DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 71

RIN 2900–AR96

Amendments to the Program of Comprehensive Assistance for Family Caregivers

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to revise the regulations that govern VA's Program of Comprehensive Assistance for Family Caregivers (PCAFC). This proposed rule explains numerous changes VA is considering making that would primarily impact PCAFC, including, but not limited to, removing, adding, and revising definitions; revising criteria related to eligibility, revocations, and discharges; revising certain processes related to reassessments and the timing of reassessments; and relaxing in-home visits during emergencies.

DATES: Comments must be received on or before February 4, 2025.

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 *www.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: *http://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 an individual. VA encourages individuals not to submit duplicative comments; however, we will post 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. In accordance with the Providing Accountability Through Transparency Act of 2023, a 100 word Plain-Language Summary of this proposed rule is available at *Regulations.gov*, under RIN 2900–AR96.

FOR FURTHER INFORMATION CONTACT: Colleen Richardson, PsyD, Executive Director, Caregiver Support Program, Patient Care Services, Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420, (202) 461–5649. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION:

I. Background and Public Input

A. Statutory Authority

Title I of Public Law 111–163, the Caregivers and Veterans Omnibus Health Services Act of 2010 (hereinafter referred to as the ''Caregivers Act''), established section 1720G(a) of title 38 of the United States Code (U.S.C.), which required VA to establish a program of comprehensive assistance for family caregivers of eligible veterans who incurred or aggravated a serious injury in the line of duty on or after September 11, 2001, are in need of personal care services, and meet other requirements. The Caregivers Act also required VA to establish a program of general caregiver support services, pursuant to 38 U.S.C. 1720G(b), for caregivers of covered veterans of all eras of military service. VA implemented PCAFC and the Program of General Caregiver Support Services (PGCSS) through its regulations in 38 CFR part 71.

On June 6, 2018, the John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018 (hereinafter referred to as the ''VA MISSION Act'') was signed into law, which in part amended 38 U.S.C. 1720G. These amendments included expanding eligibility for PCAFC in a phased approach to Family Caregivers (as that term is defined in 38 CFR 71.15) of eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001, establishing new benefits for designated Primary Family Caregivers (as that term is defined in § 71.15) of eligible veterans, and making other changes affecting program eligibility and VA's evaluation of PCAFC applications.

B. Recent Program Improvements

VA adopted revisions to 38 CFR part 71 in a final rule dated July 31, 2020, following the enactment of the VA MISSION Act. 85 FR 46226 (July 31, 2020) (hereinafter the July 31, 2020 Final Rule). The July 31, 2020 Final Rule included changes to certain PCAFC eligibility criteria and took effect October 1, 2020.

In parallel to those regulatory changes, VA implemented new processes used within PCAFC. For example, in late 2020, VA implemented the use of Centralized Eligibility and Appeals Teams (CEATs). CEATs are composed of a standardized group of inter-professional, licensed practitioners, with specific expertise and training in the eligibility requirements for PCAFC and the criteria for the higher stipend level. CEATs make determinations of PCAFC eligibility and, if applicable, determinations on whether the Primary Family Caregiver is eligible for the higher stipend level. Since implementing CEATs, the time required to evaluate PCAFC eligibility and render application determinations has been markedly reduced. At the end of fiscal year 2021, 62.9 percent of PCAFC application determinations were rendered within 90 days of VA receiving the application. By the end of fiscal year 2023, this percentage increased and 98 percent of PCAFC application determinations were rendered within 90 days of VA receiving the application.

Additionally, VA continues concerted efforts to enhance training of staff involved in the evaluation of PCAFC eligibility criteria and delivery of PCAFC. Further, VA continues to institute standardized quality assurance measures to monitor and support accuracy and consistency in decision-making. If VA issues a PCAFC determination that an individual disagrees with, processes are in place for individuals to request a review of or appeal such decision(s). Those processes are not addressed in this proposed rule. Information about options to request review of or appeal a PCAFC decision is available at *https://www.caregiver.va.gov/support/PCAFC_Appeals.asp.*

Since these regulatory and policy changes have taken effect, access to PCAFC has expanded and the number of eligible veterans and Family Caregivers participating in PCAFC has continued to grow. VA has, however, continued to hear concerns from veterans, caregivers, and other stakeholders about inconsistency in VA's decisions impacting eligibility for PCAFC, and concerns that certain PCAFC eligibility criteria may be too restrictive.

In response to those concerns, in March 2022, VA initiated a review of PCAFC to examine areas within PCAFC for which changes might be considered. This review included engagements with veterans, caregivers, Veterans Service Organizations (VSOs) and others to hear direct feedback about PCAFC.[1] During

[1] *See* Updates on the Family Caregiver program for legacy participants and applicants, VA press release, April 20, 2022, available at *https://news.va.gov/102672/updates-on-the-family-*

this review, VA identified further opportunities for improvement.

C. Consideration of Regulatory Amendments and Executive Order 14095, Increasing Access to High-Quality Care and Supporting Caregivers

Based on the activities outlined above, VA is proposing regulatory changes to more fully address concerns raised by stakeholders relating to PCAFC eligibility criteria and other program requirements. Furthermore, in April 2023, the President issued Executive Order 14095 which, among other things, directed the Secretary of Veterans Affairs to consider issuing a notice of proposed rulemaking to appropriately modify the eligibility criteria for PCAFC. In accordance with this Executive Order and based on feedback from caregivers, veterans, and other stakeholders and VA's internal evaluation of the program, VA has considered appropriate modifications to PCAFC eligibility criteria as well as other program changes, which are reflected in this proposed rule. VA believes the regulatory amendments proposed below, along with changes VA has already made to improve its support of eligible veterans and Family Caregivers, demonstrates VA's unwavering commitment to administering a program that is fair, consistent, and transparent in its decisions.

D. Public Input

VA routinely receives information and feedback about PCAFC from stakeholders. For example, on December 5, 2023, VA conducted a virtual roundtable session with various VSOs and other caregiver advocacy organizations. The session provided these stakeholders an opportunity to share their views on topics related to PCAFC. There were 24 representatives from 15 organizations that attended the virtual roundtable session with 13 individuals providing feedback during the session. Representatives provided information and recommendations on how best to improve PCAFC eligibility criteria, evaluation processes, and other aspects of PCAFC that are governed by regulation. Proposed modifications to part 71, as discussed in this proposed rule, address some of the feedback received prior to and during the December 5, 2023, session. A written transcript of the December 5, 2023, virtual roundtable session, including a list of participating organizations, is publicly available online at *www.regulations.gov* under RIN 2900–AR96. While VA did not solicit written statements as part of this event, those received by VA can also be found online at *www.regulations.gov* under RIN 2900–AR96.

VA welcomes comments from the public on all aspects of its proposed modifications to VA regulations in part 71. VA also seeks specific feedback within certain sections of this proposed rule through targeted questions located at the end of the applicable sections.

II. Proposed Changes to 38 CFR Part 71

As explained in more detail below, VA proposes to revise part 71 by adding, removing, and revising definitions and eligibility criteria; revising the regulations governing reassessments; revising and clarifying certain provisions regarding the application process and the evaluation process for determining eligibility; revising provisions regarding adjustments to the stipend payments; revising and clarifying certain processes regarding revocation and discharge; extending the transition period for legacy participants, legacy applicants, and their Family Caregivers; and making other changes. VA proposes these changes to simplify and clarify certain aspects of VA's administration of PCAFC and to support program integrity. Illustrative examples are included throughout this proposal to assist the reader with understanding VA's intended application of the proposed rule.

A. Transition Period for Legacy Cohort

VA is proposing changes to PCAFC eligibility and stipend level criteria as part of this rulemaking. Under this proposal, VA would extend the transition period for legacy participants and legacy applicants, and their Family Caregivers, as those terms are defined in § 71.15, to allow time for VA to evaluate their PCAFC eligibility and stipend level pursuant to revised regulations that may result from this rulemaking. Specifically, VA proposes to extend their eligibility and the time period for VA to complete their reassessments, through a date that is 18 months after changes from this rulemaking are made final and effective.

As part of the rulemaking that took effect October 1, 2020, VA made changes to the eligibility criteria for PCAFC in § 71.20 and in doing so, set forth a transition plan for legacy participants and legacy applicants, and their Family Caregivers, collectively referred to herein as the legacy cohort. 85 FR 46253 (July 31, 2020). As part of the transition plan, VA established a one-year transition period wherein the legacy cohort would generally continue to remain eligible for PCAFC while VA completed reassessments to determine their eligibility for PCAFC under the new eligibility criteria. *Id.* Subsequently, through publication of two interim final rules, VA extended the one-year transition period and timeline for VA to conduct all reassessments of the legacy cohort. The first interim final rule, Extension of Program of Comprehensive Assistance for Family Caregivers Eligibility for Legacy Participants and Legacy Applicants, referred to herein as the First PCAFC Extension for Legacy Cohort, was published and effective on September 22, 2021. 86 FR 52614 (September 22, 2021). The First PCAFC Extension for Legacy Cohort extended the transition period by one year. *Id.* VA then published a second interim final rule, Extension of Program of Comprehensive Assistance for Family Caregivers Eligibility for Legacy Participants and Legacy Applicants, referred to herein as the Second PCAFC Extension for Legacy Cohort, which became effective on September 21, 2022, and extended the transition period for the legacy cohort and timeline for completing their reassessments by three additional years—to September 30, 2025. 87 FR 57602 (September 21, 2022).

1. Proposal To Extend Transition Period for Legacy Cohort

VA proposes to further extend the legacy cohort transition period through a date that is 18 months after the date this rulemaking, which proposes changes to PCAFC eligibility and stipend level criteria, becomes final and effective to allow members of the legacy cohort to be reassessed by VA pursuant to such criteria. Without this extension, members of the legacy cohort would be subject to inequitable treatment or unnecessary burden, depending on whether changes to PCAFC eligibility and stipend level criteria resulting from this rulemaking go into effect before or after September 30, 2025.

If changes to the PCAFC eligibility and stipend level criteria are made final and effective under this rulemaking before September 30, 2025, VA would not have sufficient time to complete reassessments of all members of the legacy cohort under the revised criteria before such date. In this scenario, for reassessments not completed under the revised criteria before September 30, 2025, VA would have to carry out discharges and stipend reductions based on reassessments completed under outdated criteria; or alternatively, VA would have to set those determinations aside and complete new reassessments

caregiver-program-for-legacy-participants-and-applicants/ (last visited Aug. 8, 2024).

under the new criteria, which, after September 30, 2025, would result in inequities among members of the legacy cohort. This is because members of the legacy cohort who are reassessed under the new criteria and found to be no longer eligible for PCAFC, or eligible but with a reduced stipend amount, would be impacted at different times based only on when they are reassessed. Neither option would be fair and equitable to all members of the legacy cohort.

If changes to the PCAFC eligibility and stipend level criteria are made final and effective under this rulemaking after September 30, 2025, after that date, VA would have to begin carrying out discharges and stipend reductions for members of the legacy cohort pursuant to criteria VA is proposing to change. Once the revised criteria are made final and effective, such individuals would be required to reapply to be considered under the new criteria. This could be perceived as unnecessarily burdensome, and for those who reapply and are found eligible, this gap would create disruption to the supports and services they receive through PCAFC. Extending the transition period as proposed in this rulemaking would avoid these challenges.

VA proposes a period of 18 months after the effective date of this rulemaking to allow sufficient time to complete reassessments for the legacy cohort under the new PCAFC eligibility and stipend level criteria. Prior to initiating reassessments of PCAFC eligibility, VA would need to inform PCAFC participants, including the legacy cohort, about the changes to PCAFC eligibility and stipend level criteria that become effective under this rulemaking. VA believes 18 months will allow adequate time to provide such notification and would ensure VA can complete these legacy reassessments while also processing a potential influx of new applications that VA may receive following finalization of this rulemaking. There are over 14,500 legacy applicants and legacy participants who have not been determined eligible for PCAFC under the criteria that went into effect on October 1, 2020, or who have been determined eligible under such criteria but at a lower stipend amount, and who could most benefit from a reassessment under revised criteria.

For these reasons, VA proposes to amend part 71 to extend the transition period for the legacy cohort and timeline for VA to complete reassessments of the legacy cohort to a date that is 18 months after the effective date of a final rule under this rulemaking.

2. Proposed Changes to 38 CFR 71.15, 71.20, 71.30, and 71.40

To effectuate an additional extension to the legacy cohort transition period and timeline for reassessments, VA proposes several amendments to §§ 71.15, 71.20, 71.30, and 71.40. Among other changes, proposed amendments would remove references in current regulatory text to the five-year period beginning on October 1, 2020, and ending on September 30, 2025. VA would instead include language that reflects a period that begins on October 1, 2020, and ends on the date that is 18 months after the effective date of a final rule adopting changes to eligibility and stipend level criteria for PCAFC. These specific proposed changes to the regulations are discussed in greater detail later in this rulemaking.

VA solicits comments from the public on this proposal. In particular, VA requests comments on the following.

1. Should VA consider a different legacy cohort extension period other than the proposed 18-month period after the effective date of this rulemaking which would adopt changes to eligibility and stipend level criteria for PCAFC? If yes, what time period should VA consider and why?

2. What alternative approach(es) should VA consider to reassess the legacy cohort and ensure only those individuals who meet eligibility criteria are participating in PCAFC?

B. 38 CFR 71.10 Purpose and Scope

Current § 71.10 sets forth the purpose and scope of part 71. Paragraph (b) of § 71.10 explains, among other things, that PCAFC and Program of General Caregiver Support Services (PGCSS) benefits are provided only to those individuals residing in a State as that term is defined in 38 U.S.C. 101(20). VA proposes to remove the language ''as that term is defined in 38 U.S.C. 101(20)'' from 38 CFR 71.10(b) because VA proposes to add a definition for the term *State* in 38 CFR 71.15, as explained in the discussion on proposed changes to § 71.15.

This proposed revision is intended to provide clarity and reduce the burden on the reader by including all definitions in the definitions section under § 71.15.

VA proposes no other changes to § 71.10.

C. 38 CFR 71.15 Definitions

Section 71.15 contains definitions for terms used throughout part 71. VA proposes to amend § 71.15 by adding definitions for the terms *activity of daily living or activities of daily living (ADL), State,* and *typically requires;* removing the terms *inability to perform an activity of daily living (ADL), need for supervision, protection, or instruction,* and *unable to self-sustain in the community* and their definitions; and revising the definitions of *institutionalization, joint application, legacy applicant, legacy participant,* and *serious injury.* These proposed changes are explained in more detail below in alphabetical order of the terms being added, removed, or revised.

1. Activity of Daily Living or Activities of Daily Living (ADL)

In § 71.15, VA proposes to add a definition for the term *activity of daily living or activities of daily living (ADL).* In the current definition of *inability to perform an ADL,* VA includes the following ADL as applying to this term: (1) dressing or undressing oneself; (2) bathing; (3) grooming oneself in order to keep oneself clean and presentable; (4) adjusting any special prosthetic or orthopedic appliance, that by reason of the particular disability, cannot be done without assistance (this does not include the adjustment of appliances that nondisabled persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.); (5) toileting or attending to toileting; (6) feeding oneself due to loss of coordination of upper extremities, extreme weakness, inability to swallow, or the need for a non-oral means of nutrition; and (7) mobility (walking, going up stairs, transferring from bed to chair, etc.). Since, as discussed further below, VA proposes to remove the current definition of *inability to perform an ADL* which contains this list of ADL, VA proposes to add a standalone definition of ADL to § 71.15 that would maintain this list of ADL with minor changes. This separate definition is not intended to be a new definition that changes VA's current implementation and use of the term ADL. This proposal does not seek to narrow or expand VA's current interpretation of the term ADL but is intended to improve clarity for purposes of applying and implementing the term ADL as it is used throughout part 71 and in 38 U.S.C. 1720G.

VA proposes to maintain the existing ADL included in the current definition of *inability to perform an ADL* as these are widely recognized in the health care context (for example, they are found in the Katz Basic ADL Scale (*see* 76 FR 26148 (May 5, 2011)) and have been the ADL used for the purposes of PCAFC since the inception of the program. While VA proposes to maintain the list

of ADL from the definition of *inability to perform an ADL,* this new proposed definition for ADL revises the language used to describe several of the ADL as is discussed below. VA's proposed changes would not materially change the activities included in the definition of an ADL or how VA evaluates them.

In the ADL of *dressing and undressing oneself,* VA proposes to remove the word ''oneself''. Similarly, VA proposes to remove the phrase ''oneself in order to keep oneself clean and presentable'' from the description of the ADL of *grooming.* VA also proposes to remove the parenthetical following the ADL of *mobility* that includes examples (that is, walking, going up stairs, transferring from bed to chair, etc.). These words and phrases are not needed when listing the ADL and are commonly understood to be included in the definitions of the identified ADLs.

In developing the definition of *inability to perform an ADL,* VA included additional clarifying language in the descriptions of *adjusting any special prosthetic or orthopedic appliance* and *feeding oneself,* to further explain the cause for why an individual would be unable to perform these two ADLs. In establishing a standalone definition of ADL, these additional clarifications are not needed and if they were to remain may lead to misinterpretation of VA's use of the term ADL as it is referenced throughout 38 CFR part 71. For the ADL of *adjusting any special prosthetic or orthopedic appliance,* VA proposes to remove the phrase ''that by reason of the particular disability, cannot be done without assistance''. For the ADL of *feeding oneself,* VA proposes to remove the language ''due to loss of coordination of upper extremities, extreme weakness, inability to swallow, or the need for a non-oral means of nutrition''. In addition, to further simplify and clarify this ADL, VA proposes to use the more commonly used term ''eating'' in place of *feeding oneself.*

Before proposing to define ADL in this proposed rule, VA conducted a search of title 38 of the CFR to identify other regulatory definitions of ADL used by VA. VA identified several definitions of ADL in title 38 of the CFR, including in §§ 3.278, 17.62, 17.3210, and 51.2, that include descriptive language in addition to identifying specific ADL. While there are similarities among these definitions, the definition of ADL used in § 51.2 uses terminology VA believes best describes the meaning of ADL for purposes of part 71. Section 51.2 defines ADLs to mean ''the functions or tasks for self-care usually performed in the normal course of a day, *i.e.,* mobility, bathing, dressing, grooming, toileting, transferring, and eating.'' Among other things, this definition is used for purposes of determining eligibility of a veteran for payment of per diem to a State for adult day health care. *See* 38 CFR 51.52(d)(1) and (3).

Under this proposal, the new definition of ADL would refer to the same ADLs as those currently identified in the definition of *inability to perform an ADL* in § 71.15. VA proposes to add language that is included in the description of ADL in § 51.2 by specifying in the proposed new definition of ADL that ADL means ''any of the following functions or tasks for self-care usually performed in the normal course of a day'', which is consistent with how VA applies ADL for purposes of 38 U.S.C. 1720G and 38 CFR part 71. VA believes this language would be helpful to include in the proposed definition of ADL in § 71.15 because it clarifies that, for purposes of part 71, ADL are the broad categories of functions and tasks listed and are those activities usually performed in the normal course of a day. VA recognizes that the functions and tasks for self-care that are ''usually'' performed in the ''normal'' course of a day depends on the unique individual. VA discusses this in more detail in the context of proposed changes to §§ 71.20(a)(3) and 71.40(c)(4)(i)(A), which outline how VA would apply ADL in the context of those sections. Additionally, the proposed new text of ''usually performed in the normal course of a day'' does not mandate that each activity must always be completed daily for it to be considered an ADL under this definition. Some ADL may be performed daily, such as feeding and toileting. However, others such as bathing may not always be performed daily. Such ADL would still be considered among those functions or tasks for self-care that are usually performed in the normal course of a day even though an individual may not need to perform such ADL daily in order to maintain their health and well-being. This is consistent with how VA interprets and applies ADL currently within PCAFC. *See* 85 FR 46226, at 46233 (July 31, 2020).

This proposed definition of ADL (that is, functions or tasks for self-care usually performed in the normal course of a day) would align with other Federal definitions for ADL. For example, the Centers for Medicare & Medicaid Services' (CMS) regulations for its Home and Community-Based Attendant Services and Supports State Plan Option define ADL to mean basic personal everyday activities including, but not limited to, tasks such as eating, toileting, grooming, dressing, bathing, and transferring. *See* 42 CFR 441.505. Additionally, the Department of Housing and Urban Development's regulations for its Congregate Housing Services Program define ADL to mean, in part, an activity regularly necessary for personal care. *See* 24 CFR 700.105. VA asserts that the proposed definition of ADL in this rulemaking would also align with the plain meaning of the term *activity of daily living* as referring to activities that ''occur with some regularity''. *See Veteran Warriors, Inc.* v. *Sec'y of Veterans Affairs,* 29 F.4th 1320, 1339 (Fed. Cir. 2022) (''By using the word daily, Congress required the relevant activities to occur with some regularity. *See also* 38 CFR 71.15 (promulgating [a] list of activities of daily living, each of which involves regular conduct—like eating or bathing).'').

Thus, ADL would be defined to mean any of the following functions or tasks for self-care usually performed in the normal course of a day: (1) Dressing or undressing; (2) Bathing; (3) Grooming; (4) Adjusting any special prosthetic or orthopedic appliance (this does not include the adjustment of appliances that nondisabled persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.); (5) Toileting or attending to toileting; (6) Eating; or (7) Mobility.

As explained below, this proposed definition of ADL would be applied in proposed § 71.20(a)(3)(i) and (iii) for purposes of determining whether a veteran or servicemember is in need of personal care services based on the individual typically requiring hands-on assistance to complete one or more ADL or the individual typically requiring regular or extensive instruction or supervision to complete one or more ADL, and in proposed § 71.40(c)(4)(i)(A)(*2*) as part of the criteria used to determine whether a Primary Family Caregiver (as that term is defined in § 71.15) qualifies for the higher stipend level. VA's later discussions not only provide explanation of its application of the proposed definition of ADL, but also include illustrative examples.

