web-based system that solicits such revocations, or through other means prescribed by the Secretary and published in the notice section of the **Federal Register**.

(8) The election of electronic decision notice or revocation thereof by a representative receiving notice pursuant to this paragraph (d)(8) is independent of any election or revocation thereof by the claimant.

* * * * *

(f) If a claimant dies before action on the claim is completed, the person or organization holding power of attorney or the attorney who has filed the requisite declaration may continue to act until the action is completed except where the power of attorney or requisite declaration was filed on behalf of a dependent.

■ 3. Revise the undesignated center heading preceding § 1.710 and revise § 1.710 to read as follows:

Delivery of Benefits Payments and Correspondence to Claimants

§ 1.710 Homeless claimants: Delivery of benefit payments and correspondence.

(a) All correspondence and all checks for benefits payable to claimants under laws administered by the Department of Veterans Affairs shall be directed to the address specified by the claimant for the means of transmission used. The Department of Veterans Affairs will honor for this purpose any address of the claimant in care of another person or organization or in care of general delivery at a United States post office. In no event will a claim or payment of benefits be denied because the claimant has no mailing address.

(b) To ensure prompt delivery of benefit payments and correspondence, claimants who seek personal assistance from Veterans Benefits Counselors when filing their claims shall be counseled as to the importance of providing his or her current mailing address and, if no address is provided, the procedures for delivery described in paragraph (d) of this section.

(c) The Department of Veterans Affairs shall prepare and distribute to organizations specially serving the needs of veterans and the homeless, including but not limited to shelters, kitchens and private outreach facilities, information encouraging such organizations to counsel individuals on the importance of providing mailing addresses to the Department of Veterans Affairs and advising them of this regulation.

(d) If a claimant fails or refuses to provide a current mailing address, to the Department of Veterans Affairs, items described in paragraph (a) of this section that would otherwise be mailed to the claimant will be delivered to the Agent Cashier of the regional office which adjudicated or is adjudicating the claim in the case of compensation, pension or survivors' benefits, to the Agent Cashier of the Department of Veterans Affairs facility closest to the educational institution or training establishment attended by a claimant in the case of education benefits, or to the Agent Cashier of any other Department of Veterans Affairs facility deemed by the Agency to be appropriate under the circumstances of the particular case. The claimant, within 30 days after issuance, may obtain delivery of any check or correspondence held by an Agent Cashier upon presentation of proper identification. Checks unclaimed after 30 days will be returned to the Department of the Treasury and the correspondence to the regional office or facility of jurisdiction. Thereafter, the

claimant must request the reissuance of any such check or item of correspondence by written notice to the Department of Veterans Affairs.

(Authority: 38 U.S.C. 5120; 5126)

■ 4. Add § 1.711 to read as follows:

§ 1.711 Furnishing required notice.

(a) *Definitions.* For purposes of VA's obligations to provide notice under a law affecting the provision of benefits to veterans or the dependents or survivors of veterans:

Address means a place, specified by an individual where the individual is able to receive communications through a particular means. The term includes postal addresses, telephone numbers, email addresses, and unique identifiers associated with VA web-based systems.

Addressee means a claimant, beneficiary, dependent of a veteran, or another individual legally entitled to receive notice.

Alert means a communication informing the addressee that a notice is available through a VA web-based system.

Decisional notice means notice of a determination affecting the provision of benefits to a claimant or beneficiary.

Nondecisional notice means legally required notice other than decisional notice.

Notice content means the information VA is required to communicate to the addressee.

Writing means words, symbols or marks intentionally recorded on something tangible, such as paper, computer, electronic storage device, or any other medium.

(b) *Notice to a specific addressee.* Where notice is directed to a specific addressee, VA satisfies its notice obligation by transmitting, to the addressee's last address of record for the means of transmission used, either:

- (1) The required notice content; or
- (2) An alert.

(c) *Nondecisional notice.* Except as otherwise provided, nondecisional notice may be transmitted orally or in writing.

(d) *Decisional notice.* (1) In cases where the addressee has not elected to receive decisional notice electronically, VA will mail the notice content.

(2) In cases where the addressee has elected to receive decisional notice electronically, VA will either:

(i) Transmit either of the communications described in paragraph (b) of this section through electronic means; or

(ii) Mail the notice content.

(3) An addressee elects to receive decisional notice electronically by

selecting the option for electronic decision notice within a VA web-based system that solicits such elections, or through other means prescribed by the Secretary and published in the notice section of the **Federal Register**.

(4) An addressee revokes a prior election to receive decisional notice electronically by making the appropriate selection within a VA web-based system that solicits such revocations, or through other means prescribed by the Secretary and published in the notice section of the **Federal Register**.

PART 3—ADJUDICATION

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

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

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

§ 3.1 [Amended]

■ 6. Amend § 3.1 by removing and reserving paragraph (q).

■ 7. Amend § 3.103 by revising paragraph (f) and adding paragraph (g) to read as follows:

§ 3.103 Procedural due process and other rights.

* * * * *

(f) *Notification of decisions.* The claimant or beneficiary and his or her representative will be notified in writing of decisions affecting the payment of benefits or granting of relief. The notice document or enclosures or attachments or a combination thereof must include:

- (1) Identification of the issues adjudicated;
- (2) A summary of the evidence considered;
- (3) A summary of the laws and regulations applicable to the claim;
- (4) A listing of any findings made by the adjudicator that are favorable to the claimant under § 3.104(c);
- (5) For denied claims, identification of the element(s) required to grant the claim(s) that were not met;
- (6) If applicable, identification of the criteria required to grant service connection or the next higher-level of compensation;
- (7) An explanation of how to obtain or access evidence used in making the decision; and
- (8) A summary of the applicable review options under § 3.2500 available for the claimant to seek further review of the decision.

(g) *Furnishing of notice.* VA will furnish the written notice described in paragraph (f) of this section in accordance with §§ 1.525(d)(5) and 1.711(d) of this chapter.

§ 3.105 [Amended]

■ 8. Amend § 3.105, in paragraphs (d) through (h), by removing the words “at his or her latest address of record”.

■ 9. Amend § 3.110 by revising paragraph (b) to read as follows:

§ 3.110 Computation of time limit.

* * * * *

(b) The first day of the specified period referred to in paragraph (a) of this section shall be the date VA sent the communication described in § 1.711(b) of this chapter. For written notice, the date of the document containing the notice content shall be considered the date VA sent the communication described in § 1.711(b) of this chapter for purposes of computing time limits. As to appeals, see §§ 19.52, 20.203, and 20.110 of this chapter.

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

§ 3.114 [Amended]

■ 10. Amend § 3.114, in paragraph (b), by removing the words “at his or her last address of record”.

§ 3.150 [Amended]

■ 11. Amend § 3.150, in paragraph (b), by removing the words “in letters” and adding in their place the word “when”.

§ 3.905 [Amended]

■ 12. Amend § 3.905, in paragraph (b), by removing the words “sent to the person's latest address of record” and adding in their place the words “sent to the person's latest address of record for the means of communication used”.

■ 13. Amend § 3.1010, in paragraph (f)(3), by removing the word “mailing” and adding in its place the word “issuance”.

Subpart D—Universal Adjudication Rules That Apply to Benefit Claims Governed by Part 3 of This Title

§ 3.2600 [Amended]

■ 14. Amend § 3.2600, in paragraph (b), by removing the word “mails” and adding in their place the word “issues” wherever they appear.

PART 13—FIDUCIARY ACTIVITIES

■ 15. The authority citation for part 13 continues to read as follows:

Authority: 38 U.S.C. 501, 5502, 5506–5510, 6101, 6106–6108, and as noted in specific sections.

§ 13.20 [Amended]

■ 16. Revise § 13.20 by removing the definition of “Written notice”.

§ 13.300 [Amended]

■ 17. Amend § 13.300, in paragraph (c)(3), by removing the word “mails”

and adding in its place the word “issues”.

§ 13.400 [Amended]

■ 18. Amend § 13.400, in paragraphs (d)(1)(i) and (ii), by removing the word “mailed” and adding in its place the word “issued”.

■ 19. Amend § 13.600 by adding paragraph (b)(3) to read as follows:

§ 13.600 Appeals.

* * * * *

(b) * * *

(3) Notice of a decision that is appealable to the Board pursuant to paragraph (a) of this section:

(i) Will be transmitted in accordance with §§ 1.525(d)(5) and 1.711(d) of this chapter; and

(ii) Will include:

(A) A clear statement of decision;

(B) The reason(s) for the decision;

(C) A summary of the evidence considered in reach the decision; and

(D) The necessary procedures and time limits to initiate an appeal of the decision.

PART 19—BOARD OF VETERANS' APPEALS: LEGACY APPEALS REGULATIONS

Subpart B—Legacy Appeals and Legacy Appeals Processing by Agency of Original Jurisdiction

■ 20. The authority citation for part 19 continues to read as follows:

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

■ 21. Amend § 19.24 by revising paragraph (b)(3)(ii) to read as follows:

§ 19.24 Action by agency of original jurisdiction on Notice of Disagreement required to be filed on a standardized form.