2. Inability To Perform an ADL

In § 71.15 VA proposes to remove the term *inability to perform an ADL* and its definition. *Inability to perform an ADL* is currently defined to mean a veteran or servicemember requires personal care services each time he or she completes one or more of the following: (1) Dressing or undressing oneself; (2)

Bathing; (3) Grooming oneself in order to keep oneself clean and presentable; (4) Adjusting any special prosthetic or orthopedic appliance, that by reason of the particular disability, cannot be done without assistance (this does not include the adjustment of appliances that nondisabled persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.); (5) Toileting or attending to toileting; (6) Feeding oneself due to loss of coordination of upper extremities, extreme weakness, inability to swallow, or the need for a non-oral means of nutrition; or (7) Mobility (walking, going up stairs, transferring from bed to chair, etc.).

The term *inability to perform an ADL* is listed in § 71.20(a)(3)(i) as one of the bases for determining PCAFC eligibility consistent with 38 U.S.C. 1720G(a)(2)(C)(i). The term is also referenced in the definition of *unable to self-sustain in the community,* which is applied in 38 CFR 71.40(c)(4)(i)(A)(*2*) for purposes of determining eligibility of a Primary Family Caregiver for the higher stipend level. As explained in more detail below, VA proposes to implement the statutory criterion in 38 U.S.C. 1720G(a)(2)(C)(i) through regulation text in proposed 38 CFR 71.20(a)(3)(i) and § 71.40(c)(4)(i)(A)(*2*) without referencing the term *inability to perform an ADL* in § 71.15. Those proposed amendments would eliminate the need for the current definition of *inability to perform an ADL* in § 71.15 and reduce the potential for confusion. Therefore, VA proposes to remove the term *inability to perform an ADL* and its definition from § 71.15.

3. Institutionalization

In § 71.15, VA proposes to revise the current definition of *institutionalization.* This term is used in § 71.45 for purposes of discharge from PCAFC and currently refers to being institutionalized in a setting outside the home residence to include a hospital, rehabilitation facility, jail, prison, assisted living facility, medical foster home, nursing home, or other similar setting. Under this proposal, VA would remove the language ''assisted living facility'' from this definition because residing in an assisted living facility should not by itself disqualify an eligible veteran or Family Caregiver (as those terms are defined in § 71.15) from PCAFC. VA would also clarify that ''other similar settings'' must be determined by VA.

VA has found that some eligible veterans residing in assisted living, or other similarly termed settings such as senior living, choose to utilize Family Caregivers under PCAFC for the provision of their personal care services in lieu of other paid services available from the assisted living facility or other service providers. Some assisted living facilities, and similarly termed environments, may offer room and board with limited additional support as part of the cost of residing in such facility. Other assisted living facilities may offer a menu of add-on services to include assistance with the personal care services that may have been provided by a Family Caregiver through PCAFC. However, in lieu of paying for such personal care services through the assisted living facility or other personal care service provider, an eligible veteran may prefer to receive personal care services from a Family Caregiver under PCAFC. In such cases, the assisted living facility would be considered the eligible veteran's home for purposes of § 71.20(a)(6) (conditioning PCAFC eligibility on the individual receiving care at home).

Additionally, a Family Caregiver residing in an assisted living facility should not necessarily be precluded from being approved and designated as a Family Caregiver in PCAFC simply because they reside in an assisted living facility. Such individual, for example, may live in the assisted living facility with the eligible veteran and be able to provide the personal care services the eligible veteran requires. The ability of the Family Caregiver to perform required personal care services is based upon the Family Caregiver's individual abilities, rather than the environment in which they reside.

Thus, to ensure eligible veterans and/or Family Caregivers who reside in assisted living facilities would not be excluded from PCAFC based only on the fact that they reside in an assisted living facility, VA proposes to revise the term *institutionalization* to exclude ''assisted living facility,'' such that *institutionalization* would instead mean being institutionalized in a setting outside the home residence to include a hospital, rehabilitation facility, jail, prison, medical foster home, nursing home, or other similar setting as determined by VA. However, this change would not nullify any of the eligibility criteria otherwise applicable to the eligible veteran and Family Caregiver. For example, in instances when personal care services that had been provided by the Family Caregiver are instead provided to the eligible veteran by or through the assisted living facility, the veteran would no longer be eligible for PCAFC pursuant to § 71.20(a)(5) (requiring that personal care services that would be provided by the Family Caregiver will not be simultaneously and regularly provided by or through another individual or entity). In such instances, the Family Caregiver's designation would be revoked for noncompliance pursuant to § 71.45(a)(1)(ii)(A) (that is, because the eligible veteran would not meet the requirements of § 71.20(a)(5)) when the personal care services that would be provided by the Family Caregiver to the eligible veteran are the same personal care services being provided by or through the assisted living facility to the eligible veteran, unless a different basis of revocation or discharge under § 71.45 applies.

For these reasons, VA proposes to revise the definition of *institutionalization* so as not to exclude from PCAFC eligible veterans and/or Family Caregivers who may be living at an assisted living facility, provided that the eligible veteran and Family Caregiver otherwise qualify for PCAFC. The eligibility criteria in § 71.20(a)(5) and (6), among other requirements, would help to ensure that the eligible veteran and Family Caregiver continue participating in PCAFC only when otherwise eligible to do so.

The definition of *institutionalization* also references ''other similar setting''. VA proposes to add the phrase ''as determined by VA'' after ''other similar setting'' to clarify that what is considered a ''similar'' setting is a VA determination. This is consistent with current practice. VA also proposes to replace the phrase ''refers to'' with the word ''means'' within the definition of *institutionalization.* This is a non-substantive edit to align with the formatting of other definitions found within § 71.15.

4. Joint Application

In § 71.15, VA proposes to revise the current definition of *joint application.* The term *joint application* is used in the definitions of *legacy applicant* and *legacy participant,* throughout § 71.25(a), in § 71.25(f), in § 71.40(d), and in § 71.45(b)(4)(iii). The term *joint application* is currently defined as an application that has all fields within the application completed, including signature and date by all applicants, with the following exceptions: social security number or tax identification number, middle name, sex, email, alternate telephone number, and name of facility where the veteran last received medical treatment, or any other field specifically indicated as optional.

VA proposed this definition as part of a March 6, 2020 rulemaking proposal. *See* 85 FR 13356, at 13362 (March 6, 2020) (hereinafter the March 6, 2020

Proposed Rule). VA explained in that rulemaking that an application that does not have all the mandatory sections completed would be considered incomplete, and VA would not be able to begin the application review process because the required sections are necessary for VA to begin that process. *Id.* VA further explained that failure to provide all the required information had led to delays as VA had to take steps to obtain the missing information. *Id.* VA received one public comment in response to its proposed definition of *joint application. See* 85 FR 46237 (July 31, 2020). The commenter suggested, in part, that delays could still result as VA would still need to inform applicants that their applications were incomplete; however, VA made no changes and adopted the definition without change. *Id.* at 46237–46238.

Since implementing this definition of *joint application,* VA continues to receive applications that do not have all the required fields completed. VA has also experienced challenges with timely identification of missing required information which has led to delays in providing notice to applicants about required information. Additionally, while certain minimum information is needed for VA to begin reviewing and evaluating applicants' eligibility for PCAFC (for example, the name of the veteran or servicemember and each Family Caregiver applicant), some required information (for example, date of birth or zip code), can be obtained in the course of evaluating applicants' PCAFC eligibility.

Instead of requiring specific information be included in the joint application in regulation, VA proposes to define the term *joint application* to mean an application for the Program of Comprehensive Assistance for Family Caregivers in such form and manner as the Secretary of Veterans Affairs considers appropriate. This proposed change would be consistent with the statutory text at 38 U.S.C. 1720G(a)(4), which requires that PCAFC applicants ''jointly submit to the Secretary an application [for PCAFC] in such form and in such manner as the Secretary considers appropriate.'' This proposed change to the definition of *joint application* would allow VA to begin evaluating joint applications so long as they contain the minimum information needed for VA to begin such review and evaluation of the applicants' eligibility for PCAFC. This would allow efficient and timely evaluation of joint applications and avoid subsequent delays in rendering decisions. In many cases, if certain information is missing from the joint application, it may be gathered during VA's evaluations rather than serving as a precursor to such evaluations being initiated. Furthermore, this proposed definition would permit the Secretary to make changes to the application form, as needed, to ensure that the appropriate information is requested and collected from PCAFC applicants in the joint application.

VA would continue to require the use of VA Form 10–10CG as the joint application. However, to help alleviate challenges identified above, if this proposal is adopted, VA would update the form to ensure that it does not require completion of fields that are not necessary for VA to begin reviewing and evaluating applicants' eligibility for PCAFC.

5. Legacy Applicant and Legacy Participant

In 38 CFR 71.15, VA proposes to revise the definitions of *legacy applicant* and *legacy participant.* These terms are currently used throughout part 71 to describe members of the legacy cohort. *Legacy applicant* is currently defined to mean a veteran or servicemember who submits a joint application for PCAFC that is received by VA before October 1, 2020 and for whom a Family Caregiver(s) is approved and designated on or after October 1, 2020 so long as the Primary Family Caregiver approved and designated for the veteran or servicemember on or after October 1, 2020 pursuant to such joint application (as applicable) continues to be approved and designated as such. *Legacy participant* is defined as an eligible veteran whose Family Caregiver(s) was approved and designated by VA under part 71 as of the day before October 1, 2020 so long as the Primary Family Caregiver approved and designated for the eligible veteran as of the day before October 1, 2020 (as applicable) continues to be approved and designated as such. For both legacy applicants and legacy participants, the definition also states that if a new joint application is received by VA on or after October 1, 2020 that results in approval and designation of the same or a new Primary Family Caregiver, the veteran or servicemember would no longer be considered a legacy applicant or legacy participant, as applicable.

VA proposes to revise the definitions of *legacy applicant* and *legacy participant* to specify that such designation would be a temporary designation. These designations identify individuals who would be subject to the transition period and related requirements VA established for the legacy cohort through 2020 rulemaking and that VA extended under the First PCAFC Extension for Legacy Cohort and the Second PCAFC Extension for Legacy Cohort. See 85 FR 13362, 86 FR 52614, and 87 FR 57602. VA proposes to state in regulation that following expiration of the transition period for the legacy cohort, which is proposed to conclude 18 months after the effective date of a final rule that implements this rulemaking, a veteran or servicemember will no longer be considered a legacy applicant or legacy participant. VA believes that inclusion of this language would help clarify that following the conclusion of the transition period for the legacy cohort, all individuals applying for and participating in PCAFC will be subject to the same set of criteria and requirements.

VA proposes to add a sentence at the end of the definitions for *legacy applicant* and *legacy participant,* which, as proposed, would state that effective [18 months after EFFECTIVE DATE OF FINAL RULE], a veteran or servicemember is no longer considered a legacy applicant or legacy participant, respectively.

6. Need for Supervision, Protection, or Instruction

In 38 CFR 71.15, VA proposes to remove the term *need for supervision, protection, or instruction* and its definition. The term *need for supervision, protection, or instruction* is listed as one of the bases for determining eligibility under § 71.20(a)(3) and is also referenced in the definition of *unable to self-sustain in the community,* which is applied in § 71.40(c)(4)(i)(A)(*2*) for purposes of determining the amount of the monthly stipend for which the Primary Family Caregiver is eligible. The term *need for supervision, protection, or instruction* is currently defined to mean an individual has a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis. This term and its definition were intended to implement, in a combined manner, two of the statutory bases upon which a veteran or servicemember can be determined to be in need of personal care services—specifically, a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury, and a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired. 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii).

However, as VA explained in its Interim Final Rule (IFR) dated

September 21, 2022, on March 25, 2022, the U.S. Court of Appeals for the Federal Circuit issued a decision in *Veteran Warriors, Inc.* v. *Sec'y of Veterans Affairs,* 29 F.4th 1320 (Fed. Cir. 2022) that invalidated VA's definition of *need for supervision, protection, or instruction* in 38 CFR 71.15. *See* 87 FR 57602–57603 (September 21, 2022). The court determined that the definition was inconsistent with the statutory language in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii). *Veteran Warriors* at 1342–43. Specifically, the court held that VA's decision to create a single frequency requirement for ''supervision'' under clauses (ii) and (iii) of section 1720G(a)(2)(C) was inconsistent with the statutory language. *Id.* at 1342. The court also found that clauses (ii) and (iii) of section 1720G(a)(2)(C) did not restrict eligibility based on ''personal safety'' in all cases, such that the ''personal safety'' requirement in VA's definition was inconsistent with the statutory text. *Id.* at 1342–43. As a result of this ruling, VA has applied clauses (ii) and (iii) of section 1720G(a)(2)(C) in place of the regulatory term *need for supervision, protection, or instruction* and its definition in 38 CFR 71.15 when making determinations under PCAFC regulations that became effective on October 1, 2020. Thus, where the term *need for supervision, protection, or instruction* is referenced, VA applies the statutory language in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) instead.

As explained below, at this time, VA is not proposing a new definition of *need for supervision, protection, or instruction* for purposes of interpreting clauses (ii) and (iii) of 38 U.S.C. 1720G(a)(2)(C). Instead, VA's proposed interpretation of those clauses would be addressed in proposed 38 CFR 71.20(a)(3)(ii) and (iii) for purposes of determining PCAFC eligibility and in proposed § 71.40(c)(4)(i)(A)(*2*) for purposes of determining eligibility for the higher stipend level. Those amendments, if adopted, would eliminate the need for a new definition of *need for supervision, protection, or instruction* in § 71.15.

For these reasons, VA proposes to remove the term *need for supervision, protection, or instruction* and its definition from § 71.15.

7. Unable to Self-Sustain in the Community

In § 71.15, VA proposes to remove the term *unable to self-sustain in the community* and its definition. *Unable to self-sustain in the community* currently is defined to mean that an eligible veteran: (1) requires personal care services each time he or she completes three or more of the seven activities of daily living (ADL) listed in the definition of an inability to perform an activity of daily living in § 71.15, and is fully dependent on a caregiver to complete such ADLs; or (2) has a need for supervision, protection, or instruction on a continuous basis. This term and its definition are used for purposes of determining eligibility for the higher stipend level under § 71.40(c)(4)(i)(A)(*2*). This term and its definition are also used in § 71.30, as reassessments under that section include consideration of whether the eligible veteran is *unable to self-sustain in the community* for purposes of the monthly stipend level determination under § 71.40(c)(4)(i)(A).

As explained below, VA proposes to revise § 71.40(c)(4)(i)(A)(*2*), which currently explains that if VA determines that the eligible veteran is unable to self-sustain in the community, the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 1.00. In proposed § 71.40(c)(4)(i)(A)(*2*), VA would list the criteria for the higher stipend level without referencing the term *unable to self-sustain in the community.* Consistent with that change, VA would also remove the term *unable to self-sustain in the community* from § 71.30, as discussed below. As VA would discontinue use of the term *unable to self-sustain in the community* and its definition in part 71, VA proposes to remove them from § 71.15.

8. Serious Injury

In § 71.15, VA proposes to revise the definition of *serious injury.* The current definition in § 71.15 states that *serious injury* means any service-connected disability that: (1) is rated at 70 percent or more by VA; or (2) is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA. This definition is applied by VA when determining whether an individual meets the eligibility criteria in § 71.20(a)(2), which requires the individual to have a *serious injury* incurred or aggravated in the line of duty to qualify for PCAFC.

VA proposes to revise the definition of *serious injury* in § 71.15 to include a total disability rating for compensation based on individual unemployability (IU) assigned by VA. IU ratings allow VA to compensate certain veterans at the 100 percent disability rate even though their service-connected disability or disabilities are not rated as 100 percent disabling by reference to specific rating schedule criteria. Under § 4.16(a), total disability ratings may be assigned when a veteran's schedular rating is less than total (which is to say, less than 100 percent) but where the veteran is unable to secure or follow a substantially gainful occupation due to service-connected disabilities. In other words, even though the veteran may not meet the requirements for a total (or 100 percent) disability rating by reference to the VA disability rating schedule criteria, the veteran may be compensated *as if* they were 100 percent disabled if their service-connected disability or the combination of their service-connected disabilities prevents them from engaging in substantial gainful employment.

The requirements for IU include that a veteran either (1) has one service-connected disability rated at least 60 percent disabling, or (2) has two or more service-connected disabilities with at least one rated at least 40 percent disabling and a combined rating of at least 70 percent. *See* § 4.16(a). VA also allows for extra-schedular consideration for an IU rating in cases of veterans who are unemployable by reason of service-connected disabilities, but who fail to meet these percentage standards. *See* § 4.16(b).

In VA's July 31, 2020 Final Rule, VA revised the definition of *serious injury.* 85 FR 46245–46251 (July 31, 2020). In promulgating this definition, VA declined to adopt a recommendation from a commenter who recommended that VA consider including in the definition of *serious injury* service-connected veterans who are in receipt of an IU rating. *Id.* at 46249–46250. IU may encompass veterans with service-connected disabilities rated less than 70 percent, and VA did not believe it would be appropriate to use IU as a substitute for having a single or combined 70 percent rating for the purposes of PCAFC. *Id.* at 46250. VA explained that not all veterans and servicemembers applying for or participating in PCAFC would have been evaluated by VA for such rating, and if VA were to create an exception in the definition of *serious injury* for individuals with an IU rating, VA would also need to consider whether other exceptions should also satisfy the definition. *Id.* Additionally, VA referenced that IU had proven to be a very difficult concept to apply consistently in the context of disability compensation and had been the source of considerable dissatisfaction with VA adjudications and of litigation. *Id.* Observing that importing this standard could introduce potential inconsistency into PCAFC, VA declined to make any changes to incorporate IU into the

definition of *serious injury* in VA's July 31, 2020 Final Rule. *Id.*

Following VA's implementation of the revised definition of *serious injury,* veterans and other stakeholders continued to raise concerns regarding the exclusion of IU from the definition of *serious injury.* VA therefore took another look at this topic and reexamined the exclusion of IU. Upon further review and reconsideration, VA now proposes to include a total disability rating for compensation based on IU within the definition of *serious injury* for purposes of PCAFC, regardless of the schedular disability rating assigned as VA has concluded the advantages of including IU in the definition of *serious injury* outweigh the concerns VA identified with doing so in VA's 2020 final rule.

VA's Schedule for Rating Disabilities (VASRD) percentage ratings represent the average impairment in earning capacity resulting from service-connected disabilities. See § 4.1. When the VASRD does not adequately account for the severity of the veteran's disability and its impact on the veteran's employability, VA may assign a total disability rating by establishing IU when the requirements under § 4.16 are met. An IU determination reflects VA's assessment that even though the veteran has a less than total schedular rating, their service-connected disability, or the combination of their service-connected disabilities, precludes them from engaging in substantial gainful employment and entitles them to payment at the 100 percent disability rate. *See* § 4.16. VA's assignment of an IU rating establishes that the veteran's service-connected disability or disabilities renders them unemployable and compensable as if they were 100 percent disabled. Therefore, individuals with IU assigned by VA have the same level of impairment in earning capacity as that of an individual with a schedular 100 percent disability rating, regardless of whether the individual's disability picture warrants a 100-percent rating under the rating schedule(s) for the service-connected disability or disabilities.

In proposing this change, VA also reexamined its prior concerns with including IU in the definition of *serious injury,* and VA no longer believes those concerns necessitate the same approach. One such concern was the fact that not all veterans and servicemembers applying for or participating in PCAFC will have been evaluated by VA for IU. *See* 85 FR 46250 (July 31, 2020). While this is still true, VA notes that any individual who does not currently have a total disability rating, including those that do not meet the definition of *serious injury* because their service-connected disability rating is less than 70 percent, can file a claim for an increased rating, which may include a request for IU if they believe such a rating is warranted.[2] There are existing processes for individuals to request consideration for IU, and adding IU to the definition of *serious injury* as proposed would provide an additional opportunity for veterans to satisfy the *serious injury* requirement in § 71.20(a)(2).

VA also considered that IU was a difficult concept to apply consistently in the context of disability compensation. *Id.* While VA knows that IU may be challenging to apply consistently and has been the source of litigation, it does not want to exclude veterans with IU ratings from meeting the definition of *serious injury* based on these challenges and prevent them from participating in PCAFC when all other eligibility requirements are met.

Additionally, VA has examined whether other criteria should meet the definition of *serious injury* (based on disability rating criteria or otherwise). Based on this review, the only criterion VA identified as being equivalent to having a single or combined 70 percent service-connected rating or higher, is a VA rating of IU. However, as indicated below, VA welcomes input from the public on any other VA ratings or other criteria that VA should consider as potentially meeting the definition of *serious injury* for purposes of PCAFC.

Accordingly, VA believes its earlier concerns about including IU in the definition of *serious injury* are now outweighed by the advantages that would result for individuals with an IU rating who satisfy all other PCAFC eligibility criteria. Thus, when VA determines that a veteran's service-connected disability or disabilities are so severe as to render them unable to secure or follow a substantially gainful occupation and grants the veteran entitlement to IU, VA believes such disability, or disabilities, should be considered a *serious injury* for purposes of PCAFC. VA believes this is true regardless of the basis for VA's IU rating under § 4.16(a) or (b). Further, VA reached this conclusion, in part, based on continued feedback from VSOs and other stakeholders. VA believes for the reasons set forth above, the proposed inclusion of IU in the definition of *serious injury* is a reasonable expansion of the definition for purposes of PCAFC.