* * * * *

(b) * * *

(3) * * *

(i) * * *

(ii) One year from the date of issuance of notice of the decision of the agency of original jurisdiction.

* * * * *

■ 22. Amend § 19.26 by revising paragraph (b) and (c)(1)(ii) to read as follows:

§ 19.26 Action by agency of original jurisdiction on Notice of Disagreement.

* * * * *

(b) *Unclear communication or disagreement.* If within one year after issuing an adverse decision (or 60 days for simultaneously contested claims), the AOJ receives a written communication expressing dissatisfaction or disagreement with the adverse decision, but the AOJ cannot

clearly identify that communication as expressing an intent to appeal, or the AOJ cannot identify which denied claim(s) the claimant wants to appeal, then the AOJ will contact the claimant to request clarification of the claimant's intent. This contact may be either oral or written. For oral contacts, VA will contact whoever filed the communication. VA will make a written record of any oral clarification request conveyed to the claimant including the date of the adverse decision involved and the response. In any request for clarification, the AOJ will explain that if a response to this request is not received within the time period described in paragraph (c) of this section, the earlier, unclear communication will not be considered an NOD as to any adverse decision for which clarification was requested.

(c) * * *

(1) * * *

(i) * * *

(ii) One year after the date of issuance of notice of the adverse decision being appealed (60 days for simultaneously contested claims).

* * * * *

§ 19.32 [Amended]

■ 23. Amend § 19.32 by removing the words “1-year” and adding in their place the words “one-year”.

■ 24. Amend § 19.52 by revising paragraphs (a), (b)(1), and (b)(2)(i) and (ii) to read as follows:

§ 19.52 Time limit for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case.

(a) *Notice of Disagreement.* Except in the case of simultaneously contested claims, a claimant, or his or her representative, must file a Notice of Disagreement with a determination by the agency of original jurisdiction within one year from the date of issuance of the communication notifying the claimant of the determination. Otherwise, that determination will become final. The date of issuance of the determination will be presumed to be the same as the date of that communication for purposes of determining whether an appeal has been timely filed.

(b) * * *

(1) *General.* Except in the case of simultaneously contested claims, a Substantive Appeal must be filed within 60 days from the date that the agency of original jurisdiction mails the Statement of the Case, or within the remainder of the one-year period from the date of mailing of the determination being appealed was issued, whichever period

ends later. The date notice of mailing of the Statement of the Case will be presumed to be the same as the date of the Statement of the Case and the date of issuance of notice of the determination will be presumed to be the same as the date of that communication for purposes of determining whether an appeal has been timely filed.

(2) * * *

(i) A claimant submits additional evidence within one year of the date of issuance of the determination being appealed was issued; and

(ii) That evidence requires, in accordance with § 19.31 of this chapter, that the claimant be furnished a Supplemental Statement of the Case, then the time to submit a Substantive Appeal shall end not sooner than 60 days after such Supplemental Statement of the Case is mailed to the appellant, even if the 60-day period extends beyond the expiration of the one-year appeal period.

* * * * *

PART 20—BOARD OF VETERANS' APPEALS: RULES OF PRACTICE

■ 25. The authority citation for part 20 continues to read as follows:

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

Subpart B—The Board

■ 26. Amend § 20.104 by revising paragraph (c) to read as follows:

§ 20.104 Rule 104. Jurisdiction of the Board.

* * * * *

(c) *Authority to determine jurisdiction.* The Board shall decide all questions pertaining to its jurisdictional authority to review a particular case. When the Board, on its own initiative, raises a question as to a potential jurisdictional defect, all parties to the proceeding and their representative(s), if any, will be given notice of the potential jurisdictional defect(s) and granted a period of 60 days following the date on which such notice is issued to present written argument and additional evidence relevant to jurisdiction and to request a hearing to present oral argument on the jurisdictional question(s). The Board may dismiss any case over which it determines it does not have jurisdiction.

* * * * *

■ 27. Amend § 20.110 by revising paragraphs (b) and (c) to read as follows:

§ 20.110 Rule 110. Computation of time limit for filing.

* * * * *

(b) *Computation of time limit.* In computing the time limit for any action by a party or representative, the first day of the specified period will be excluded and the last day included. Where the time limit would expire on a Saturday, Sunday, or legal holiday, the next succeeding workday will be included in the computation.