Given the above, VA proposes to revise the definition of *serious injury* in § 71.15 to include a total disability rating for compensation based on IU assigned by VA. VA proposes to revise the definition of *serious injury* by reorganizing the introductory text and paragraphs (1) and (2), including the current criteria from paragraphs (1) and (2) in revised paragraphs (1) and (2), and adding this new basis in a new paragraph (3). This change, if adopted, would allow individuals who do not currently have a single or combined 70 percent disability rating to meet the definition of *serious injury* if they have an IU rating assigned by VA. As proposed, the definition of *serious injury* would state *serious injury* means any of the following as assigned by VA: (1) a service-connected disability rated at 70 percent or more; (2) any service-connected disabilities that result in a combined rating of 70 percent or more; or (3) any service-connected disability or disabilities that result in a total disability rating for compensation based on individual unemployability.

9. State

In § 71.15 VA proposes to add a definition for the term *State.* As explained above, current § 71.10(b) explains, among other things, that PCAFC and PGCSS benefits are provided only to those individuals residing in a State as that term is defined in 38 U.S.C. 101(20). Currently, § 71.10(b) is the only instance in which part 71 refers to the term *State* and its definition in 38 U.S.C. 101(20). However, this rulemaking proposal, if adopted, would add the term *State* in other sections of part 71 as well. Specifically, this term would be used in a new basis for revocation under proposed revisions to 38 CFR 71.45 and regarding State-declared emergencies in proposed § 71.55, as discussed in more detail below. Thus, as the term is proposed to be used in multiple sections in part 71, it would be appropriate to define it in § 71.15. VA's proposed definition would be consistent with current § 71.10(b), as VA would define *State* in proposed § 71.15 to have the meaning given to that term in 38 U.S.C.

[2] An IU rating under 38 CFR 4.16 would not ordinarily be awarded as a proposed rating to a servicemember undergoing medical discharge through the Integrated Disability Evaluation System. However, a servicemember undergoing medical discharge would still be able to meet the definition of serious injury for purposes of satisfying the requirement in § 71.20(a)(2), based on a proposed service-connected disability rating of 70 percent or higher. See 85 FR 13356, at 13369 (March 6, 2020) (explaining that ''[f]or servicemembers undergoing medical discharge . . . who apply for PCAFC, we would accept their proposed VA rating of disability when determining whether the servicemember has a serious injury''). Additionally, VA notes that servicemembers undergoing medical discharge can be considered for an IU rating upon discharge.

101(20). In 38 U.S.C. 101(20), *State* is defined to mean ''each of the several States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico. For the purpose of section 2303 and chapters 34 and 35 of [title 38], such term also includes the Canal Zone.''

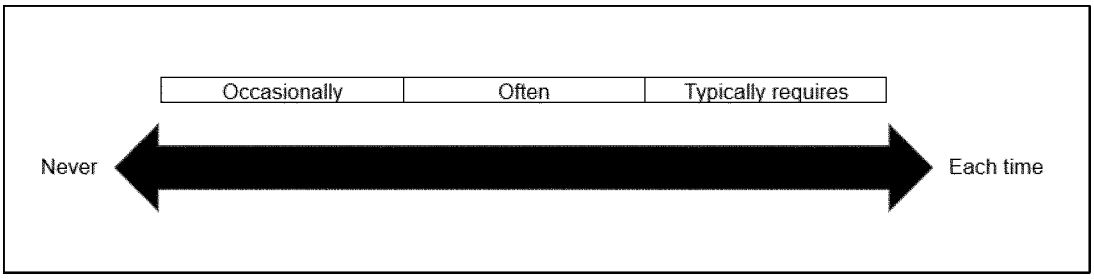
As this is the definition VA currently uses for this term in 38 CFR 71.10(b), this change would have no substantive impact on that section. However, to provide clarity and consistency throughout part 71, VA proposes to include a new definition for the term *State* in § 71.15 so that it is easier to locate, understand, and reference the definition of this term.

10. Typically Requires

In § 71.15, VA proposes to add a definition for the term *typically requires.* VA proposes to use the term *typically requires* in the bases for PCAFC eligibility in proposed § 71.20(a)(3)(i) and (iii) and the monthly stipend payment criteria in proposed § 71.40(c)(4)(i)(A)(*2*)(*i*). As this term is proposed to be used in multiple sections of part 71, and VA intends for this term to have the same meaning when referenced throughout part 71, VA proposes to add a definition for *typically requires* in § 71.15.

VA proposes to add a definition stating that *typically requires* means a clinical determination which refers to that which is generally necessary. Cambridge Dictionary defines ''typically'' as ''in a way that shows all the characteristics that you would expect from the stated person, thing, or group.'' [3] The Britannica Dictionary defines ''typically'' as ''generally or normally—used to say what normally happens'' and ''in the usual way—used to describe what is normal or expected of a certain place, person, situation, etc.'' [4] VA's use of ''typically'' denotes frequency for purposes of proposed § 71.20(a)(3)(i) and (iii) and for proposed § 71.40(c)(4)(i)(A)(*2*)(*i*) and would be consistent with these dictionary definitions. As frequency occurs on a continuum, to further demonstrate where on the continuum VA's proposed term *typically requires* would fall in comparison to other terms of frequency, VA provides the below graphic. *See* also the visual aid published at *www.regulations.gov* under RIN 2900–AR96.

Figure 1—Typically Requires



Additionally, like the definition of *in the best interest* in § 71.15, VA's proposed definition of *typically requires* would make clear that it is a clinical determination. This definition would allow VA to consider each individual's unique functional needs, abilities, and usual routines when making the clinical determination of whether the criteria in proposed § 71.20(a)(3)(i) and (iii) and proposed § 71.40(c)(4)(i)(A)(*2*)(*i*) are met. Additional discussion on how VA proposes to use the term *typically requires* is found in VA's discussion on proposed changes to §§ 71.20 and 71.40 below.

VA solicits comments from the public on all aspects of this proposed rule. In particular, VA asks the following questions on specific aspects of this proposal.

1. Please identify any similarly situated veterans or servicemembers who may not have an IU rating but nonetheless should be found to have a *serious injury* under the definition of that term in § 71.15 based on other VA ratings or other criteria.

2. VA has proposed a definition for the term *typically requires* that, in part, refers to that which is generally necessary. What other phrasing should VA consider as an alternative to generally necessary and why? Are there other criteria with regard to frequency that should be considered in defining *typically requires*?

3. Is there an alternative term other than *typically requires* that would be better defined to mean that which is generally necessary? For example, would the phrasing usually, most of the time, routinely, or ordinarily requires be clearer than the phrasing *typically requires*?

4. What factors should VA consider when determining what is generally necessary?

D. 38 CFR 71.20 Eligible Veterans and Servicemembers

Section 71.20(a) sets forth seven criteria for veterans and servicemembers to be determined eligible for a Primary Family Caregiver or Secondary Family Caregiver under part 71. In this rulemaking proposal, VA proposes to make substantive revisions to only two of the current criteria in § 71.20(a): (1) the individual is in need of personal care services for a minimum of six continuous months based on an inability to perform an activity of daily living, or a need for supervision, protection, or instruction (*see* § 71.20(a)(3)); and (2) the individual receives ongoing care from a primary care team or will do so if VA designates a Family Caregiver (*see* § 71.20(a)(7)). VA also proposes to make technical edits to § 71.20(a), as described in more detail below. VA's discussions of proposed changes include illustrative examples of how a veteran or servicemember could meet the two referenced criteria; however, this does not guarantee eligibility of the veteran or servicemember or caregiver applicant for participation in PCAFC, particularly as all the other criteria in § 71.20(a) would also have to be met, in addition to meeting other requirements in part 71.

[3] Cambridge University Press & Assessment, 2023, *https://dictionary.cambridge.org/dictionary/english/typically* (last visited Feb. 8, 2024) (also defining ''typically'' as ''used when you are giving an average or usual example of a particular thing'' and ''in a way that shows the characteristics of a particular kind of person or thing; or gives a usual example of a particular thing'').

[4] The Britannica Dictionary, 2023, *https://www.britannica.com/dictionary/typically* (last visited Feb. 8, 2024).

1. Section 71.20(a)(3)—Bases Upon Which the Individual May Be Determined To Be in Need of Personal Care Services for a Minimum of Six Continuous Months

Current § 71.20(a)(3) requires that the individual be in need of personal care services for a minimum of six continuous months based on (i) an inability to perform an activity of daily living; or (ii) a need for supervision, protection, or instruction. VA established these criteria based on its interpretation of 38 U.S.C. 1720G(a)(2)(C)(i) through (iii). 85 FR 13371–13372 (March 6, 2020). However, VA's use of the term *need for supervision, protection, or instruction,* including its definition, was invalidated by the court's decision in *Veteran Warriors,* as explained in the above discussion on the proposed removal of such term and definition from 38 CFR 71.15. As such, and to make other changes to better clarify the three statutory bases upon which an individual may be determined to be in need of personal care services in 38 U.S.C. 1720G(a)(2)(C)(i) through (iii), VA proposes to amend 38 CFR 71.20(a)(3) by revising the language in paragraphs (i) and (ii) and adding a new paragraph (iii).

As proposed, § 71.20(a)(3) would state the individual is in need of personal care services for a minimum of six continuous months based on any one of the following: (i) the individual typically requires hands-on assistance to complete one or more ADL; (ii) the individual has a frequent need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury; or (iii) the individual typically requires regular or extensive instruction or supervision to complete one or more ADL.

a. Proposed § 71.20(a)(3)(i)—The Individual Typically Requires Hands-On Assistance To Complete One or More ADL

As explained in the discussion of the definition of the term *inability to perform an ADL,* VA proposes to remove such term and its definition from § 71.15 and address the statutory basis under 38 U.S.C. 1720G(a)(2)(C)(i) (that is, the individual is in need of personal care services because of an inability to perform one or more ADL) in proposed 38 CFR 71.20(a)(3)(i) for purposes of determining a veteran's or servicemember's eligibility for PCAFC.

Therefore, VA proposes to revise § 71.20(a)(3)(i) to remove the current language of an inability to perform an activity of daily living and replace it with the individual typically requires hands-on assistance to complete one or more ADL. An individual who typically requires hands-on assistance to complete one or more ADL would have an inability to perform such ADL without such assistance, which would be consistent with the criterion in 38 U.S.C. 1720G(a)(2)(C)(i). This would include individuals who require assistance with some, or all of the tasks associated with an ADL, thus permitting individuals who are unable to contribute to the completion of the ADL to meet this criterion. VA explains below how this proposed change would clarify and differ from the current eligibility criterion in § 71.20(a)(3)(i).

i. Hands-On Assistance

First, in determining whether an individual is in need of personal care services under proposed § 71.20(a)(3)(i), VA would consider whether the individual typically requires ''hands-on'' assistance to complete one or more ADL. VA would require ''hands-on'' assistance for purposes of proposed paragraph (i), as this would be consistent with how VA has interpreted and applied the term *inability to perform an ADL,* (and remains consistent with 38 U.S.C. 1720G(a)(2)(C)(i)), for purposes of determining whether a veteran or servicemember is in need of personal care services on such basis. *See* 85 FR 46229, 46233, 46235 (July 31, 2020). In VA's July 31, 2020 Final Rule, VA noted that if an eligible veteran is eligible for PCAFC because they meet the definition of *inability to perform an ADL,* the in-person personal care services required to perform an ADL would be hands-on care. *Id.* at 46229. This is how VA has implemented this requirement since that final rule took effect on October 1, 2020. Individuals who do not meet the ''hands-on'' requirement may still meet the requirement for being in need of personal care services under current 38 CFR 71.20(a)(3) based on the statutory text in 38 U.S.C. 1720G(a)(2)(C)(ii) or (iii)—even though their needs are related to ADLs. *See* 85 FR 46235 (July 31, 2020). To provide further clarity and remove uncertainty concerning the type of assistance an individual must typically require in order to meet the criterion in proposed 38 CFR 71.20(a)(3)(i), VA proposes to include the words ''hands-on''.

By using the phrase ''assistance to complete'' in proposed § 71.20(a)(3)(i), in reference to situations in which hands-on assistance is typically required, it is not VA's intent to require any minimum amount of contribution by the veteran or servicemember in completing the ADL. If a caregiver performs an ADL entirely on behalf of the veteran or servicemember (such as dressing and undressing or bathing a veteran or servicemember who is unable to contribute to the completion of such ADL because of a physical or cognitive disability), the veteran or servicemember could still meet this proposed criterion.

In addition to being consistent with current practice, including the words ''hands-on'' in proposed § 71.20(a)(3)(i) would also make clear a distinction between proposed § 71.20(a)(3)(i), and proposed § 71.20(a)(3)(ii) and (iii), as proposed paragraph (iii) would set forth an additional explicit basis upon which an individual can be determined to be in need of personal care services related to an ADL, even without a need for ''hands-on'' assistance with the performance of one or more ADL.

ii. Removal of ''Each Time'' Requirement

Next, VA proposes to change the requirement that an individual must require personal care services ''each time'' the veteran or servicemember completes one or more ADL to be determined eligible for PCAFC under the basis in § 71.20(a)(3)(i). To do this, VA proposes to modify the current language in § 71.20(a)(3)(i) to remove reference to the term *inability to perform an ADL.* In current § 71.15, the definition of *inability to perform an ADL* means a veteran or servicemember requires personal care services ''each time'' they complete one or more ADL. Since VA proposes to remove the term *inability to perform an ADL* and its definition from § 71.15 and instead interpret the statutory requirement in 38 U.S.C. 1720G(a)(2)(C)(i) in proposed 38 CFR 71.20(a)(3)(i), VA believes it is important to acknowledge that VA's proposed revisions to § 71.20(a)(3)(i) would not retain the ''each time'' requirement for purposes of determining whether an individual typically requires hands-on assistance to complete one or more ADL, as VA has found ''each time'' to be too restrictive.

In establishing this requirement of ''each time'', VA believed that specifying the frequency with which personal care services would be needed (that is, ''each time'' the veteran or servicemember completes one or more ADL) would establish a clear, objective standard that could be consistently applied throughout PCAFC. *See* 85 FR 13360–13361 (March 6, 2020); 85 FR 46233 (July 31, 2020). It was also established to align with VA's goal of focusing PCAFC on eligible veterans with moderate and severe needs. *Id.*

However, VA received comments when it originally proposed the ''each time'' requirement, which included concerns that the ''each time'' requirement would be too restrictive and may result in denial of eligibility for some individuals with moderate and severe needs. *Id.* at 46232–46234. In the July 31, 2020 Final Rule, VA explained that if, over time, VA found that the definition of *inability to perform an ADL* was as restrictive as the commenters asserted it would be, VA would adjust and revise the definition accordingly in a future rulemaking. *Id.* at 46234.

Since that time, VA has continued to receive feedback from stakeholders that the requirement of ''each time'' in the current definition of the term *inability to perform an ADL* is too restrictive. For example, this issue was raised by stakeholders that participated in VA's roundtable listening session conducted on December 5, 2023. (*See* written transcript of roundtable discussion available online at *www.regulations.gov* under RIN 2900–AR96). VA agrees based on VA's review of denied applications. Through exchanges with stakeholders, including veterans, caregivers, VSOs, and members of Congress, and reviews of de-identified PCAFC evaluations that have been completed, VA identified instances of veterans with moderate or severe needs who almost always require assistance with one or more ADL yet, because of occasional episodes of independence, do not meet the current standard of requiring personal care services ''each time'' the veteran completes one or more ADL. This does not align with VA's intent to focus PCAFC on individuals with moderate and severe needs. VA provides illustrative examples below to showcase the restrictive nature of the ''each time'' requirement.

For example, a veteran may experience tremors and weakness due to their disability and consequently, require hands-on assistance from another individual when feeding and dressing on most occasions. However, due to waxing and waning of such symptoms over the course of an occasional day, this veteran can feed and dress themselves without assistance from another individual when they are experiencing limited symptoms. Such episodes in which the veteran experiences limited symptoms are not common for the veteran's level of function, and the reprieve of symptoms is infrequent. Because this veteran has occasional episodes of independence to complete one or more ADL, the veteran does not meet the current definition of *inability to perform an ADL* because personal care services are not required ''each time'' they feed and dress themselves.

Similarly, as another example, a veteran who usually requires hands-on assistance with toileting and mobility may have occasional days when the veteran, following a full night of rest, can perform each of these ADL independently for a limited period of time in the morning. However, as the day progresses, this veteran becomes fatigued and is unable to sustain the level of exertion needed to independently perform these ADL for the remainder of the day, thus requiring the assistance of another individual. This veteran also does not meet the current definition of inability to perform an ADL because they do not require assistance ''each time'' they perform these ADL.

In these and similar illustrative examples, VA has found that the ''each time'' standard has excluded individuals from meeting the requirement to be in need of personal care services based on an *inability to perform an ADL* despite having what VA considers to be moderate or severe needs. Such individuals are determined to not meet the current definition of *inability to perform an ADL* because they have episodes of independence that do not result in such individuals requiring personal care services ''each time'' they perform an ADL and they do not meet the requirement under current § 71.20(a)(3)(i). VA has thus determined that the requirement of ''each time'' in the current definition of *inability to perform an ADL* is too restrictive.

VA acknowledges that when the ''each time'' requirement in the definition of *inability to perform an ADL* was established, VA believed that such an objective and clear frequency requirement was necessary to create a consistent standard that could be operationalized across PCAFC. 85 FR 46233 (July 31, 2020). However, VA no longer believes this standard is necessary to create consistency when evaluating an individual's inability to perform an ADL. This is because VA's process for evaluating veterans and servicemembers under § 71.20(a)(3) includes comprehensive assessments that are able to identify specific variability in a veteran's or servicemember's unique functional needs, abilities, and usual routines. VA therefore asserts it is reasonable and appropriate to propose a standard that is less strict than ''each time'' in order to accommodate veterans and servicemembers with moderate and severe needs who would otherwise be excluded from PCAFC.

As an alternative to this proposal, VA considered whether to include a specific frequency requirement other than ''each time'', and whether that should be a quantitative standard. VA recognizes the importance of ensuring VA's interpretation of 38 U.S.C. 1720G(a)(2)(C)(i) in proposed 38 CFR 71.20(a)(3)(i) accounts for the unique functional needs, abilities, and usual routines of individual veterans and servicemembers who require hands-on assistance to complete one or more ADL and decided not to propose a quantitative standard and instead focus on what a veteran or servicemember *typically requires.* As discussed in regard to proposed changes to § 71.15, VA proposes to add a definition stating that *typically requires* means a clinical determination which refers to that which is generally necessary.

As identified by the Federal Circuit in *Veteran Warriors,* ''[t]here is a statutory gap'' as to how often an individual must be unable to perform an ADL under 38 U.S.C. 1720G(a)(2)(C)(i). *See Veteran Warriors* at 1339. Previously, VA adopted the ''each time'' requirement to fill that gap for purposes of interpreting and applying 38 U.S.C. 1720G(a)(2)(C)(i), and now, VA proposes to modify the requirement by replacing it with *typically requires in* 38 CFR 71.20(a)(3)(i). Inclusion of the term *typically requires* would address such questions as how often a veteran or servicemember must be unable to perform an ADL, how often the inability must be present, and how pervasive the inability must be for purposes of establishing inability to perform an ADL. *Id.*

In proposing to revise § 71.20(a)(3)(i) to focus on what is typically required by each veteran or servicemember rather than use another quantitative standard, VA would avoid setting a specific quantifiable threshold. VA acknowledges that in its July 31, 2020 Final Rule VA stated it did not want to use a non-specific threshold (for example, most or majority of time) for purposes of defining *inability to perform an ADL* because using such thresholds would be vague, subjective, arbitrary, difficult to quantify, and could lead to inconsistencies. 85 FR 46233–46234 (July 31, 2020). However, VA now believes using the term *typically requires* is appropriate because the determination of whether a veteran or servicemember is in need of personal care services based on an inability to perform an ADL is a clinical determination that inherently accounts for the individual's unique functional needs, abilities, and usual routines. A specific quantifiable threshold that

applies equally to all individuals could potentially result in the exclusion of some veterans and servicemembers with moderate and severe needs from PCAFC as was the case with VA's implementation of the ''each time'' requirement. This is because such a threshold would not provide the flexibility that would be required to account for each individual's unique functional needs, abilities, and usual routines in making the determination of whether they are in need of personal care services.

iii. Implementation of Proposed § 71.20(a)(3)(i)

A determination that a veteran or servicemember typically requires hands-on assistance to complete one or more ADL under proposed § 71.20(a)(3)(i) would be a clinical determination based on an assessment of the veteran's or servicemember's unique functional needs, abilities, and usual routines and take into consideration the tasks required to complete the ADL. In making this clinical determination VA may consider, for example, the frequency with which the ADL is completed, the functions and tasks performed by the individual to complete the ADL, and the frequency with which hands-on assistance from another individual is needed to complete such ADL, as each of these can vary from person to person.

A. Frequency of the Functions and Tasks Required To Complete an ADL

VA first must determine what functions and tasks are performed by an individual in order to complete an ADL, as this can vary from person to person. VA notes that requiring hands-on assistance only to complete functions or tasks performed on an occasional basis that are not part of the individual's usual self-care routine would not mean the veteran or servicemember typically requires hands-on assistance to complete an ADL. For example, one veteran may shave on a daily basis as part of completing the ADL of grooming, while a different veteran who chooses to maintain a full beard does not shave as part of their grooming routine.

B. Frequency of Need for Hands-On Assistance

VA would not require assistance ''each time'' the veteran or servicemember completes the ADL, as was explained above. Rather, VA would assess how frequently hands-on assistance is needed in conjunction with how often the ADL is completed. This would be a more expansive basis than what VA applies today.

Failure to meet the proposed criterion in § 71.20(a)(3)(i) would not preclude individuals from being determined to be in need of personal care services under another basis in § 71.20(a)(3). Veterans and servicemembers could also be determined to be in need of personal care services based on proposed § 71.20(a)(3)(ii) or (iii) (that is, the individual has a frequent need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury; or the individual typically requires regular or extensive instruction or supervision to complete one or more ADL), which are discussed below.

b. Proposed § 71.20(a)(3)(ii)—The Individual Has a Frequent Need for Supervision or Protection Based on Symptoms or Residuals of Neurological or Other Impairment or Injury

Under current § 71.20(a)(3)(ii), an individual may be determined to be in need of personal care services for a minimum of six continuous months based on a need for supervision, protection, or instruction. As explained above, this criterion was intended to implement the statutory criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) in a combined manner. However, the U.S. Court of Appeals for the Federal Circuit invalidated this term and its definition in the *Veteran Warriors* decision. Since the *Veteran Warriors* decision, in place of the term *need for supervision, protection, or instruction* and its definition in current § 71.15, VA has applied the statutory language in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) when determining whether a veteran or servicemember is in need of personal care services under 38 CFR 71.20(a)(3)(ii).

VA proposes to update its regulations to align with VA's current practice of interpreting the statutory criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) separately. To do so, VA proposes to revise 38 CFR 71.20(a)(3)(ii) to align with how VA has implemented the statutory criteria for 38 U.S.C. 1720G(a)(2)(C)(ii) (that is, a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury) as a result of the *Veteran Warriors* decision. For purposes of interpreting 38 U.S.C. 1720G(a)(2)(C)(ii), VA proposes to revise 38 CFR 71.20(a)(3)(ii) by replacing the language ''[a] need for supervision, protection, or instruction'' with the language ''[t]he individual has a frequent need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury''. This would be consistent with the statutory language in 38 U.S.C. 1720G(a)(2)(C)(ii). However, as previously discussed regarding 38 U.S.C. 1720G(a)(2)(C)(i), the statutory language in section 1720G(a)(2)(C)(ii) does not include an explicit frequency requirement; therefore, VA proposes to include the phrase ''has a frequent need'' in proposed 38 CFR 71.20(a)(3)(ii) to address that gap. Such term would be reflective of how VA has been applying this statutory basis since the *Veteran Warriors* ruling. Consistent with that, VA intends to apply common dictionary definitions of the word ''frequent'', which refer to an action occurring ''repeatedly, ''habitually'', or ''on many occasions'', when implementing this new criterion.[5] VA discusses its proposed implementation of this language in greater detail further below.

In implementing this proposed change, VA would continue to apply the statutory criteria as it relates to the interpretation of ''supervision or protection'' and ''symptoms or residuals of neurological or other impairment or injury'' as VA does in current practice. VA discusses this interpretation below.

i. Supervision or Protection

The statutory language in 38 U.S.C. 1720G(a)(2)(C)(ii) does not define supervision or protection. Therefore, VA has relied on common definitions and uses of these terms to inform VA's interpretation of this statutory provision. For instance, consistent with dictionary definitions of the term, VA considers ''supervision'' to be critical watching of an individual to provide oversight or directing (such as of activities or actions).[6] For the purposes of proposed 38 CFR 71.20(a)(3)(ii), supervision would not be limited to or dependent upon the veteran's or servicemember's needs related to specific activities or functions, which is in contrast to VA's interpretation of ''supervision'' under proposed § 71.20(a)(3)(iii), as discussed in more detail below. When VA evaluates a veteran or servicemember on the basis of whether the individual has a frequent

[5] *See* Merriam-Webster Dictionary, 2023, *https://www.merriam-webster.com/dictionary/frequent* (last visited Jul. 26, 2024); The Britannica Dictionary, 2023, *https://www.britannica.com/dictionary/frequent* (last visited Jul. 26, 2024); and Oxford English Dictionary, 2023, *https://www.oed.com/search/dictionary/?scope=Entries&q=frequent* (last visited Jul. 26, 2024).

[6] *See* Merriam-Webster Dictionary, 2023, *https://www.merriam-webster.com/dictionary/supervision* (last visited Feb. 8, 2024); The Britannica Dictionary, 2023, *https://www.britannica.com/dictionary/supervision* (last visited Feb. 8, 2024); and Oxford English Dictionary, 2023, *https://www.oed.com/search/dictionary/?scope=Entries&q=supervision* (last visited Feb. 8, 2024).

need for supervision based on symptoms or residuals of neurological or other impairment or injury, VA considers their overall need for supervision in general. VA interprets the word ''protection'' to mean keep, cover, or shield from harm. This is also consistent with common definitions for such term.[7]

VA considers the need for both supervision and protection when evaluating the statutory criterion in 38 U.S.C. 1720G(a)(2)(C)(ii). Although VA recognizes that the terms are distinct, VA does not believe it is necessary in its determinations to parse out whether an individual needs supervision, protection, or both under proposed 38 CFR 71.20(a)(3)(ii) because either one would satisfy this regulatory basis. Additionally, making this distinction would prove challenging because individuals who have a need for protection, generally also have a need for supervision. Likewise, an individual who needs supervision may need such supervision at times as a means of protection; however, at other times, supervision may be needed in the absence of a need for protection. When a caregiver takes action to protect a veteran or servicemember from harm, they may do so in the course of also overseeing (or supervising) that individual. For example, a veteran with a history of hypervigilance and hallucinations and who acts upon such hallucinations may need protection to support their safety during hallucinations. In such instances, the caregiver must provide supervision to identify whether protection is needed.

ii. Symptoms or Residuals of Neurological or Other Impairment or Injury

Next, VA describes its interpretation of the basis for such supervision and protection, that is, symptoms or residuals of neurological or other impairment or injury. Consistent with VA's current practice, in evaluating and determining whether a veteran or servicemember has a frequent need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury under proposed § 71.20(a)(3)(ii), VA would not have a discrete list of symptoms or residuals of neurological or other impairment or injury by which a veteran or servicemember may be determined eligible under this criterion as these can vary by individual. As clinical practices evolve over time, VA would not want to list in regulation specific symptoms or residuals as doing so could unnecessarily limit VA's ability to find individuals eligible under this criterion. However, examples of symptoms and residuals of neurological or other impairment or injury for which a veteran or servicemember may require supervision or protection may include, but are not limited to, unmanaged impulse control, command hallucinations, uncontrolled seizures, loss of muscular control, or cognitive impairments.

VA does not currently have a discrete list of neurological or other impairments or injuries that would make a veteran or servicemember eligible under this criterion. *See* 85 FR 13363–13364 (March 6, 2020). This is because individuals with similar impairments or injuries may experience a wide variation of symptoms leading to a variety of functional impacts. While VA does not propose to maintain a discrete list of impairments or injuries in regard to this criterion, examples of impairments or injuries for which symptoms or residuals may lead to a veteran or servicemember typically requiring supervision or protection may include, but are not limited to, traumatic brain injury, mental health conditions, Parkinson's disease, dementia, and neuromuscular disorders such as muscular dystrophy, multiple sclerosis, or amyotrophic lateral sclerosis.

iii. Implementation of Proposed § 71.20(a)(3)(ii)

While VA would consider whether an individual has a frequent need for supervision or protection when evaluating whether an individual is in need of personal care services on this basis, VA would not set forth a specific quantitative requirement for the frequency with which a veteran or servicemember may require supervision or protection other than specifying that the need for supervision or protection is frequent. VA has found that there is no uniform frequency of individuals' need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury. The frequency of need varies based on each individual's unique needs and depends on severity of their symptomology.

Therefore, when implementing proposed § 71.20(a)(3)(ii), VA would consider how frequently a veteran or servicemember is in need of personal care services under this basis. VA would consider how symptoms manifest for each unique individual, whether their symptoms are well-controlled, and whether the veteran or servicemember has a past pattern or history of requiring supervision or protection because of such symptomology. Although a past pattern or history of requiring supervision or protection will be considered, VA notes that it is not necessarily determinative of whether an individual would be determined to meet proposed § 71.20(a)(3)(ii), as such individual may not continue to need supervision or protection on a frequent basis.

In requiring a ''frequent need'', VA can allow for variance in the type of need and circumstances presented in each individual case, while still maintaining a consistent standard. This approach differs from the frequency proposed under 38 CFR 71.20(a)(3)(i) and (iii) (that is, *typically requires*). This is because unlike the criteria in proposed § 71.20(a)(3)(i) and (iii), which focus on ADLs, the need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury proposed in § 71.20(a)(3)(ii) does not have a discrete list of needs or circumstances. In this regard, determining what is typically required for an individual would be impractical.

To illustrate how the requirement for a frequent need would be applied, VA provides the following example. There may be two veterans with the same diagnosis of multiple sclerosis who both have symptoms of muscle weakness that require a caregiver to stay in close proximity and intervene if the veteran stumbles, to minimize or prevent falls. In this example, one veteran experiences muscle weakness on a daily, or near daily, basis and has a history of multiple falls, resulting in a daily or near daily need for supervision and/or protection by a caregiver. The other veteran experiences occasional muscle weakness one or two days per week for limited amounts of time following completion of recommended strengthening exercises, resulting in an occasional need for supervision or protection by a caregiver on these days. While these two veterans have the same diagnosis and both experience the same symptoms of muscle weakness, the former veteran may have a frequent need for supervision and protection while the latter veteran may only occasionally have such need. In the case of the second veteran in this example, where the need for supervision or protection only occurs after participating in their recommended strengthening exercises, the veteran may not be considered to have a frequent need for supervision or protection

[7] *See* Merriam-Webster Dictionary, 2023, *https://www.merriam-webster.com/dictionary/protect* (last visited Feb. 8, 2024); and The Britannica Dictionary, 2023, *https://www.britannica.com/dictionary/protection* (last visited Feb. 8, 2024).

because such need is infrequent and not generally necessary.

Additionally, under proposed 38 CFR 71.20(a)(3)(ii), VA would consider whether an individual has a demonstrated past pattern or history when determining whether the individual has a frequent need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury. However, a past pattern or history of needing supervision or protection is not necessarily determinative of whether an individual would be determined to meet proposed § 71.20(a)(3)(ii), as such individual may not continue to have a frequent need for supervision or protection.

VA looks forward to receiving public comments on this proposal. Additionally, VA notes that if the changes under proposed § 71.20(a)(3)(ii) become effective, VA would develop trainings and guidance materials to support consistent evaluation of this standard.

c. Proposed § 71.20(a)(3)(iii)—The Individual Typically Requires Regular or Extensive Instruction or Supervision To Complete One or More ADL

As previously explained, the current regulatory text in § 71.20(a)(3)(ii) was intended to implement the statutory criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) in a combined manner by establishing that an individual could be determined to be in need of personal care services based on a *need for supervision, protection, or instruction.* However, the *Veteran Warriors* decision, issued on March 25, 2022, invalidated VA's definition of *need for supervision, protection, or instruction.* Since that decision, VA has been applying the statutory language in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) in place of the criterion in current 38 CFR 71.20(a)(3)(ii). VA discussed its proposed interpretation of 38 U.S.C. 1720G(a)(2)(C)(ii) above and proposes to further interpret 38 U.S.C. 1720G(a)(2)(C)(iii) in proposed modifications to the regulations as discussed in more detail below.

For purposes of interpreting 38 U.S.C. 1720G(a)(2)(C)(iii) (that is, a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired), VA proposes to add 38 CFR 71.20(a)(3)(iii) to state that the individual typically requires regular or extensive instruction or supervision to complete one or more ADL. This proposed interpretation of the statutory criteria deviates from current practice in two ways. The first is VA's inclusion of the term *typically requires,* which would specify how often a veteran or servicemember would be in need of personal care services on this basis. The second is that VA identified a need to further define its interpretation of the statutory phrase ''without which the ability of the veteran to function in daily life would be seriously impaired''. In proposed § 71.20(a)(3)(iii), VA would interpret this statutory phrase to mean ''to complete one or more ADL''. VA discusses its interpretation of the statutory language and its proposed criterion in greater detail further below.

i. Typically Requires

Including the term *typically requires* in proposed § 71.20(a)(3)(iii) would specify the frequency with which an eligible veteran would be in need of personal care services on this basis and would align with VA's use of the term *typically requires* in proposed § 71.20(a)(3)(i), as discussed above. Although the words ''regular'' and ''daily'' in 38 U.S.C. 1720G(a)(2)(C)(iii) could be viewed in isolation as referring to specific frequencies, for the reasons explained below, VA does not believe that Congress intended those words to establish any frequency requirement in section 1720G(a)(2)(C)(iii). Accordingly, VA proposes to include the term *typically requires* in proposed 38 CFR 71.20(a)(3)(iii) to modify the frequency requirement previously established in the definition of *supervision, protection, or instruction* that referred to a ''daily basis''.[8]

ii. Regular or Extensive Instruction or Supervision

In 38 U.S.C. 1720G(a)(2)(C)(iii), Congress did not define what is meant by regular or extensive instruction or supervision. In implementing this statutory criterion, VA has relied upon common definitions of the terms ''regular'', ''extensive'', ''instruction'', and ''supervision'' to inform VA's interpretation. Today, ''regular'' has been applied to mean some amount of supervision or instruction while ''extensive'' has generally been applied to mean a large amount of supervision or instruction. Additionally, to date, VA has applied common definitions of ''instruction'' and ''supervision'' when implementing the statutory criteria under section 1720G(a)(2)(C)(iii). VA now seeks to clarify and further define its interpretation of the statutory criterion and use of these terms.

The term ''instruction'' commonly refers to the provision of guidance or detailed information to complete or perform an action. It is defined as ''something that someone tells you to do,'' as ''a statement that describes how to do something; an order or command; the action or process of teaching'' and ''that which is taught; knowledge or authoritative guidance imparted by one person to another.'' [9] VA's use of the term ''instruction'' in proposed § 71.20(a)(3)(iii) would be consistent with these definitions, as VA would consider the need for instruction to mean the need for detailed information is necessary to perform an activity as VA does in current practice.

VA's interpretation of the meaning of ''supervision'' is addressed in the discussion above regarding proposed 38 CFR 71.20(a)(3)(ii) (that is, VA considers ''supervision'' to be critical watching of an individual to provide oversight or directing (such as of activities or actions)).[10] While the term ''supervision'' has the same meaning in proposed paragraphs (a)(3)(ii) and (iii), in proposed paragraph (a)(3)(iii) supervision would be needed with respect to the veteran's or servicemember's ability to complete one or more ADL, in contrast to supervision under proposed paragraph (a)(3)(ii) which does not include that same requirement.

Additionally, VA recognizes that the terms ''instruction'' and ''supervision'' are distinct terms. However, consistent with VA's proposed approach with regard to supervision or protection under proposed 38 CFR 71.20(a)(3)(ii) discussed above, VA does not believe it is necessary in its determinations to parse out whether an individual typically requires instruction, supervision, or both under proposed

[8] Even if not viewed as a statutory gap, the language in 38 U.S.C. 1720G(a)(2)(C)(iii) is at least ambiguous as to the frequency with which an individual would need regular or extensive instruction to be determined in need of personal care services on this basis. For the reasons explained below, VA would resolve that ambiguity by establishing in proposed 38 CFR 71.20(a)(3)(iii), that the individual typically requires regular or extensive instruction or supervision to meet this criterion.

[9] *See* Cambridge Dictionary, 2023, *https://dictionary.cambridge.org/us/dictionary/english/instruction* (last visited Feb. 8, 2024); The Britannica Dictionary, 2023, *https://www.britannica.com/dictionary/instruction* (last visited Feb. 8, 2024); and Oxford English Dictionary, 2023, *https://www.oed.com/search/dictionary/?scope=Entries&q=instruction* (last visited Feb. 8, 2024).

[10] *See* Merriam-Webster Dictionary, 2023, *https://www.merriam-webster.com/dictionary/supervision* (last visited Sept. 24, 2023); The Britannica Dictionary, 2023, *https://www.britannica.com/dictionary/supervision* (last visited Feb. 8, 2024); and Oxford English Dictionary, 2023, *https://www.oed.com/search/dictionary/?scope=Entries&q=supervision* (last visited Feb. 8, 2024).

§ 71.20(a)(3)(iii) because either one would satisfy this regulatory basis.

Next, VA explains its proposed interpretations of ''regular'' instruction or supervision and ''extensive'' instruction or supervision and the distinction between the two. The word ''regular'' can carry several meanings, such as ''characterized by evenness, order, or harmony in physical form, structure, or organization; arranged in or constituting a constant or definite pattern; happening over and over again at the same time or in the same way; happening or done very often; normal or usual.'' [11] Merriam Webster Dictionary describes ''regular'' as meaning, ''recurring, attending, or functioning at fixed, uniform, or normal intervals; normal, standard; something of average or medium size.'' [12] It is this latter meaning, that is, that which is something of average or medium size, which VA interprets to have the most applicability for purposes of evaluating that which is ''regular'' instruction or supervision under proposed § 71.20(a)(3)(iii). Notably, ''regular'' is commonly used to refer to a standard or indicative of size, such as regular clothing size versus petite or long, regular warranty versus extended warranty, regular display versus extended display, or an amount, such as with regular (basic) rates of pay.[13] These common definitions and usages that align with the term meaning a size or degree, inform VA's interpretation of the statutory language and its use of the term ''regular'' in proposed § 71.20(a)(3)(iii). This is also consistent with how VA currently interprets this term when applying the statutory criteria today.

VA's use of the term ''regular'' in proposed § 71.20(a)(3)(iii) aligns with common usage of the term relating to size or degree, such as a standard amount. VA considered the use of ''regular'' in terms of frequency. However, Congress did not include a frequency requirement in either of the criteria found in 38 U.S.C. 1720G(a)(2)(C)(i) or (ii). Therefore, VA does not believe that Congress intended to add a frequency requirement in the context of only one basis that an individual could be determined to be in need of personal care services.[14] As previously discussed, VA is proposing to establish a consistent frequency requirement for the two statutory bases VA proposes would apply to the need for personal care services to complete ADLs through VA's use of the term *typically requires* in the proposed criterion discussed here and the criterion in proposed 38 CFR 71.20(a)(3)(i) discussed above. As referenced in VA's discussion of proposed § 71.15, *typically requires* would be a clinical determination that would take into consideration an individual's unique functional needs, abilities, and usual routines when assessing the frequency of the individual's need for personal care services.

Similarly, VA would continue to interpret the term ''extensive'' to also account for size or degree but on a larger scale than regular. The term ''extensive'' commonly refers to that which is large in size or amount, having a wide or considerable extent, or extending over or occupying a large surface or space, covering a large area or being a large amount.[15] Each of these meanings for extensive refers to a size or degree. VA therefore equates ''extensive'' with a greater size or higher degree of personal care services requiring instruction or supervision than that of ''regular'' as explained below.

VA interprets the terms regular (something of average or medium size) and extensive (that which is large in size), to reflect different points along a spectrum. VA interprets this difference in size or degree to reflect a distinction in the size or degree of personal care services required by the veteran or servicemember. This means that a regular need for instruction or supervision is of a lower size or degree than an extensive need for instruction or supervision.

Using this proposed standard, if adopted as final, when applying the criterion in proposed 38 CFR 71.20(a)(3)(iii), VA would interpret the need for extensive instruction or supervision to mean that such instruction or supervision is required throughout the performance of the activity; hence the personal care services (that is, instruction or supervision) required to complete the activity would be of a large size or degree. In contrast, VA would interpret the need for regular instruction or supervision to mean such personal care services are only needed to complete a portion of the activity. Thus, VA would consider ''regular'' to refer to a lesser size or degree of instruction or supervision than that of ''extensive''.

Although VA interprets ''regular'' and ''extensive'' to reflect different sizes or degrees of personal care services required by the veteran or servicemember, having either a ''regular'' or ''extensive'' need for instruction or supervision to complete one or more ADL would satisfy the criterion in proposed § 71.20(a)(3)(iii). This is consistent with VA's proposed approach with regard to supervision or protection under proposed § 71.20(a)(3)(ii) and instruction or supervision under § 71.20(a)(3)(iii) discussed above. However, the distinction between ''regular'' and ''extensive'' would be relevant to determinations under proposed § 71.40(c)(4)(A)(*2*)(*i*) regarding stipend level determinations, as discussed further below.

iii. Ability To Function in Daily Life Would Be Seriously Impaired

Finally, in proposed 38 CFR 71.20(a)(3)(iii), VA also proposes to interpret ''without which the ability of the veteran to function in daily life would be seriously impaired'' in 38 U.S.C. 1720G(a)(2)(C)(iii) to mean that such individual typically requires regular or extensive instruction or supervision ''to complete one or more ADL''. This is a deviation from current practice as currently VA may include other activities or functions in addition to ADL when applying this statutory criterion as is explained below. VA believes it is reasonable to interpret ADL as the ''ability of the veteran to function in daily life'' contemplated in 38 U.S.C. 1720G(a)(2)(C)(iii). Activities or functions other than ADL for which

[11] *See* Cambridge Dictionary, 2023, *https://dictionary.cambridge.org/us/dictionary/english/regular* (last visited Feb. 8, 2024); The Britannica Dictionary, 2023, *https://www.britannica.com/dictionary/regular* (last visited Feb. 8, 2024); and Oxford English Dictionary, 2023, *https://www.oed.com/search/dictionary/?scope=Entries&q=regular* (last visited Feb. 8, 2024).

[12] *See* Merriam-Webster Dictionary, 2023, *https://www.merriam-webster.com/dictionary/regular* (last visited Feb. 8, 2024).

[13] *See* for example, Regular Military Compensation (RMC) Calculator, Department of Defense, *https://militarypay.defense.gov/calculators/rmc-calculator/* (Describing ''regular military compensation'' as a basic level of compensation that every servicemember receives.) (last visited Feb. 8, 2024).