(c) *Date of issuance.* Where the time period runs from the date VA provides notice, the first day of the specified period referred to in paragraph (b) of this section shall be the date VA sent the communication described in § 1.711(b) of this chapter. For written notice, the date of the document containing the notice content shall be considered the date VA sent the communication described in § 1.711(b) of this chapter for purposes of computing time limits.

Subpart C—Commencement and Filing of Appeals

§ 20.202 [Amended]

- 28. Amend § 20.202 by:
 - a. In paragraph (c)(2), removing the word “mails” and adding in its place the word “issues”;
 - b. In paragraph (f), removing the word “mailing” and adding in its place the words “issuance of notice of”; and
 - c. In paragraph (g)(1)(ii), removing the word “mailing” and adding in its place the word “issuance”.

§ 20.203 [Amended]

- 29. Amend § 20.203, in paragraph (b), removing the word “mails” and adding in its place the word “issues” and removing the last sentence.

Subpart E—Appeal in Simultaneously Contested Claims

§ 20.402 [Amended]

- 30. Amend § 20.402 by:
 - a. In the first sentence, removing the word “mailing” and adding in its place the word “issuance”; and
 - b. Removing the last sentence.

§ 20.404 [Amended]

- 31. Amend § 20.404 by removing the last sentence.

§ 20.406 [Amended]

- 32. Amend § 20.406 by removing the words “last address of record” and adding in their place the words “last address of record for the means of transmission used”.

Subpart F—Legacy Appeal in Simultaneously Contested Claims

- 33. Revise § 20.502 to read as follows:

§ 20.502 Rule 502. Time limits for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case in simultaneously contested claims.

(a) *Notice of Disagreement.* In simultaneously contested claims, the Notice of Disagreement from the person adversely affected must be filed within 60 days from the date of issuance of the notification of the determination to him or her; otherwise, that determination will become final.

(b) *Substantive Appeal.* In the case of simultaneously contested claims, a Substantive Appeal must be filed within 30 days from the date of mailing of the Statement of the Case.

(c) *Supplemental Statement of the Case.* Where a Supplemental Statement of the Case is furnished by the agency of original jurisdiction in a simultaneously contested claim, a period of 30 days from the date of mailing of the Supplemental Statement of the Case will be allowed for response, but the receipt of a Supplemental Statement of the Case will not extend the time allowed for filing a Substantive Appeal as set forth in paragraph (b) of this section. Provided a Substantive Appeal has been timely filed in accordance with paragraph (b) of this section, the response to a Supplemental Statement of the Case is optional and is not required for the perfection of an appeal.

§ 20.503 [Amended]

- 34. Amend § 20.503 by removing the last sentence.

§ 20.505 [Amended]

- 35. Amend § 20.505 by removing the words “last address of record” and adding in their place the words “last address of record for the means of transmission used”.

Subpart H—Hearings on Appeal

§ 20.709 [Amended]

- 36. Amend § 20.709, in paragraph (h)(3), by removing the word “mailed” and adding in its place the word “issued”.

§ 20.711 [Amended]

- 37. Amend § 20.711, in paragraph (b)(2)(i) by removing the words “the letter of notification” and adding in their place the words “issuance of notice”.

§ 20.714 [Amended]

- 38. Amend § 20.714 by removing the word “mailed” and adding in its place the word “issued”.

§ 20.715 [Amended]

- 39. Amend § 20.715, in paragraph (a)(2), by removing the word “mailing” and adding in its place the word “issuance”.
- 40. Amend § 20.801 by adding paragraph (d) to read as follows:

§ 20.801 Rule 801. The decision.

* * * * *

(d) *Notice.* Notice of a decision will be transmitted in accordance with §§ 1.525(d)(5) and 1.711(d) of this chapter.

(Authority: 38 U.S.C. 7104)

§ 20.804 [Amended]

- 41. Amend § 20.804, in paragraph (c), by removing the last sentence.

Subpart J—Action by the Board in Legacy Appeals

- 42. Amend § 20.903 by adding paragraph (d) to read as follows:

§ 20.903 Rule 903. The decision.

* * * * *

(d) *Notice.* Notice of a decision will be transmitted in accordance with §§ 1.525(d)(5) and 1.711(d) of this chapter.

(Authority: 38 U.S.C. 7104)

§ 20.908 [Amended]

- 43. Amend § 20.908 by:
 - a. In paragraph (a), removing the last sentence; and
 - b. In paragraph (b)(1), removing the last sentence.

Subpart K—Vacatur and Reconsideration

§ 20.1002 [Amended]

- 44. Amend § 20.1002(c)(2) by:
 - a. In the first sentence, removing the words “mailing of the letter of notification” and adding in their place the words “issuance of notice”; and
 - b. Removing the second sentence.

Subpart L—Finality

- 45. Amend § 20.1100 by revising paragraph (a) to read as follows:

§ 20.1100 Rule 1100. Finality of decisions of the Board.

(a) *General.* Unless the Chairman of the Board orders reconsideration, and with the exception of matters listed in paragraph (b) of this section, all Board decisions are final on the date of notice of the decision. With the exception of matters listed in paragraph (b) of this section, the decision rendered by the reconsideration Panel in an appeal in which the Chairman has ordered reconsideration is final.

* * * * *

Subpart N—Miscellaneous

■ 46. Amend § 20.1305 by revising paragraphs (a) and (d) to read as follows:

§ 20.1305 Rule 1305. Procedures for legacy appellants to request a change in representation, personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.

(a) *Request for a change in representation, request for a personal hearing, or submission of additional evidence within 90 days following notification of certification and transfer of records.* An appellant in a legacy appeal, as defined in § 19.2 of this chapter, and his or her representative, if any, will be granted a period of 90 days following the date of issuance of notice to them that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board, or up to and including the date the appellate decision is promulgated by the Board, whichever comes first, during which they may submit a request for a personal hearing, additional evidence, or a request for a change in representation. Any such request or additional evidence should be submitted directly to the Board and not to the agency of original jurisdiction. If any such request or additional evidence is submitted to the agency of original jurisdiction instead of to the Board, the agency of original jurisdiction must forward it to the Board in accordance with § 19.37(b) of this chapter. Any evidence which is submitted at a hearing on appeal which was requested during such period will be considered to have been received during such period, even though the hearing may be held following the expiration of the period. Any pertinent evidence submitted by the appellant or representative is subject to the

requirements of paragraph (d) of this section if a simultaneously contested claim is involved.

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(d) *Simultaneously contested claims.* In simultaneously contested claims, if pertinent evidence which directly affects payment, or potential payment, of the benefit sought is submitted by any claimant and is accepted by the Board under the provisions of this section, the substance of such evidence will be issued to each of the other claimants who will then have 60 days from the date of issuance of notice of the new evidence within which to comment upon it and/or submit additional evidence in rebuttal. For matters over which the Board does not have original jurisdiction, a waiver of initial agency of original jurisdiction consideration of pertinent additional evidence received by the Board must be obtained from each claimant in accordance with paragraph (c) of this section. No further period will be provided for response to such comment or rebuttal evidence.

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Subpart O—Revision of Decisions on Grounds of Clear and Unmistakable Error

■ 47. Amend § 20.1405 by revising paragraphs (e) and (f) to read as follows:

§ 20.1405 Rule 1405. Disposition.

* * * * *

(e) *General Counsel opinions.* The Board may secure opinions of the General Counsel in connection with a motion under this subpart. In such cases, the Board will notify the party and his or her representative, if any. When the opinion is received by the Board, a copy of the opinion will be furnished to the party's representative or, subject to the limitations provided in

38 U.S.C. 5701(b)(1), to the party if there is no representative. A period of 60 days from the date a copy of the opinion was furnished will be allowed for response.

(f) *Decision.* The decision of the Board on a motion under this subpart will be in writing. The decision will include separately stated findings of fact and conclusions of law on all material questions of fact and law presented on the record, the reasons or bases for those findings and conclusions, and an order granting or denying the motion. Notice of the decision will be transmitted in accordance with §§ 1.525(d)(5) and 1.711(d) of this chapter.

■ 48. Revise § 20.1408 to read as follows:

§ 20.1408 Rule 1408. Special rules for simultaneously contested claims.

In the case of a motion under this subpart to revise a final Board decision in a simultaneously contested claim, as that term is used in Rule 3(l) (§ 20.3(l)), a copy of such motion shall, to the extent practicable, be issued to all other contesting parties. Other parties have a period of 30 days from the date of issuance of the copy of the motion to file a brief or argument in answer. Notices in simultaneously contested claims will be forwarded to the last address of record for the means of transmission used of the parties concerned and such action will constitute sufficient evidence of notice.

■ 49. Amend § 20.1409 by revising paragraph (a) to read as follows:

§ 20.1409 Rule 1409. Finality and appeal.

(a) A decision on a motion filed by a party or initiated by the Board pursuant to this subpart is final on the date of notice of the decision.

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