[14] One could argue that use of the word ''daily'' in section 1720G(a)(2)(C)(iii) refers to a frequency requirement and could imply that a veteran or servicemember must experience the need each day. However, in section 1720G(a)(2)(C)(iii) the word ''daily'' is used to modify the word ''life'' and is better understood to refer to the types of activities that the veteran or servicemember ordinarily completes to function in the normal course of a day (such as ADL). For this reason, VA does not read the word ''daily'' in section 1720G(a)(2)(C)(iii) to contain a frequency requirement. Additional discussion of VA's interpretation of the phrase ''ability of the veteran to function in daily life would be seriously impaired'' in section 1720G(a)(2)(C)(iii) is below.

[15] *See* Merriam-Webster Dictionary, 2023, *https://www.merriam-webster.com/dictionary/extensive* (last visited Feb. 8, 2024); The Britannica Dictionary, 2023, *https://www.britannica.com/dictionary/extensive* (last visited Feb. 8, 2024); and Oxford English Dictionary, 2023, *https://www.oed.com/search/dictionary/?scope=Entries&q=extensive* (last visited Feb. 8, 2024).

veterans and servicemembers with moderate or severe needs may be in need of personal care services could be captured under the basis proposed in 38 CFR 71.20(a)(3)(ii) (that is, the individual has a frequent need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury). Therefore, proposed 38 CFR 71.20(a)(3)(iii) would refer to instruction or supervision to complete one or more ADL rather than repeating the verbiage in 38 U.S.C. 1720G(a)(2)(C)(iii).

As VA explained above regarding the term ''regular'' in section 1720G(a)(2)(C)(iii), VA does not believe Congress intended the term ''daily'' in such section to establish a frequency requirement—especially one more restrictive than would apply under clauses (i) and (ii) of section 1720G(a)(2)(C). The statute does not say that the veteran or servicemember would have a daily need for regular or extensive instruction or supervision. Rather, it says that without such regular or extensive instruction or supervision, the ability to ''function in daily life would be seriously impaired.'' In this context, VA interprets ''function in daily life'' to align with VA's proposed definition of ADL in 38 CFR 71.15. In proposed § 71.15, ADL would be defined, in part, as the functions or tasks for self-care usually performed in the normal course of a day. VA believes this is consistent with the language 38 U.S.C. 1720G(a)(2)(C)(iii) concerning functioning in daily life, as ADL are typically performed on a daily basis. However, similar to VA's discussion on proposed 38 CFR 71.20(a)(3)(i) and the proposed definition of ADL in § 71.15, VA would not require that the ADL with which the individual requires regular or extensive instruction or supervision be performed on a daily basis. ADL often occur on a daily basis, but not always (for example, bathing). For purposes of this criterion, VA would apply the proposed definition of ADL in 38 CFR 71.15, and the term *typically requires* would set forth the applicable frequency of need. VA explains its rationale for this interpretation in more detail below.

In determining whether the ability of the veteran or servicemember to function in daily life would be seriously impaired for purposes of 38 U.S.C. 1720G(a)(2)(C)(iii), VA contemplated what other essential functions or activities, beyond or instead of ADL, might be considered functions in daily life that would be seriously impaired without regular or extensive instruction or supervision under proposed 38 CFR 71.20(a)(3)(iii). Specifically, VA considered activities caregivers commonly assist veterans with beyond ADL. Such activities include but are not limited to meal preparation, shopping for essential needs, managing finances, housework, and coordinating medical care.[16] VA does not believe Congress intended to capture such activities under 38 U.S.C. 1720G(a)(2)(C)(iii) for the reasons discussed below.

First, and most noteworthy, the phrasing of this criterion in 38 U.S.C. 1720G(a)(2)(C)(iii) implies the veteran or servicemember is the individual who performs the activity. To have a need for regular or extensive instruction or supervision *without which* the ability to function in daily life would be seriously impaired suggests that the veteran or servicemember must be capable of performing some activity to function in daily life *with* the provision of such instruction or supervision. This means that if a veteran or servicemember is not capable of performing such activity because that veteran or servicemember is physically or cognitively incapable of doing so, and no amount of instruction or supervision would enable that veteran or servicemember to perform that activity, such veteran or servicemember would not qualify under this basis. This means an individual who may have a greater need, that is, who requires another person to complete the activity necessary for functioning in daily life in its entirely or on behalf of the veteran, would not qualify under this basis, while an individual who can complete the activity with assistance (instruction or supervision) could qualify.[17]

Second, VA does not believe Congress intended to include activities classified as instrumental activities of daily living (IADL) such as meal preparation, shopping for essential needs, managing finances, housework, or coordinating medical care within the criterion in 38 U.S.C. 1720G(a)(2)(C)(iii) because such activities are those that may be completed entirely by another individual without the veteran's or servicemember's presence or involvement. Therefore, if these activities are not performed by the veteran or servicemember either by choice or inability, and are instead completed by another individual, the veteran's or servicemember's functioning in daily life would not be seriously impaired—with or without instruction or supervision in performing such activities, as they do not perform the activity. This would not mean that individuals who are incapable of performing or who otherwise need assistance with these activities would be excluded from PCAFC. Such individuals may still be in need of personal care services based on meeting the other criteria under proposed § 71.20(a)(3).

Therefore, ADL are the only activities VA identified for which the ability of the veteran or servicemember to function in daily life would be seriously impaired in the absence of regular or extensive instruction or supervision and that pursuant to this interpretation, the criterion in proposed § 71.20(a)(3)(iii) would not unduly disadvantage one group over another. Furthermore, in contrast to the other functions or activities VA considered, ADL cannot be done without the veteran's or servicemember's presence or involvement. The veteran's or servicemember's physical presence is necessary for the ADL to be completed because the ADL that is completed is performed on, or directly impacts, the veteran's body. Thus, VA finds it appropriate to interpret 38 U.S.C. 1720G(a)(2)(C)(iii) to mean the individual typically requires regular or extensive instruction or supervision to complete one or more ADL. While there are indeed other activities which could result in a veteran's or servicemember's ability to function in daily life being seriously impaired that are not related to ADL, such as but not limited to a veteran or servicemember who requires supervision due to frequent falls, or a veteran or servicemember who requires instruction or supervision to properly self-administer medications, such needs could be captured under proposed 38 CFR 71.20(a)(3)(ii). An illustrative example is provided below when VA addresses multiple bases for being determined to be in need of personal care services.

Although VA did not identify any other life activities or functions that would meet the statutory language beyond that which are ADL and which are not already covered under the other bases (that is, a need for hands-on assistance or a need for regular or extensive supervision or instruction to complete one or more ADL), VA specifically requests comments on this topic from the public on whether there are certain IADL, or other activities or functions in daily life that VA should consider for purposes of determining that an individual is in need of personal

[16] Rajeev Ramchand, et al., Hidden Heroes: America's Military Caregivers. Santa Monica, CA: RAND Corporation (2014), pages 54–56, available at *https://www.rand.org/pubs/research_reports/RR499.html.*

[17] Note that the individual with a greater need may qualify under a separate criterion under proposed 38 CFR 71.20(a)(3)(i) or (ii) and the failure to qualify under this basis in § 71.20(a)(3)(iii) would not mean that an individual is necessarily ineligible for PCAFC.

care services under 38 U.S.C. 1720G(a)(2)(C)(iii) and proposed 38 CFR 71.20(a)(3)(iii).

iv. Implementation of Proposed § 71.20(a)(3)(iii)

Similar to VA's discussions above regarding proposed 38 CFR 71.20(a)(3)(i), in evaluating whether the individual typically requires regular or extensive instruction or supervision to complete one or more ADL should this proposed regulation text become final, VA would consider the instruction or supervision that is generally necessary when the individual is completing one or more ADL. In determining if an individual typically requires regular or extensive instruction or supervision to complete one or more ADL, VA would consider for each individual, factors such as how often the ADL is completed as well as the frequency with which instruction or supervision is needed to complete such ADL. What is typically required would be a clinical determination based on an assessment of the veteran's or servicemember's needs and would take into consideration things like the individual veteran's or servicemember's unique functional needs, abilities, usual routines, and the tasks required to be able to complete the ADL.

d. Eligibility Under Multiple Proposed Bases

Under VA's proposed interpretation of 38 CFR 71.20(a)(3)(i) through (iii), some veterans and servicemembers may be determined to be in need of personal care services based on more than one criterion. This means that a veteran or servicemember may be determined to be in need of multiple types of personal care services (that is, hands-on assistance with ADL, supervision or protection, and/or instruction or supervision). For example, while both proposed § 71.20(a)(3)(i) and (iii) would require a veteran or servicemember to typically require personal care services with respect to one or more ADL, the type of personal care services that would be required by the veteran to satisfy each proposed criterion differ. Under proposed § 71.20(a)(3)(i), the individual would typically require hands-on assistance, and under proposed § 71.20(a)(3)(iii), the individual would typically require regular or extensive instruction or supervision, which VA would consider to be something other than hands-on assistance. For example, a veteran may typically require hands-on assistance with bathing and also typically require regular or extensive instruction for dressing. In such instance, the veteran may meet both proposed § 71.20(a)(3)(i) and (iii). This is just one example; however, an individual could be determined to be in need of personal care services based on meeting various combinations of the criteria in proposed § 71.20(a)(3) such as meeting the criterion in proposed § 71.20(a)(3)(i) and (ii) or meeting all three criteria in proposed § 71.20(a)(3)(i) through (iii).

2. Section 71.20(a)(7)—Ongoing Care From a Primary Care Team

Current § 71.20(a)(7) requires that the individual receives ongoing care from a primary care team or will do so if VA designates a Family Caregiver. VA proposes to revise this paragraph to require that the individual receives ongoing care from a primary care team or will do so within 120 days of the date VA designates a Family Caregiver. VA would further propose to state in this paragraph that if the individual is unable to receive such care due, at least in part, to an event or action within VA's control, VA may extend this 120-day period.

As explained in VA's 2011 IFR and 2015 Final Rule implementing PCAFC, the current requirement to receive ongoing care in § 71.20(a)(7) is necessary to enable VA to perform statutorily required functions, including documenting findings related to the delivery of personal care services and ensuring appropriate follow-up. *See* 76 FR 26151 (May 5, 2011) and 80 FR 1363–1364 (January 9, 2015) (citing 38 U.S.C. 1720G(a)(9)).

As proposed, VA would continue to require that the individual receives ongoing care from a primary care team or will do so if VA designates a Family Caregiver. However, VA proposes to add a timeframe, specifically, within 120 days of the date VA designates a Family Caregiver, within which the individual must do so. Requiring the individual to receive ongoing care from a primary care team within a specified time frame would enable VA to ensure that it continues to provide appropriate follow-up and perform statutorily mandated functions within a reasonable amount of time following designation of a Family Caregiver, as described above. This is especially important for those individuals who are not already receiving ongoing care from a primary care team, as that could result in delayed access to necessary care, including supports and services, which could lead to potentially unsafe situations.

VA believes that allowing for 120 days to receive such care is a reasonable amount of time to schedule and receive care from a primary care team following VA's designation of a Family Caregiver. Furthermore, it would align with the timing within which VA would conduct the first wellness contact, which is generally conducted 120 days after approval. *See* 38 CFR 71.40(b)(2). Wellness contacts include but are not limited to a review of the eligible veteran's well-being and allow VA the opportunity to identify and provide any additional support, services, or referrals for services needed by the eligible veteran or Family Caregiver. *See* 85 FR 13380 (March 6, 2020). Additionally, while eligible veterans and Family Caregivers may request additional supports and services at any time, such requests are often made and discussed during wellness contacts. Ensuring the eligible veteran is receiving ongoing care from a primary care team within 120 days of the date VA designates a Family Caregiver would avoid delay in the eligible veteran obtaining needed services.

Pursuant to proposed paragraph (a)(7), VA would also have the discretion to extend this time period if the individual is unable to receive ongoing care from a primary care team due, at least in part, to an event or action within VA's control. While VA anticipates an individual who seeks to receive care from a primary care team will be able to receive such care within 120 days, VA recognizes there may be extenuating circumstances in which receipt of such care may take longer than 120 days. This provision, as proposed, would continue to allow for some flexibility in such instances.

3. Section 71.20(b) and (c)—Legacy Applicants and Legacy Participants

Currently, under paragraphs (b) and (c) of § 71.20, for five years beginning on October 1, 2020, a veteran or servicemember is eligible for a Primary or Secondary Family Caregiver under part 71 if they are a legacy applicant or legacy participant. As discussed earlier in this rulemaking, VA proposes to extend this transition period for the legacy cohort. To provide for this additional period, VA proposes to amend § 71.20(b) and (c).

First, VA proposes to amend § 71.20(b) and (c) by removing the phrase ''For five years beginning on October 1, 2020'' and adding in its place, the phrase ''Beginning on October 1, 2020 through [18 months after EFFECTIVE DATE OF FINAL RULE]''. Additionally, VA would replace ''Primary or Secondary Family Caregiver'' with ''Primary Family Caregiver or Secondary Family Caregiver'' to reference those terms as they are defined in § 71.15. Finally, VA

would replace the phrase ''he or she'' with ''veteran or servicemember'' to conform to VA's goal to ensure its regulations are gender neutral.

As proposed, paragraph (b) would state beginning on October 1, 2020 through [18 months after EFFECTIVE DATE OF FINAL RULE], a veteran or servicemember is eligible for a Primary Family Caregiver or Secondary Family Caregiver under this part if the veteran or servicemember is a legacy participant. Proposed paragraph (c) would state beginning on October 1, 2020 through [18 months after EFFECTIVE DATE OF FINAL RULE], a veteran or servicemember is eligible for a Primary Family Caregiver or Secondary Family Caregiver under this part if the veteran or servicemember is a legacy applicant.

VA solicits comments from the public on all aspects of this proposed rule. In particular, VA asks the following questions on specific aspects of this proposal.

1. What activities or tasks in addition to or other than ADL should VA consider when determining whether a veteran or servicemember has a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired?

2. VA has explained VA's interpretation of the words ''regular'' and ''extensive'' instruction or supervision. How else might ''regular'' be distinguished from ''extensive'' instruction or supervision?

3. As explained above, VA would not set forth a specific quantitative requirement for the frequency with which a veteran or servicemember may require supervision or protection other than specifying that the individual has a frequent need for supervision or protection. This is because the need for supervision or protection is not limited to a discrete list of activities or circumstances. VA has found that there is no uniform frequency of individuals' need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury. The frequency of need varies based on each individual's unique needs and depends on severity of their symptomology. Is there a different frequency standard VA should consider, and if so, what is that standard?

E. 38 CFR 71.25 Approval and Designation of Primary Family Caregivers and Secondary Family Caregivers

Section 71.25 describes the process for approval and designation of Primary Family Caregivers and Secondary Family Caregivers. As described below, VA proposes to amend § 71.25(a) and (b) by revising certain terminology, restructuring certain language, and adding additional language to address application and eligibility requirements.

1. Section 71.25(a)—Application Requirement

Current § 71.25(a) explains the requirement for submission of a joint application for approval and designation of a Primary Family Caregiver or Secondary Family Caregiver. In current § 71.25(a)(1), VA requires individuals who wish to be considered for designation by VA as Primary Family Caregivers or Secondary Family Caregivers to submit a joint application, along with the veteran or servicemember. Individuals interested in serving as Family Caregivers must be identified as such on the joint application, and no more than three individuals may serve as Family Caregivers at one time for an eligible veteran, with no more than one serving as the Primary Family Caregiver and no more than two serving as Secondary Family Caregivers.

VA proposes to add a paragraph to § 71.25(a)(1) to address instances of a Secondary Family Caregiver seeking designation as the Primary Family Caregiver and would reorganize § 71.25(a)(1) as a result. As proposed, § 71.25(a)(1) would state that individuals who wish to be considered for designation by VA as Primary Family Caregivers or Secondary Family Caregivers must submit a joint application, along with the veteran or servicemember. However, VA would add two paragraphs to proposed § 71.25(a)(1).

Proposed § 71.25(a)(1)(i) would consist of the second sentence of current paragraph § 71.25(a)(1) without change. Proposed § 71.25(a)(1)(ii) would state a currently approved Secondary Family Caregiver for the eligible veteran may apply for designation as the Primary Family Caregiver by submitting a new joint application along with the eligible veteran.

VA proposes to add § 71.25(a)(1)(ii) to clarify that the joint application requirement still applies when an individual who is currently serving as a Secondary Family Caregiver wishes to be designated as the Primary Family Caregiver. If a Primary Family Caregiver's designation is revoked, they are discharged from PCAFC, or if the Primary Family Caregiver's revocation or discharge is pending, then the eligible veteran and their approved and designated Secondary Family Caregiver may want the Secondary Family Caregiver to be approved and designated as the Primary Family Caregiver. VA's current practice is to require that the Secondary Family Caregiver submit a new joint application, along with the eligible veteran. VA would continue with its current practice as it ensures the statutory requirements in 38 U.S.C. 1720G(a)(7) are met, including the requirement in section 1720G(a)(7)(B)(iii), that the eligible veteran consents to VA's designation of the individual as the Primary Family Caregiver for the eligible veteran. By submitting a new joint application, both the eligible veteran and the individual applying as the Primary Family Caregiver make their intentions known and it ensures that both parties are seeking the change in designation. Therefore, new proposed 38 CFR 71.25(a)(1)(ii) would state a currently approved Secondary Family Caregiver for the eligible veteran may apply for designation as the Primary Family Caregiver by submitting a new joint application along with the eligible veteran.

Although this is not a proposed change, it is important to note that if the eligible veteran is a legacy participant or legacy applicant and a new joint application is received by VA on or after October 1, 2020 that results in approval and designation of the same or a new Primary Family Caregiver, the eligible veteran would no longer be considered a legacy participant or legacy applicant as those terms are defined in 38 CFR 71.15. *See* 85 FR 13375–13376 (March 6, 2020).

VA also proposes to amend § 71.25(a)(2)(i) to address evaluation requirements when a current Secondary Family Caregiver seeks designation as a Primary Family Caregiver. Pursuant to current § 71.25(a)(2)(i), upon receiving a joint application, VA (in collaboration with the primary care team to the maximum extent practicable) will perform the evaluations required to determine the eligibility of the applicants under part 71, and if eligible, determine the applicable monthly stipend amount under § 71.40(c)(4). *See* § 71.25(a)(2)(i). Notwithstanding that, VA will not evaluate a veteran's or servicemember's eligibility under § 71.20 as part of the application process when a joint application is received seeking to designate a Secondary Family Caregiver for an eligible veteran who has a designated Primary Family Caregiver. *Id.*

VA proposes to add an additional exception when it would not evaluate a veteran's or servicemember's eligibility under § 71.20 as part of the application process and proposes to reorganize

§ 71.25(a)(2)(i) as a result. VA proposes to revise § 71.25(a)(2)(i) by adding the phrase ''except as provided in paragraphs (a)(2)(i)(A) and (B) of this section,'' in the first sentence and adding new paragraphs (A) and (B). In proposed § 71.25(a)(2)(i), VA would refer to the ''monthly stipend payment'' instead of the term ''monthly stipend amount'' that appears in the first sentence of current § 71.25(a)(2)(i). This proposed change would ensure consistency with terminology used elsewhere in part 71. VA also proposes to move part of the last sentence in current § 71.25(a)(2)(i) regarding when a joint application is received seeking to designate a Secondary Family Caregiver for an eligible veteran who already has a designated Primary Family Caregiver to new paragraphs (A) and (A)(*1*). In addition to reorganizing that language into a new paragraph (a)(2)(i)(A) and paragraph (A)(*1*), VA would add ''as part of the application process'', change ''add'' to ''designate'', and add ''already''. These proposed edits are intended to be non-substantive technical changes that would further clarify this provision. VA proposes no other changes to that language.

VA also proposes to add new paragraph § 71.25(a)(2)(i)(A)(*2*) to address situations in which a current Secondary Family Caregiver seeks to change their designation to a Primary Family Caregiver. Under proposed § 71.25(a)(2)(i)(A)(*2*), VA would not reevaluate an eligible veteran under § 71.20 when an eligible veteran seeks to designate a current Secondary Family Caregiver for the eligible veteran as the Primary Family Caregiver for that same eligible veteran so long as the eligible veteran has already been determined to meet the eligibility criteria found in current § 71.20(a) or proposed § 71.20(a). In proposing this change, VA seeks to eliminate unnecessary evaluations of eligible veterans while also ensuring that VA approves and designates a Primary Family Caregiver only for a veteran or servicemember who has been determined to meet PCAFC eligibility criteria in § 71.20(a). In proposed § 71.25(a)(2)(i)(A)(*2*), VA would reference the § 71.20(a) criteria that would be in effect as of the effective date of this proposed rulemaking, if adopted, as well as the current § 71.20(a) criteria (which may have included the statutory criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) in place of the definition of *need for supervision, protection, or instruction*). This is because, those who have been determined to meet the eligibility criteria in current § 71.20(a) would also meet the eligibility criteria in proposed § 71.20(a). Instead of evaluating eligibility under § 71.20(a) when a joint application is received to change the Secondary Family Caregiver to Primary Family Caregiver, VA proposes to rely on its most recent evaluation of the personal care needs of the eligible veteran to inform the determination of the Secondary Family Caregiver's ability to serve in the role of Primary Family Caregiver, and if eligible, the monthly stipend payment the Primary Family Caregiver would be eligible to receive as set forth in proposed revisions to § 71.40(c)(4)(i)(A). This most recent evaluation of the personal care needs of the eligible veteran would have included the Family Caregiver's assessment of the needs and limitations of the eligible veteran to the extent required by 38 U.S.C. 1720G(a)(3)(C)(iii)(I). In this scenario, re-evaluation of the eligible veteran would be unnecessary. However, at any time after the Secondary Family Caregiver transitions to being approved and designated as the Primary Family Caregiver, the eligible veteran or Primary Family Caregiver may request a reassessment in writing pursuant to proposed § 71.30(c), which is discussed below.

As proposed, § 71.25(a)(2)(i) would state upon receiving such application, except as provided in paragraphs (a)(2)(i)(A) and (B) of § 71.25, VA (in collaboration with the primary care team to the maximum extent practicable) will perform the evaluations required to determine the eligibility of the applicants under part 71, and if eligible, determine the applicable monthly stipend payment under § 71.40(c)(4). Proposed § 71.25(a)(2)(i)(A) would state VA will not evaluate a veteran's or servicemember's eligibility under § 71.20 as part of the application process when: (1) A joint application is received seeking to designate a Secondary Family Caregiver for an eligible veteran who already has a designated Primary Family Caregiver; or (2) A joint application is received that seeks to change the designation of a current Secondary Family Caregiver for an eligible veteran to designation as the Primary Family Caregiver for that same eligible veteran so long as the eligible veteran has already been determined to meet the eligibility criteria under proposed § 71.20(a) or § 71.20(a) (2021) (which may have included the statutory criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) in place of the criterion in § 71.20(a)(3)(ii)).

Additionally, VA proposes to add new § 71.25(a)(2)(i)(B) to indicate that the required evaluations for Family Caregiver applicants found in § 71.25 may not all be required when a current approved Secondary Family Caregiver applies to be designated as the Primary Family Caregiver for the same eligible veteran. Proposed § 71.25(a)(2)(i)(B) would state upon receipt of a joint application that seeks to designate a current Secondary Family Caregiver as the Primary Family Caregiver for the same eligible veteran, VA will determine which evaluations under § 71.25 are necessary to assess the individual's eligibility as the Primary Family Caregiver. VA proposes this new paragraph as VA may not require re-evaluation of each eligibility criteria for such individuals, as those serving as a Secondary Family Caregiver for an eligible veteran would have already been determined to meet the eligibility requirements found in § 71.25. The individual designated as a Secondary Family Caregiver would have already completed caregiver training and demonstrated the ability to carry out the specific personal care services, core competencies, and additional care requirements needed by the eligible veteran. For these reasons, VA believes that a more limited evaluation may be warranted to determine eligibility of a current Secondary Family Caregiver to serve as the Primary Family Caregiver.

While VA is not proposing to amend § 71.40(d) regarding the effective date of PCAFC benefits, VA notes that new benefits for Secondary Family Caregivers who are subsequently designated as a Primary Family Caregiver would become effective pursuant to § 71.40(d). This would mean that in the event a Secondary Family Caregiver applies for and is designated as the Primary Family Caregiver for the same eligible veteran, additional benefits exclusive to the role of Primary Family Caregiver, such as the monthly stipend, would become effective pursuant to § 71.40(d) requirements.

Current § 71.25(a)(2)(ii) explains that individuals who apply to be Family Caregivers must complete all necessary eligibility evaluations (along with the veteran or servicemember), education and training, and the initial home-care assessment (along with the veteran or servicemember) so that VA may complete the designation process no later than 90 days after the date the joint application was received by VA. Current § 71.25(a)(2)(ii) further explains that if such requirements are not completed within 90 days from the date the joint application is received by VA, the joint application will be denied, and a new joint application will be required. VA may extend the 90-day period based on

VA's inability to complete the eligibility evaluations, provide necessary education and training, or conduct the initial home-care assessment, when such inability is solely due to VA's action.

VA has had instances in which VA has extended the 90-day timeline based on VA's inability to approve and designate a Family Caregiver solely because of actions taken or not taken by VA. However, VA has found that such inability is rarely because of one discrete event where responsibility for the delay is easily identified and attributed to VA. More often, VA has experienced instances when there may be an initial delay in VA scheduling an evaluation, for example, and because of this delay the veteran (or servicemember) or Family Caregiver applicant may be delayed in completing other requirements, or vice versa. VA proposes to provide flexibility to VA to extend the 90-day period rather than deny the application and require the veteran and Family Caregiver applicant to re-submit a joint application, which would further delay access to PCAFC.

Thus, VA proposes to revise this last sentence of § 71.25(a)(2)(ii) to remove the word solely and explain that VA may extend the 90-day period based on VA's inability to complete the eligibility evaluations, provide necessary education and training, or conduct the initial home-care assessment, when such inability is, *at least in part,* due to VA's action. This proposal, if adopted, would give VA greater flexibility to extend the deadline for completing the designation process, and VA expects that this change would reduce burdens on VA staff as well as PCAFC applicants who would otherwise be required to re-submit a joint application if the designation process was not completed within the 90-day timeline.

VA also proposes to amend § 71.25(a)(3) to address how it would evaluate joint applications if the proposed revisions to the definition of *joint application* under § 71.15 and other proposed changes to eligibility criteria discussed in this proposed rule are made final and effective. Current § 71.25(a)(3) explains how VA will evaluate joint applications received before, on, and after October 1, 2020, which is the date that the July 31, 2020 Final Rule became effective. Joint applications received by VA before October 1, 2020 were evaluated by VA based on 38 CFR 71.15, 71.20, and 71.25 (2019) except that the term *joint application* as defined in current § 71.15 applied to such applications. Joint applications received on or after October 1, 2020 were and are evaluated based on the criteria in effect on or after such date. § 71.25(a)(3)(ii). Paragraphs (A) and (B) of § 71.25(a)(3)(ii) further address joint applications submitted by veterans and servicemembers seeking to qualify for PCAFC based on the phased expansion of PCAFC eligibility criteria in current § 71.20(a)(2)(ii) and (iii) (codifying the criteria for the phased expansion of PCAFC to qualifying veterans and servicemembers who incurred or aggravated a serious injury in the line of duty before September 11, 2001). *See* 85 FR 13376 (March 6, 2020). As VA has evaluated all joint applications received by VA before October 1, 2020, the regulation text addressing those joint applications in § 71.25(a)(3)(i) is no longer necessary. Similarly, the regulation text found in paragraphs (A) and (B) of § 71.25(a)(3)(ii) is also obsolete as VA has evaluated all joint applications referenced in those paragraphs. Therefore, VA proposes to remove the current text found in § 71.25(a)(3)(i) and (a)(3)(ii)(A) and (B) addressing joint applications received by VA before October 1, 2020 and to further revise these paragraphs as discussed below.

The application process for PCAFC requires evaluation, training, and assessments that occur over a period of time. Given this, VA expects there will be joint applications received by VA prior to the effective date of this proposed rule for which eligibility determinations are still pending on the effective date of the rule. Consistent with the approach taken in the July 31, 2020 Final Rule, VA proposes to review pending joint applications received by VA before the effective date of the final rule, if adopted, using the eligibility criteria in place on the day the joint application was received, unless otherwise noted. 85 FR 13375 (March 6, 2020). Since VA proposes to change certain eligibility criteria, including certain terms and definitions that would affect VA's review of joint applications received, among other things in this proposed rule, VA believes it is reasonable for VA to continue to evaluate joint applications received prior to the effective date of any final rule adopting amendments to eligibility criteria, under the statutes and regulations in effect at the time the joint application was received by VA. This approach would provide transparency for applicants and reduce the likelihood of inconsistencies or delays when rendering a decision as certain evaluations may need to be repeated if VA were to apply the new criteria to joint applications pending on the date a final rule becomes effective. While VA would seek to mitigate these concerns through applying the statutes and regulations in effect at the time VA received the joint application, VA proposes certain exceptions as explained below.

First, VA would not apply the definition of *joint application* as it currently appears in § 71.15 if this rule is adopted as proposed. Rather VA would apply the new proposed definition of *joint application* discussed above regarding proposed changes to § 71.15. VA discusses the challenges associated with the current definition of this term and VA's rationale for this proposed definition above. If adopted, VA would apply the proposed definition of *joint application* in rendering a determination under the regulations in effect from October 1, 2020, through the effective date of any rule changes, thereby eliminating any use of the current definition once rule changes become final and effective. Given the challenges associated with the current definition of *joint application,* VA sees no reason to maintain its use in evaluating joint applications received prior to the effective date of any rule changes to the definition of *joint application.*

Next, VA proposes to make clear how VA has addressed the term *need for supervision, protection, or instruction* in part 71 since the term was invalidated by *Veteran Warriors,* and how VA would continue to address it when evaluating joint applications received prior to the effective date of any rule changes to delete the definition of *need for supervision, protection, or instruction* in § 71.15. Specifically, this proposed change would codify in regulations the criteria used by VA since the court's ruling in *Veteran Warriors.* As explained above, the *Veteran Warriors* decision, issued on March 25, 2022, invalidated VA's definition of *need for supervision, protection, or instruction* in § 71.15. Since that decision, VA no longer applies this term or its definition when rendering PCAFC decisions. Instead, VA applies the statutory criteria found in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii). As proposed, 38 CFR 71.25(a)(3)(ii) would establish in VA's regulations that for PCAFC applications received between October 1, 2020 and the effective date of a final rule adopting the amendments to part 71 in this proposed rule, VA would not apply the term *need for supervision, protection, or instruction* and would apply the statutory criteria under 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) instead.

To incorporate these changes into 38 CFR 71.25(a)(3), VA proposes to revise

§§ 71.25(a)(3)(i)–(ii) and (a)(3)(ii)(A)–(B) and add new § 71.25(a)(3)(ii)(B)(*1*)–(*2*). As proposed, § 71.25(a)(3)(i) would state that a joint application under part 71 is evaluated in accordance with the statutes and regulations in effect on the date VA receives such joint application. Section 71.25(a)(3)(ii) and (a)(3)(ii)(A)–(B) would state notwithstanding paragraph (a)(3)(i) of § 71.25, in rendering a determination under part 71, based on the regulations that were in effect from October 1, 2020 through the effective date of the final rule: (A) the definition of ''joint application'' in § 71.15 that would become effective on the effective date of the final rule would apply, and (B) the definition of ''need for supervision, protection, or instruction'' in § 71.15 does not apply. Proposed § 71.25(a)(3)(ii)(B)(*1*)–(*2*) would explain that in place of the definition of ''need for supervision, protection, or instruction'' in § 71.15, the following criteria apply: (1) a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury; or (2) a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired.

2. Section 71.25(b)—Eligibility To Serve as Primary Family Caregiver or Secondary Family Caregiver

Current § 71.25(b) explains the requirements to serve as a Primary Family Caregiver or Secondary Family Caregiver. This includes being either a family member or someone who lives with the eligible veteran full-time or will do so if designated as a Family Caregiver. *See* § 71.25(b)(2)(i) and (ii). VA proposes to revise § 71.25(b)(2)(ii) to refer to someone who lives with the eligible veteran full-time or will do so within 120 days of the date VA designates the individual as a Family Caregiver. This proposed change would account for Family Caregiver applicants who are not family members of the veteran or servicemember and who may be living apart from the veteran or servicemember during the application process but who intend to live with them once the Family Caregiver is approved and designated. The personal care needs of a veteran or servicemember applying for PCAFC may be provided by a non-family member who only intends to live with the veteran or servicemember if approved and designated as a Family Caregiver, since doing so would be a condition of participation in PCAFC. Upon approval and designation, VA would not expect the newly designated Family Caregiver to be prepared to move in with the veteran or servicemember instantly and without advance notice. Rather a period of transition may be needed, and appropriate, so VA proposes to establish a time period for such transition in § 71.25(b)(2)(ii). VA believes a period of up to 120 days is an adequate amount of time for a Family Caregiver or the veteran or servicemember to relocate if necessary. This 120-day period also aligns with the time period within which VA would conduct the first wellness contact, which is generally conducted 120 days after approval and designation. *See* § 71.40(b)(2). During this wellness contact, VA would have the opportunity to confirm the non-family member Family Caregiver is living with the eligible veteran full-time.

Finally, VA proposes to revise the section heading for § 71.25 by replacing the word ''Primary'' with the term ''Primary Family Caregivers''. As proposed, the section heading would state ''Approval and designation of Primary Family Caregivers and Secondary Family Caregivers''. VA proposes a similar edit to the heading and introductory sentence for § 71.25(b), which would state ''*Eligibility to serve as Primary Family Caregiver or Secondary Family Caregiver.* In order to serve as a Primary Family Caregiver or Secondary Family Caregiver, the applicant must meet all of the following requirements''. If adopted, these changes, along with a similar change to proposed § 71.25(a)(1), discussed above, would be non-substantive technical edits to fully reference the term *Primary Family Caregiver* as such term is defined in § 71.15.

F. 38 CFR 71.30 Reassessment of Eligible Veterans and Family Caregivers

Current § 71.30 describes the process for reassessments of eligible veterans and Family Caregivers under PCAFC. VA proposes to amend § 71.30 to revise the language regarding the frequency of VA-initiated reassessments, incorporate a standard by which eligible veterans and Primary Family Caregivers can request a reassessment and to make other technical and conforming amendments consistent with other changes included in this proposed rule.

1. Proposed Changes to the Frequency of VA-Initiated Reassessments

VA proposes to revise § 71.30 by removing the language that reassessments will occur on an annual basis. Currently, § 71.30(a) requires that, except as provided in paragraphs (b) or (c), each eligible veteran and Family Caregiver will be reassessed by VA (in collaboration with the primary care team to the maximum extent practicable) on an annual basis to determine their continued eligibility for participation in PCAFC. The reassessment of eligible veterans and Family Caregivers under § 71.30 includes consideration of PCAFC eligibility criteria and, if applicable, the criteria in § 71.40(c)(4)(i)(A) for purposes of the monthly stipend rate. *See* § 71.30(a).

VA believes it is important to conduct reassessments to monitor an eligible veteran's need for personal care services and the needs and capabilities of the designated Family Caregiver(s), to determine if any of these needs have changed over time. Reassessments also provide Family Caregivers and eligible veterans with an opportunity to provide feedback to VA, which can inform whether additional instruction, preparation, training, or technical support may be warranted. *See* 85 FR 13379 (March 6, 2020). *See* also 38 U.S.C. 1720G(a)(3)(D). The reassessment process may also result in changes to a Primary Family Caregiver's monthly stipend. VA takes the Family Caregiver's assessment of the eligible veteran's needs and limitations into account when determining the Primary Family Caregiver's monthly stipend payment, if applicable. *See* 85 FR 13379 (March 6, 2020). *See* also 38 U.S.C. 1720G(a)(3)(C)(iii)(I).

Reassessments are necessary to ensure that individuals participating in PCAFC continue to meet eligibility requirements. VA proposes to maintain reassessments but proposes to remove the language in § 71.30(a) which states reassessments will occur on an annual basis, except as provided under paragraphs (b) and (c). VA originally proposed this default frequency for reassessments under § 71.30(a) because it recognized that an eligible veteran's need for personal care services may change over time, and the reassessments provided an opportunity for VA to consider whether an eligible veteran's assessed level of need had increased or decreased during the year. 85 FR 13378 (March 6, 2020). In addition, VA believed that requiring annual reassessments would create consistency across the program and ensure that reassessments were generally conducted on a standard timeline. *Id.* at 13378–79.

While applying the provision of annual reassessments provided standardization in the frequency of reassessments, VA no longer believes that annually is the appropriate standard cadence to assess continued eligibility for PCAFC. Although VA has the authority to conduct reassessments more or less frequently than annually pursuant to current § 71.30(b) and (c),

VA believes that this proposal, if adopted in a final rule, would provide transparency for the public that VA intends to no longer maintain a default threshold of an annual reassessment. VA would continue to provide notice to PCAFC participants regarding the timeline for future reassessments through issuance of VA policy and written communication with PCAFC participants. VA also would continue monitoring the results of reassessments over time and use data to inform any changes to the cadence of reassessments within policy.

To remove the default frequency of conducting annual reassessments, VA proposes to revise the first sentence of § 71.30(a) by removing the phrase ''on an annual basis''. VA would also remove the phrase ''[e]xcept as provided in paragraphs (b) and (c) of this section,'' from the first sentence because the exceptions to the annual requirement currently set forth in § 71.30(b) and (c) would no longer be necessary. VA is proposing additional changes to paragraphs (b) and (c), which are discussed further below.

VA also proposes a technical edit to clarify that reassessments are completed for the eligible veteran and all Family Caregivers of the eligible veteran (in cases where there is more than one), by adding the word ''each'' before ''Family Caregiver'' in the first sentence of proposed § 71.30(a). Thus, as proposed, the first sentence of § 71.30(a) would state that the eligible veteran and each Family Caregiver will be reassessed by VA (in collaboration with the primary care team to the maximum extent practicable) to determine their continued eligibility for participation in PCAFC under part 71.

Finally, VA proposes to change the second sentence of § 71.30(a) which explains that in the context of reassessments, VA considers whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate under § 71.40(c)(4)(i)(A). VA proposes to add the phrase ''if applicable'' to the end of the second sentence because consideration of the monthly stipend only occurs as part of a reassessment when the eligible veteran and Primary Family Caregiver are determined eligible for PCAFC. Also, in proposed § 71.30(a), VA would refer to the ''monthly stipend payment'' instead of the term *monthly stipend rate* that appears in the second sentence of current § 71.30(a). The phrase ''monthly stipend payment'' would refer to the applicable stipend amount authorized under § 71.40(c)(4) and would account for the term *monthly stipend rate* and its definition in § 71.15. VA also proposes to remove reference to the term *unable to self-sustain in the community* from § 71.30(a), consistent with its proposed removal of such term and its definition from § 71.15 as discussed above and further below in the context of proposed changes to § 71.40(c)(4)(i)(A). As proposed, the second sentence would state that reassessments will include consideration of the monthly stipend payment under § 71.40(c)(4)(i)(A), if applicable.

2. Proposed Changes To Reassessing Eligible Veterans' Continued Eligibility Under § 71.20(a)(3)

Current § 71.20(a)(3) sets forth one of the seven criteria in § 71.20(a) that a veteran or servicemember must meet to be determined eligible for a Family Caregiver under PCAFC, and it requires the individual to be ''in need of personal care services for a minimum of six continuous months'' based on any one of multiple enumerated bases. VA proposes to limit when VA would reassess an eligible veteran under the criteria in § 71.20(a)(3) through proposed revisions to § 71.30(b).

Section 71.30(b) currently states that reassessments may occur more frequently than annually if a determination is made and documented by VA that more frequent reassessment is appropriate. VA proposes to remove the current regulation text found in § 71.30(b) as it would no longer be necessary if proposed changes to § 71.30(a) are adopted, as explained above. For the reasons explained below, VA proposes to add, in its place, a standard under which VA would reassess an eligible veteran's continued eligibility under § 71.20(a)(3) not more frequently than every two years, with certain exceptions.

VA reviewed findings from reassessments conducted pursuant to § 71.30(a) for participants that joined PCAFC on or after October 1, 2020. Since implementing annual reassessments pursuant to § 71.30(a), VA has found the majority of reassessments conducted have identified minimal changes in an eligible veteran's need for personal care services under § 71.20(a)(3) since their assessment in the previous year. As PCAFC is designed for eligible veterans with moderate and severe needs (85 FR 46228 (July 31, 2020)) who are in need of personal care services for at least six continuous months (§ 71.20(a)(3)), VA believes it is reasonable to expect there would be limited change in the functions and needs of the eligible veterans within a 12-month period. Additionally, when reassessments require the evaluation of § 71.20(a)(3), the clinical evaluations associated with § 71.20(a)(3) criteria may be lengthy and may be burdensome to veterans and servicemembers. In proposing a standard for reassessing an eligible veteran's continued eligibility under § 71.20(a)(3) of not more frequently than every two years, VA would extend the time period between such evaluations while still providing flexibility for VA to continue to monitor the outcome of such reassessments and extend the cadence beyond every two years, as appropriate, to ensure that individuals participating in PCAFC continue to meet eligibility requirements and have access to the appropriate level of supports. VA believes proposed changes to § 71.30(b) would reduce reassessments that may be unnecessary and would do so in a standardized manner. Given this, VA believes reassessment of an eligible veteran's continued eligibility under § 71.20(a)(3) not more frequently than every two years would be reasonable and appropriate.

Notwithstanding these changes, certain instances exist when VA would need to reassess an eligible veteran under § 71.30(a)(3) on a more frequent basis than every two years. To address these situations, VA proposes to include two exceptions to the ''not more frequently than every two years'' provision in proposed § 71.30(b).

The first exception would apply when an eligible veteran or Primary Family Caregiver requests a reassessment pursuant to proposed changes to § 71.30(c). To be responsive to the needs of veterans and Primary Family Caregivers, VA would conduct reassessments upon request, even if it has been less than two years since the previous evaluation of the eligible veteran's eligibility under § 71.30(a)(3). More details about how reassessments could be requested under proposed § 71.30(c) and how those requests would be addressed are outlined further below.

The second exception would apply when a reassessment of an eligible veteran's continued eligibility under § 71.20(a)(3) is necessary for VA to evaluate a Family Caregiver's ability to carry out specific personal care services, core competencies, or additional care requirements. Per 38 U.S.C. 1720G(a)(3)(D), the Secretary is required to ''periodically evaluate . . . the skills of the family caregiver of such veteran to determine if additional instruction, preparation, training, or technical support'' is needed. In these instances, an evaluation of the needs of the eligible veteran pursuant to proposed 38 CFR 71.20(a)(3) may be necessary to

determine whether a Family Caregiver has the ability to carry out the specific personal care services, core competencies, and additional care requirements described in § 71.25(c)(2). This second proposed exception in § 71.30(b) would provide VA with the ability to review the quality of personal care services being provided to an eligible veteran in the context of a reassessment and take corrective action as applicable. *See* 38 U.S.C. 1720G(a)(9)(C)(i)–(ii).

Thus, as proposed, § 71.30(b) would state that except as provided in paragraph (c) of § 71.30, VA will reassess an eligible veteran's continued eligibility under § 71.20(a)(3) not more frequently than every two years unless such a reassessment is necessary for VA to evaluate the Family Caregiver's ability to carry out specific personal care services, core competencies, or additional care requirements.

3. Proposed Changes To Address Requests for Reassessments

Currently, § 71.30(c) states that reassessments may occur on a less than annual basis if a determination is made and documented by VA that an annual reassessment is unnecessary. As noted above, VA proposes to remove the reference to an annual reassessment frequency under § 71.30(a), and as a result, VA would also remove the exception found in § 71.30(c). VA proposes to further revise § 71.30(c) by adding a new provision explaining the option for eligible veterans and Primary Family Caregivers to request reassessment at any time through a written request.

When eligible veterans and Family Caregivers have specifically requested reassessments before an annual reassessment was due, VA has considered such requests when making a determination under current § 71.30(b) that a more frequent than annual reassessment is appropriate. For example, a Primary Family Caregiver may find they are providing physical assistance with more ADL than they were at the time they were designated as the Primary Family Caregiver. In this case, the Primary Family Caregiver may request a reassessment, in part, because they believe they may qualify for a higher monthly stipend.

To make clear the opportunity for an eligible Veteran or Primary Family Caregiver to request a reassessment, VA proposes to establish procedural requirements for these types of requests in proposed § 71.30(c). As proposed, § 71.30(c) would state that reassessments may occur when an eligible veteran or a Primary Family Caregiver of an eligible veteran submits to VA a written request indicating that a reassessment is requested, and such request contains the signature of the eligible veteran or the Primary Family Caregiver. In accordance with the ''[e]xcept as provided in paragraph (c)'' clause in proposed § 71.30(b), reassessments requested under proposed § 71.30(c) would include a reassessment of an eligible veteran's continued eligibility under § 71.20(a)(3).

For reassessment requests under proposed § 71.30(c), VA proposes not to mandate use of a specific standardized form because VA would like to provide flexibility to eligible veterans and Primary Family Caregivers. However, VA does propose to require requests be submitted to VA in writing, indicate the nature of the request (that is, a request for reassessment), and contain the signature of the eligible veteran or the Primary Family Caregiver of an eligible veteran. These requirements would ensure that: (1) the request is from an individual authorized to make such a request under proposed § 71.30(c) (that is, an eligible veteran or Primary Family Caregiver), (2) VA has enough information to associate the request with the correct eligible veteran, and (3) VA can understand the nature of the request and intent of the requestor. If verbal requests for reassessment are made, VA would inform eligible veterans and Primary Family Caregivers of the process for submitting a written request for reassessment.

Additionally, requiring a written request for reassessment would provide VA with documentation of the request and VA could formally track receipt of such request. This would be important because if the requested reassessment results in an increase in the monthly stipend payment pursuant to a determination under proposed § 71.40(c)(4)(i)(A)(*2*), the date the written request under proposed § 71.30(c) is received by VA could be the effective date of the increase under proposed § 71.40(c)(4)(ii)(C)(*1*)(*ii*). This is discussed further below regarding proposed changes to § 71.40 under heading ''G. 38 CFR 71.40 Caregiver benefits''. In implementing this requirement for a written request in proposed § 71.30(c), if adopted in a final rule, VA would provide further written guidance and instructions to Primary Family Caregivers and eligible veterans about how and where such requests should be submitted.

VA does not propose to include reassessment requests from Secondary Family Caregivers in proposed § 71.30(c). This is because VA does not believe individuals other than the eligible veteran or Primary Family Caregiver should be able to initiate a process that could uniquely impact the benefits provided to the Primary Family Caregiver. Although certain PCAFC benefits are provided to both Primary Family Caregivers and Secondary Family Caregivers, others are provided only to Primary Family Caregivers, including the monthly stipend.

Additionally, Secondary Family Caregivers who would like to request additional supports or services do not need to request a reassessment under § 71.30 to receive such supports or services. All Family Caregivers who are seeking additional training, education or other PCAFC assistance, can do so without requesting a reassessment. For example, a Family Caregiver who wishes to engage with a peer support mentor under § 71.40(b)(5), can make this request at any time to the local Caregiver Support Program (CSP) Team. Similarly, a Family Caregiver who is seeking other counseling services under § 71.40(b)(5), can make such a request at any time, including during wellness contacts. An increase in the monthly stipend level for Primary Family Caregivers under § 71.40(c)(4)(i)(A), however, can only be provided as a result of a reassessment which includes consideration of an eligible veteran's need for personal care services pursuant to § 71.20(a)(3). For this reason, a Primary Family Caregiver may wish to request a reassessment to be considered for the higher stipend level. Therefore, under proposed § 71.30(c), VA would conduct a requested reassessment only if submitted in writing by the eligible veteran or Primary Family Caregiver (and that meets the other requirements previously described).

Although Secondary Family Caregivers would not be included in proposed § 71.30(c), when a request for reassessment is received from the eligible veteran or Primary Family Caregiver under such paragraph, the reassessment would apply to the eligible veteran and all Family Caregivers of the eligible veteran. This is because reassessments initiated based on the request of an eligible veteran or Primary Family Caregiver, would be carried out using the same processes in § 71.30 for reassessments initiated by VA. In completing reassessments under § 71.30, VA determines the eligibility of the eligible veteran and each Family Caregiver, which necessarily requires consideration of whether each Family Caregiver, including Secondary Family Caregivers, has the ability to carry out the specific personal care services required by the eligible veteran.

4. Proposed Changes to Legacy Reassessments

Current paragraph (e)(1) of § 71.30 requires VA to conduct reassessments of members of the legacy cohort within the five-year period beginning on October 1, 2020 to determine whether the eligible veteran meets the requirements of § 71.20(a). If the eligible veteran meets the requirements of § 71.20(a), the reassessment will take into consideration whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate under § 71.40(c)(4)(i)(A). *See* § 71.30(e)(1).

For reasons discussed earlier in this rulemaking, VA proposes to extend the transition period for continued eligibility of members of the legacy cohort and the timeframe for completing reassessments of this cohort to a date that is 18 months after the effective date of a final rule under this rulemaking. The following conforming amendments to § 71.30(e) are also proposed to extend the timeframe for conducting legacy reassessments.

First, VA proposes to add introduction text to paragraph (e) that would describe a legacy reassessment. Currently, paragraph (e)(1) states the reassessment will be done in collaboration with a primary care team to the maximum extent practicable, may include a visit to the eligible veteran's home, and may include consideration of the monthly stipend. These provisions mirror the requirements for the reassessment under current and proposed § 71.30(a). To provide clarity, VA proposes to remove this language from paragraph (e)(1) and would instead state in the introduction text for paragraph (e) that a legacy reassessment is a reassessment to determine continued eligibility under § 71.20(a) for legacy applicants and legacy participants that is conducted in accordance with the requirements of § 71.30(a).

VA would further revise paragraph (e)(1) to address the timeframe for completing legacy reassessments. VA proposes to remove the phrase ''five-year period beginning on October 1, 2020'' and add in its place, the phrase ''period beginning on October 1, 2020 and ending on [18 months after EFFECTIVE DATE OF FINAL RULE]''. VA would also include the language currently found in paragraph (e)(2) regarding exceptions to this rule. Currently, paragraph (e)(2) states that notwithstanding paragraph (e)(1), a reassessment will not be completed under paragraph (e)(1) if at some point before a reassessment is completed during the five-year period beginning on October 1, 2020 the individual no longer meets the requirements of § 71.20(b) or (c). VA proposes to move this language to paragraph (e)(1) with minor conforming changes to remove the cross reference to paragraph (e)(1) and reference to the ''five-year'' period.

As proposed, paragraph (e)(1) would state if the eligible veteran meets the requirements of § 71.20(b) or (c) *(i.e.,* is a legacy participant or a legacy applicant), VA will conduct a legacy reassessment for the eligible veteran and each Family Caregiver within the time period beginning on October 1, 2020 and ending on [18 months after EFFECTIVE DATE OF FINAL RULE]. It would also state that notwithstanding the previous sentence, a legacy reassessment will not be completed if at some point before such reassessment is completed, the eligible veteran no longer meets the requirements of § 71.20(b) or (c).

Finally, VA proposes to revise paragraph (e)(2) to address monthly stipend payments. As part of the legacy reassessment, for eligible veterans who meet the requirements of § 71.20(a), VA considers the monthly stipend payment under § 71.40(c)(4)(i)(A) and eligibility for a one-time retroactive monthly stipend payment under current § 71.40(c)(4)(ii)(C)(*2*)(*i*). This one-time retroactive stipend payment is not currently addressed in § 71.30(e). VA believes including a reference to the regulations that govern the one-time retroactive stipend payment within § 71.30(e) would assist the reader in understanding this facet of the legacy reassessment. VA proposes to relocate the provisions currently found in § 71.40(c)(4)(ii)(C)(*2*)(*i*) to § 71.40(c)(4)(iii), therefore, this latter citation is proposed to be included in paragraph (e)(2). Accordingly, VA proposes to revise paragraph (e)(2) to state, if the eligible veteran meets the requirements of § 71.20(a), the legacy reassessment will include consideration of the monthly stipend payment under § 71.40(c)(4)(i)(A) and whether the Primary Family Caregiver is eligible for a one-time retroactive stipend payment pursuant to § 71.40(c)(4)(iii).

5. Proposed Technical Edits To Conform With Proposed Changes

VA proposes to add paragraph headings to paragraphs (a) through (e) of § 71.30 to assist the reader. If adopted, the heading for paragraph (a) would state ''General.'' The heading for paragraph (b) would state ''Frequency of reassessment.'' The heading for paragraph (c) would state ''Requests for reassessment.'' The heading for paragraph (d) would state ''Required participation'' and the heading for paragraph (e) would state ''Legacy reassessments.''

VA solicits comments from the public on all aspects of this proposed rule. In particular, VA asks the following questions on specific aspects of this proposal.

1. Other than the changes proposed, what changes, if any, to the frequency of reassessments should VA consider and why?

2. What models or standards are used by programs other than PCAFC to determine continued eligibility and benefits that could inform the appropriate frequency for PCAFC reassessments?

G. 38 CFR 71.40 Caregiver Benefits

Section 71.40 describes the benefits available to General Caregivers, Secondary Family Caregivers, and Primary Family Caregivers. Section 71.40(c) explains the benefits available to Primary Family Caregivers, which includes a monthly stipend payment. *See* § 71.40(c)(4). VA proposes changes to the eligibility requirements for the higher stipend level and provisions regarding adjustments to monthly stipend payments.

1. Stipend Level Criteria

Under current § 71.40(c)(4)(i)(A)(*1*), the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate (as that term is defined in § 71.15) by 0.625. However, if VA determines the eligible veteran is *unable to self-sustain in the community,* the monthly stipend payment is calculated by multiplying the monthly stipend rate by 1.00. *See* § 71.40(c)(4)(i)(A)(*2*). These two levels for the monthly stipend payment were intended to align with VA's aim at targeting PCAFC to those veterans and servicemembers with moderate and severe needs, with the higher stipend level provided to Primary Family Caregivers of eligible veterans with severe needs. *See* 85 FR 13383 (March 6, 2020). Thus, the Primary Family Caregiver of an eligible veteran who is determined to be *unable to self-sustain in the community* would be eligible for the higher stipend level under § 71.40(c)(4)(i)(A)(*2*).

Currently, *unable to self-sustain in the community* is defined in § 71.15 to mean that an eligible veteran (1) requires personal care services each time he or she completes three or more of the seven activities of daily living (ADL) listed in the definition of an inability to perform an activity of daily living in § 71.15, and is fully dependent

on a caregiver to complete such ADLs; or (2) has a need for supervision, protection, or instruction on a continuous basis. Although the definition of *unable to self-sustain in the community* includes the term *need for supervision, protection, or instruction,* following the *Veteran Warriors* decision, VA no longer applies that term and instead has applied the statutory language in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) in place of the term *need for supervision, protection, or instruction* when determining whether a veteran is unable to self-sustain in the community as explained below.

a. Determining the Monthly Stipend Payment Following the Veteran Warriors Decision

As discussed earlier in this rulemaking regarding VA's proposed removal of the term and definition of *need for supervision, protection, or instruction* from § 71.15 and the proposed changes to § 71.20(a)(3), the U.S. Court of Appeals for the Federal Circuit in *Veteran Warriors* invalidated VA's definition of the term *need for supervision, protection, or instruction.* Notably, the court dismissed or denied the petition for review with respect to the other regulatory provisions challenged, including the definition of *unable to self-sustain in the community. See Veteran Warriors* at 1348–51. However, because the term *need for supervision, protection, or instruction* is included in the definition of *unable to self-sustain in the community,* following the court's decision, VA has applied the criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) in place of the term *need for supervision, protection, or instruction,* when making determinations about whether an eligible veteran is *unable to self-sustain in the community* for purposes of determining the monthly stipend payment. Following the court's decision, a Primary Family Caregiver is eligible for the higher stipend level if the eligible veteran has a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury on a continuous basis or a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired on a continuous basis.

b. Proposed Changes to the Higher Stipend Level Criteria

VA proposes to revise the criteria for determining the monthly stipend payment in § 71.40(c)(4)(i)(A)(*2*). In proposing to amend § 71.40(c)(4)(i)(A)(*2*), VA would maintain the methodology for calculating the monthly stipend rate, such that the higher stipend level would continue to be calculated by multiplying the monthly stipend rate (as that term is defined in § 71.15) by 1.00. However, VA would revise the criteria under which a Primary Family Caregiver would qualify for the higher stipend level. Specifically, VA proposes to remove the term *unable to self-sustain in the community* from § 71.40(c)(4)(i)(A)(*2*) and add multiple new bases upon which a Primary Family Caregiver may be eligible for the higher stipend level. VA's new proposed bases for the higher stipend level would align with the proposed bases in § 71.20(a)(3) upon which a veteran or servicemember may be determined to be in need of personal care services.

Instead of proposing to update the current definition of *unable to self-sustain in the community* in § 71.15 to reflect VA's proposed criteria for determining the higher stipend level, VA proposes removing the term *unable to self-sustain in the community* and its definition from § 71.15 and adding the criteria for determining the higher stipend level in proposed § 71.40(c)(4)(i)(A)(*2*). This approach is consistent with VA's proposed changes to § 71.15 and § 71.20(a)(3), under which VA would remove the terms *inability to perform an ADL* and *need for supervision, protection, or instruction,* and their definitions from § 71.15 and add the bases for being in need of personal care services into proposed § 71.20(a)(3)(i) through (iii) rather than referring to criteria contained mostly in terms and definitions found in § 71.15.

In proposed § 71.40(c)(4)(i)(A)(*2*), VA would explain how Primary Family Caregivers could be eligible for the higher stipend level for each basis upon which an individual may be determined to be in need of personal care services consistent with 38 U.S.C. 1720G(a)(2)(C) and proposed 38 CFR 71.20(a)(3). VA believes the changes VA proposes to 38 CFR 71.40(c)(4)(i)(A)(*2*), as explained in more detail in this section, would improve clarity and consistency when determining eligibility for the higher stipend level. They would also ensure each basis upon which an eligible veteran may be determined to be in need of personal care services under proposed 38 CFR 71.20(a)(3) includes a related basis by which a Primary Family Caregiver may be eligible for the higher stipend level. If these proposed changes are adopted, the Primary Family Caregiver could be eligible for the higher stipend level based on any of the criteria in proposed § 71.40(c)(4)(i)(A)(*2*), just as eligible veterans could meet more than one of the bases in proposed § 71.20(a)(3)(i) through (iii).

Additionally, in contrast to the current definition of *unable to self-sustain in the community,* which refers exclusively to the needs of the eligible veteran, the criteria in proposed § 71.40(c)(4)(i)(A)(*2*) would be phrased to reflect both the eligible veteran's needs as well as the amount and degree of personal care services the Primary Family Caregiver provides to the eligible veteran. This change would ensure VA's regulations are reflective of the statutory requirement that the stipend be ''based upon the amount and degree of personal care services provided.'' 38 U.S.C. 1720G(a)(3)(C)(i). VA recognizes that the Primary Family Caregiver may not provide all the personal care services required by an eligible veteran, as the eligible veteran's care needs may also be met, in part, by Secondary Family Caregivers or through other services and supports. However, because it is the Primary Family Caregiver who receives the stipend payment, VA believes it is reasonable to interpret the phrase ''personal care services provided'' in 38 U.S.C. 1720G(a)(3)(C)(i) to refer to those personal care services provided by the Primary Family Caregiver.

VA does not believe it would be reasonable to base the monthly stipend payment for the Primary Family Caregiver upon the amount and degree of personal care services provided by individuals and entities other than the Primary Family Caregiver. Under 38 U.S.C. 1720G(a)(3)(C)(ii), the Secretary is required to ensure, to the extent practicable, that ''the schedule required by clause (i) specifies that the amount of the monthly personal caregiver stipend provided to a primary provider of personal care services for the provision of personal care services to an eligible veteran is not less than the monthly amount a commercial home health care entity would pay an individual in the geographic area of the eligible veteran to provide equivalent personal care services to the eligible veteran.'' By referring to ''an individual'' providing ''equivalent personal care services to the eligible veteran'', this requirement supports VA's proposed interpretation that the monthly stipend payment is based on the personal care services that only the Primary Family Caregiver provides to the eligible veteran and not the personal care services provided by another individual or entity. By referring to the required personal care services that the

eligible veteran receives from the Primary Family Caregiver, proposed 38 CFR 71.40(c)(4)(i)(A)(*2*) would make clear that the amount of the monthly stipend is based upon the amount and degree of personal care services that the Primary Family Caregiver provides to the eligible veteran.

In addition, VA proposes to add language to proposed paragraph (c)(4)(i)(A)(*2*) as a technical edit to clarify that the proposed criteria in paragraph (c)(4)(i)(A)(*2*) would apply notwithstanding paragraph (c)(4)(i)(A)(*1*). Currently, and under VA's proposed revisions to § 71.40(c)(4)(i)(A), a Primary Family Caregiver's monthly stipend payment is calculated under paragraph (c)(4)(i)(A)(*1*) (by multiplying the monthly stipend rate by 0.625) unless the criteria in paragraph (c)(4)(i)(A)(*2*) are met, in which case the Primary Family Caregiver's monthly stipend payment is calculated under paragraph (c)(4)(i)(A)(*2*) (by multiplying the monthly stipend rate by 1.00). VA also proposes to add a heading to paragraph § 71.40(c)(4)(i)(A)(*1*) which states ''Level 1 Stipend'' and a heading to paragraph § 71.40(c)(4)(i)(A)(*2*) that states ''Level 2 Stipend'' to further distinguish the two different stipend levels described in these paragraphs.

As proposed, § 71.40(c)(4)(i)(A)(*2*) would state that notwithstanding paragraph (c)(4)(i)(A)(*1*) of § 71.40, the Primary Family Caregiver's monthly stipend payment is calculated by multiplying the monthly stipend rate by 1.00 if VA determines that: (i) the eligible veteran typically requires personal care services to complete three or more distinct ADL, and for each distinct ADL, the eligible veteran either is substantially dependent on the Primary Family Caregiver for hands-on assistance or requires extensive instruction or supervision from the Primary Family Caregiver; or (ii) the eligible veteran has a frequent need for supervision or protection on a continuous basis from the Primary Family Caregiver based on the eligible veteran's symptoms or residuals of neurological or other impairment or injury.

The meaning of the term *typically requires* throughout proposed § 71.40(c)(4)(i)(A)(*2)* would be consistent with its meaning in proposed § 71.20(a)(3)(i) and (iii) based on the proposed definition in § 71.15 (that is, *typically requires* would mean a clinical determination which refers to that which is generally necessary). Please see the discussion of proposed changes to §§ 71.15 and 71.20(a)(3)(i) and (iii) for additional information on the term *typically requires.* VA further explains the multiple bases for eligibility for the higher stipend level that VA is proposing under the two criterion in proposed § 71.40(c)(4)(i)(A)(*2)(i)* and *(ii*), as well as its proposed use of the term *typically requires* in § 71.40(c)(4)(i)(A)(*2*)(*i*), in greater detail below.

i. First Proposed Basis for the Higher Stipend Level Payment

Under this proposal, § 71.40(c)(4)(i)(A)(*2*)(*i*) would set forth the first proposed basis upon which a Primary Family Caregiver would be eligible for the higher stipend level payment and would refer to a VA determination that the eligible veteran typically requires personal care services to complete three or more distinct ADL, and for each distinct ADL, the eligible veteran is substantially dependent on the Primary Family Caregiver for hands-on assistance.

If adopted, this would amend the standard applied under the first basis in the current definition of *unable to self-sustain in the community* (that is, an eligible veteran requires personal care services each time he or she completes three or more of the seven ADL listed in the definition of an inability to perform an activity of daily living in § 71.15 and is fully dependent on a caregiver to complete such ADL). That basis was intended to establish the higher stipend level for the Primary Family Caregiver of an eligible veteran with physical impairment. 85 FR 13383 (March 6, 2020). In addition, this proposed basis in § 71.40(c)(4)(i)(A)(*2*)(*i*) would align with the eligibility criteria in proposed 38 CFR 71.20(a)(3)(i) (that is, the individual typically requires hands-on assistance to complete one or more ADL). It would therefore account for those Primary Family Caregivers of eligible veterans who are in need of personal care services based on an inability to perform an ADL (38 U.S.C. 1720G(a)(2)(C)(i)) and who have severe needs.

This first proposed basis for the higher stipend level payment would be consistent with the requirement in 38 U.S.C. 1720G(a)(3)(C)(i) to base the monthly stipend payment upon the amount and degree of personal care services provided because it would refer to three or more distinct ADL and it would include a requirement that the eligible veteran be *substantially dependent* upon the Primary Family Caregiver. The proposal to require three or more distinct ADL would address the amount of personal care services provided by the Primary Family Caregiver because a greater amount of personal care services would be provided if an eligible veteran requires hands-on assistance to complete three or more distinct ADL versus to complete fewer than three ADL. Notably, the eligibility criterion in proposed § 71.20(a)(3)(i) refers to the individual typically requiring hands-on assistance to complete just *one* or more ADL. In addition, the proposed requirement that the eligible veteran be substantially dependent on the Primary Family Caregiver would address the degree of personal care services provided. As discussed below, if adopted in a final rule, VA would apply the term ''substantially dependent'' in proposed § 71.40(c)(4)(i)(A)(*2*)(*i*) to mean that the Primary Family Caregiver puts forth more than half the effort when providing hands-on assistance to the eligible veteran to complete three or more distinct ADL.

As is the case in the first basis of the current definition of *unable to self-sustain in the community,* proposed § 71.40(c)(4)(i)(A)(*2*)(*i*) would refer to the eligible veteran requiring personal care services to complete three or more ADL, but VA would specify that the personal care services under this basis must be required for three distinct ADL (as that term is proposed to be defined in § 71.15). VA proposes to use the term ''distinct'' in front of ''ADL'' to account for VA's proposal in new § 71.40(c)(4)(i)(A)(*2*)(*i*) to include more than one basis upon which a Primary Family Caregiver could be eligible for the higher stipend level related to an eligible veteran's need for personal care services to complete ADL. As discussed separately below, proposed § 71.40(c)(4)(i)(A)(*2*)(*i*) would allow for a combination of two different types of personal care services to complete ADL (that is, if the eligible veteran either is substantially dependent on the Primary Family Caregiver for hands-on assistance or requires extensive instruction or supervision from the Primary Family Caregiver), as long as the criteria are met with respect to the completion of three or more distinct ADL. VA's proposal to refer to ''three or more distinct ADL'' would clarify that an eligible veteran who requires both types of personal care services to perform the same ADL, would not be considered to require personal care services to complete two ADL. This is discussed in more detail below under the heading referring to VA's third proposed basis for the higher stipend level.

Consistent with the discussion of proposed § 71.20(a)(3)(i), VA would not require in proposed § 71.40(c)(4)(i)(A)(*2*)(*i*) that personal

care services be required ''each time'' the eligible veteran completes three or more distinct ADL. While the first basis of the current definition of *unable to self-sustain in the community* requires personal care services be required ''each time'' the eligible veteran completes three or more ADL, VA proposes not to include such requirement in proposed § 71.40(c)(4)(i)(A)(*2*)(*i*). VA's rationale for proposing to remove the ''each time'' requirement is explained in the discussion on proposed § 71.20(a)(3)(i).

Additionally, while the first basis in the current definition of *unable to self-sustain in the community* refers to an eligible veteran being ''fully dependent'' on a caregiver to complete three or more ADL, the first new basis under proposed § 71.40(c)(4)(i)(A)(*2*)(*i*) would require that an eligible veteran be ''substantially dependent'' on the Primary Family Caregiver for hands-on assistance. While this proposed change from ''fully dependent'' to ''substantially dependent'' would be a change in terminology, it would be consistent with how VA has applied the first basis in the current definition of *unable to self-sustain in the community* since 2020. Since that time, VA has not required the eligible veteran to have complete dependence on a caregiver to perform three or more ADL, as the term ''fully dependent'' may imply and how VA described this term in its July 31, 2020 Final Rule.[18] This is because after publication of VA's July 31, 2020 Final Rule, and prior to implementation, VA determined such an approach would have been unduly restrictive. Dependence occurs on a spectrum based on degrees of need. Upon further review of the requirement to be ''fully dependent'' on the Primary Family Caregiver, VA found that this would require that an eligible veteran must be at the very highest end of the spectrum of a degree of need, such that no greater degree of need is possible. It is not, and has never been, the intent of VA to require such a standard. Rather, since implementing the first basis in the definition of *unable to self-sustain in the community,* it has been and continues to be VA's practice that individuals who require a degree of personal care services that is of a lesser degree than that of the very highest degree could and do meet the definition.

VA currently applies the meaning of ''substantially'' in place of ''fully'' under the first basis in the definition of *unable to self-sustain in the community* as VA believes ''substantially'' more accurately reflects the level of dependence VA requires for a Primary Family Caregiver to be eligible for the higher stipend level. The term ''substantially dependent'' is commonly used in the health care field and is generally understood to mean an individual provides more than half the effort, when used in the context of assessing levels of assistance provided to an individual to complete daily activities. For example, CMS uses the term ''substantial/maximal assistance'' when determining the type and level of assistance required for a patient to complete an activity in a post-acute care setting.[19] Specifically, CMS and other organizations define the term ''substantial/maximal assistance'' to mean a helper does more than half the effort.[20] VA proposes to interpret the proposed term ''substantially dependent'' in a similar manner such that, if VA's proposed changes to § 71.40(c)(4)(i)(A)(*2*)(*i*) are adopted, ''substantially dependent'' would be applied to mean that the Primary Family Caregiver puts forth more than half the effort when providing hands-on assistance to an eligible veteran to complete three or more distinct ADL. An eligible veteran who is substantially dependent on the Primary Family Caregiver for hands-on assistance with an ADL (that is, who requires a Primary Family Caregiver to perform more than half the effort to complete an ADL), would require a higher degree of personal care services than an eligible veteran whose Primary Family Caregiver provides less than half the effort to complete ADL. Although ''substantially dependent'' would be applied to mean a lesser degree of dependence than that of the very highest degree, it could also encompass eligible veterans whose dependence on the Primary Family Caregiver for hands-on assistance with an ADL is at the very highest degree on the spectrum (for example, if the eligible veteran is unable to put forth any effort to complete the ADL). It is not VA's intent for the term ''substantially dependent'' in proposed § 71.40(c)(4)(i)(A)(*2*)(*i*) to exclude eligible veterans who are fully dependent or entirely dependent on a Primary Family Caregiver for hands-on assistance with an ADL.

For example, an eligible veteran who typically requires hands-on assistance with dressing may require the Primary Family Caregiver to pull a shirt over their head, position both arms into shirt sleeves and pull sleeves down, but the eligible veteran is able to pull the shirt down over their trunk. Additionally, the eligible veteran typically requires hands-on assistance from the Primary Family Caregiver to lift feet and place them through undergarments and pantlegs, pull feet through clothing, and lift undergarments and pants to knees but the eligible veteran is able to pull clothing from knees to waist. The eligible veteran may be determined substantially dependent on the Primary Family Caregiver for dressing. This would be the case if the Primary Family Caregiver is determined to perform more than half the effort to complete the ADL of dressing while the eligible veteran provides less than half the effort. In contrast, an eligible veteran who only typically requires hands-on assistance when dressing to lift both arms into shirtsleeves but is able to independently perform all other tasks related to the ADL of dressing, would not be substantially dependent on the Primary Family Caregiver for hands-on assistance when dressing because the Primary Family Caregiver would not be performing more than half the effort required to complete the ADL of dressing.

An eligible veteran who typically requires hands-on assistance for the ADL of eating such that hand over hand assistance is needed from the Primary Family Caregiver to place food on a fork, to place the fork to the eligible veteran's mouth, and hold a cup with a straw in proximity to the eligible veteran's mouth so that the veteran can drink, would be considered substantially dependent upon the Primary Family Caregiver for the ADL of eating because in such case, the Primary Family Caregiver provides more than half the effort to complete the ADL. Conversely, an eligible veteran who typically requires a Primary Family Caregiver to place and adjust adaptive utensils in the

[18] VA stated ''[t]o be fully dependent means the eligible veteran requires the assistance of another to perform each step or task related to completing the ADL'' and ''[w]hile dependence is considered along a spectrum, fully dependent is at the top of the spectrum.'' 85 FR 46274 (July 31, 2020).

[19] *See* Outcome and Assessment Information Set OASIS–E Manual, effective January 1, 2023, page 126, Centers for Medicare and Medicaid Services, available at *https://www.cms.gov/files/document/oasis-e-manual-final.pdf* (last visited Feb. 8, 2024).

[20] Inpatient Rehabilitation Facility—Patient Assessment Instrument, Version 3.0, effective October 1, 2019, page 7, Centers for Medicare and Medicaid Services, available at *https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/Proposed_IRFPAI_Version3_Eff_20191001.pdf* (last visited Feb. 8, 2024) (defines Substantial/maximal assistance as ''Helper does MORE THAN HALF the effort. Helper lifts or holds trunk or limbs and provides more than half the effort.'' (Emphasis in original.)); Section GG Self-Care (Activities of Daily Living) and Mobility Items, 2022, pages 1–3, American Occupational Therapy Association, available at *https://www.aota.org/-/media/Corporate/Files/Practice/Manage/Documentation/Self-Care-Mobility-Section-GG-Items-Assessment-Template.pdf* (last visited Feb. 8, 2024) (defines Substantial/maximal assistance as ''Helper does MORE THAN HALF the effort. Helper lifts or holds trunk or limbs and provides more than half the effort.'' (Emphasis in original.)).

eligible veteran's grasp, but the veteran is otherwise able to eat would not be considered substantially dependent upon the Primary Family Caregiver for the ADL of eating because the Primary Family Caregiver would not be providing more than half the effort in order for the eligible veteran to complete the ADL.

Similarly, an eligible veteran who typically requires hands-on assistance with the ADL of adjusting any special prosthetic or orthopedic appliance, may be substantially dependent on the Primary Family Caregiver if the Primary Family Caregiver provides more than half the effort. For example, if the Primary Family Caregiver assists with putting on the prosthetic limb by positioning a sock appropriately, applying a foam liner, and lifting and placing the eligible veteran's stump into the prosthesis, the eligible veteran may be determined to be substantially dependent on the Primary Family Caregiver to complete the ADL. If the eligible veteran only requires assistance from the Primary Family Caregiver to hold the foam lining in place while the eligible veteran applies the sock, lining, and positions their stump into the prosthesis such that the Primary Family Caregiver does not contribute more than half the effort required to perform the ADL, the eligible veteran would not be determined to be substantially dependent on the Primary Family Caregiver to complete the ADL.

An eligible veteran who typically requires hands-on assistance to complete each of the three ADL described in the illustrative examples above, that is dressing, adjusting a prosthetic limb, and eating, and for each such ADL is substantially dependent on the Primary Family Caregiver for such hands-on assistance may be determined to meet this proposed basis such that the Primary Family Caregiver may be eligible for the higher stipend level.

ii. Second Proposed Basis for the Higher Stipend Level Payment

Under proposed new § 71.40(c)(4)(i)(A)(*2*)(*i*), the second proposed basis upon which a Primary Family Caregiver would be eligible for the higher stipend level payment would be that the eligible veteran typically requires personal care services to complete three or more distinct ADL, and for each distinct ADL the eligible veteran requires extensive instruction or supervision from the Primary Family Caregiver.

This proposed second basis upon which a Primary Family Caregiver may be determined eligible for the higher stipend level payment would align with proposed § 71.20(a)(3)(iii), that is, that a veteran may be determined in need of personal care services because the individual typically requires regular or extensive instruction or supervision to complete one or more ADL. A Primary Family Caregiver of an eligible veteran who meets such proposed basis may be eligible for the higher stipend level payment if such eligible veteran typically requires personal care services to complete three or more distinct ADL and for each distinct ADL, requires extensive instruction or supervision from the Primary Family Caregiver. This second proposed basis would be consistent with the language in 38 U.S.C. 1720G(a)(3)(C)(i) stating that the amount of the stipend shall be based upon the amount and degree of personal care services provided through the requirement of ''three or more distinct ADL'' and the requirement that the eligible veteran requires ''extensive'' instruction or supervision from the Primary Family Caregiver. As previously noted, the requirement for three or more distinct ADL would address the amount of personal care services provided by the Primary Family Caregiver. This is because a Primary Family Caregiver would provide a greater amount of personal care services when providing instruction or supervision for three or more distinct ADL than when providing instruction or supervision for fewer than three distinct ADL.

Referring to ''extensive'' instruction or supervision in proposed 38 CFR 71.40(c)(4)(i)(A)(*2*)(*i*) would address the degree of personal care services provided by the Primary Family Caregiver and align with VA's proposed interpretation of this term in proposed § 71.20(a)(3)(iii). While proposed § 71.20(a)(3)(iii) would refer to ''regular or extensive'' instruction or supervision, proposed § 71.40(c)(4)(i)(A)(*2*)(*i*) would refer to ''extensive'' instruction or supervision from the Primary Family Caregiver for purposes of the higher stipend level payment. This is because VA considers those who require regular instruction or supervision to complete one or more ADL to be indicative of those with moderate needs while VA considers those who require extensive instruction or supervision to complete three or more distinct ADL to have severe needs. As explained in, and consistent with, VA's earlier discussion on proposed § 71.20(a)(3)(iii), if this proposed rule is adopted as final, VA would consider the need for extensive instruction or supervision to mean that the instruction or supervision is required throughout the completion of the ADL. In contrast, VA would consider regular instruction or supervision to mean that the instruction or supervision is required for a portion of completing the ADL rather than throughout the completion of the ADL. Those who require extensive instruction or supervision therefore would be considered to have a greater degree of need than those who require regular instruction or supervision to complete an ADL. VA provides the following illustrative examples to help explain VA's interpretation of how an eligible veteran would meet the requirement of needing ''extensive'' instruction or supervision to complete three or more distinct ADL. If an eligible veteran requires supervision when determining the amount of shampoo necessary, applying shampoo to head, lathering hair, and rinsing hair but is otherwise able to perform the remaining actions of bathing without assistance, they would not have an extensive need for supervision to complete the ADL of bathing because supervision from the Primary Family Caregiver is not needed throughout the act of bathing. Once the portion of the activity for which supervision is needed was completed, the eligible veteran may be able to function safely and independently for the remainder of completing the activity. In contrast, if such an eligible veteran also required supervision to adjust water temperature at the beginning of the activity, identify body parts to wash, then rinse during the act of bathing, and towel dry at the end of the activity, such eligible veteran may be determined to require extensive supervision from the Primary Family Caregiver to complete the ADL of bathing because assistance would be required throughout the ADL of bathing.

An eligible veteran who is in need of extensive instruction to toilet may require step-by-step instruction throughout the ADL of toileting, such as to position self at the toilet, unfasten clothing, cleanse oneself, and refasten clothing. Such veteran would require extensive instruction from a Primary Family Caregiver because such instruction is needed throughout the activity of toileting. In contrast, if such instruction was only needed to position self at the toilet and unfasten clothing, such need may be a regular need, because instruction is only necessary for a portion of the activity, which is at the beginning, and the eligible veteran is otherwise able to complete the ADL of toileting in the absence of the Primary Family Caregiver.

A veteran who requires step-by-step instruction from a Primary Family Caregiver when eating, such as

instruction to select appropriate utensils to bring food to mouth, chew food prior to swallowing, and to swallow prior to bringing additional food to mouth may be determined to have an extensive need for instruction from a Primary Family Caregiver when eating because such instruction is required throughout the activity of eating. In contrast, if the eligible veteran only requires such instruction for the first two bites of the meal after which such pattern is established, and is able to finish eating independently without further instruction from a Primary Family Caregiver to complete the activity of eating, such veteran may be determined to be in need of regular instruction for the ADL of eating.

An eligible veteran who typically requires extensive instruction or supervision with each of the three distinct ADL described in the examples above, that is bathing, toileting and eating may be determined to meet this second proposed basis under 38 CFR 71.40(c)(4)(i)(A)(*2*)(*i*) such that the Primary Family Caregiver may be eligible for the higher stipend level.

iii. Third Proposed Basis for Higher Stipend Level Payment

As proposed, §71.40(c)(4)(i)(A)(*2*)(*i*). would state that for each distinct ADL the eligible veteran either is substantially dependent on the Primary Family Caregiver for hands-on assistance or requires extensive instruction or supervision from the Primary Family Caregiver. VA would consider both types of personal care services when determining whether the Primary Family Caregiver is eligible for the higher stipend level payment on this basis. Therefore, a combination of both types of personal care services, if provided by the Primary Family Caregiver to complete three or more distinct ADL, could establish a third basis for determining eligibility for the higher stipend level pursuant to proposed § 71.40(c)(4)(i)(A)(*2*)(*i*).

For a Primary Family Caregiver to be eligible for the higher stipend level under § 71.40(c)(4)(i)(A)(*2*)(*i*), the eligible veteran would require at least one of these types of personal care services (that is, be substantially dependent on the Primary Family Caregiver for hands-on assistance, or require extensive instruction or supervision from the Primary Family Caregiver) to complete three or more distinct ADL. VA would not require the eligible veteran to need the same type of personal care services to complete each of the three or more distinct ADL. For example, an eligible veteran who typically requires personal care services to complete three or more distinct ADL would not have to be substantially dependent on the Primary Family Caregiver for hands-on assistance to complete all three distinct ADL or require extensive instruction or supervision from the Primary Family Caregiver to complete all three distinct ADL. Instead, the Primary Family Caregiver of such an eligible veteran could be eligible for the higher stipend level under § 71.40(c)(4)(i)(A)(*2*)(*i*) if, for example, the eligible veteran is substantially dependent on the Primary Family Caregiver for hands-on assistance to complete two ADL and requires extensive instruction from the Primary Family Caregiver to complete an additional distinct ADL. In this example, the eligible veteran typically requires personal care services to complete three or more distinct ADL, and for each distinct ADL, the eligible veteran either is substantially dependent on the Primary Family Caregiver for hands-on assistance or requires extensive instruction or supervision from the Primary Family Caregiver; therefore, the Primary Family Caregiver would be eligible for the higher stipend level under proposed § 71.40(c)(4)(i)(A)(*2*)(*i*). In contrast, if an eligible veteran typically requires personal care services to complete only two distinct ADL, the Primary Family Caregiver would not qualify for the higher stipend level under this proposed basis, even if for both such ADL the eligible veteran is both substantially dependent on the Primary Family Caregiver for hands-on assistance and requires extensive instruction from the Primary Family Caregiver.

iv. Fourth Proposed Basis for Higher Stipend Level Payment

The fourth proposed basis would be set forth in proposed § 71.40(c)(4)(i)(A)(*2*)(*ii*), which would state that the eligible veteran has a frequent need for supervision or protection on a continuous basis from the Primary Family Caregiver based on the eligible veteran's symptoms or residuals of neurological or other impairment or injury. As VA explained above, following the *Veteran Warriors* decision, a Primary Family Caregiver is eligible for the higher stipend level if an eligible veteran has a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury (38 U.S.C. 1720G(a)(2)(C)(ii)) on a continuous basis. The proposed fourth basis in 38 CFR 71.40(c)(4)(i)(A)(*2*)(*ii*) would maintain this criterion but with an added requirement that the eligible veteran has a frequent need for supervision or protection, consistent with the other proposed bases for the higher stipend level as discussed earlier in this rulemaking.

Consistent with VA's prior and current interpretation (*see* 85 FR 46239–46240 (July 31, 2020)), in making determinations on whether an eligible veteran has a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury on a continuous basis following the *Veteran Warriors* decision, VA considers ''continuous'' to refer to the amount and degree of personal care services provided. Whether or not the eligible veteran has a frequent need for supervision or protection on a continuous basis would be a clinical determination and would consider the degree of intervention required, how frequently the required intervention is needed, whether such required personal care services are limited or expansive in the extent of assistance required, and whether such personal care services are provided for short durations or occur over an extended period of time.

For example, as these criteria are applied today, an eligible veteran with post-traumatic stress disorder with a demonstrated pattern of severe, uncontrolled panic attacks, who requires a Family Caregiver to actively intervene through verbal and physical intervention to assist the eligible veteran in grounding and de-escalating multiple times during the day may be in need of supervision or protection on a continuous basis. Additionally, an eligible veteran with amyotrophic lateral sclerosis and that consequently has muscle weakness who experiences loss of muscle control throughout the day may be in need of supervision or protection throughout the day, and thus may be determined to have a frequent need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury on a continuous basis.

The phrase ''on a continuous basis'' for purposes of this proposed basis would not mean that the eligible veteran would require supervision or protection 24 hours per day, seven days per week, and it is not meant to imply that an individual requires hospitalization or nursing home care. Instead, the need for supervision or protection could be demonstrated through, but would not be limited to, a recurring, consistent, and prevalent need.

This requirement of ''on a continuous basis'' in proposed § 71.40(c)(4)(i)(A)(*2*)(*ii*) would address the amount and degree of personal care

services provided, consistent with the language in 38 U.S.C. 1720G(a)(3)(C)(i), as the Primary Family Caregiver who provides supervision or protection on a continuous basis would provide a greater amount and degree of personal care services to the eligible veteran than a Primary Family Caregiver who provides supervision or protection on a less than continuous basis.

For example, an eligible veteran with an uncontrolled seizure disorder may experience seizures on a near daily basis and when such seizures occur, the eligible veteran frequently needs protection from the Primary Family Caregiver to clear the area of hard objects, support the eligible veteran's head, call for medical assistance, if needed, and help the eligible veteran re-orient following the seizure. Such need for supervision or protection may be needed on a continuous basis because such need is recurring, can occur at any time, and could require the Primary Family Caregiver to actively intervene to maintain the safety of the eligible veteran. Such Primary Family Caregiver may be determined eligible for the higher stipend level under proposed § 71.40(c)(4)(i)(A)(*2*)(*ii*).

VA provides the foregoing examples as illustrations of its intended application of the proposed rule should it be adopted as final, but VA's determinations would continue to be fact-specific and could differ depending on the facts and circumstances of an individual eligible veteran and their Primary Family Caregiver.

v. Multiple Bases for Eligibility for Higher Stipend Level Payment

Since implementing changes following the *Veteran Warriors* ruling, there are three bases under which a Primary Family Caregiver may be eligible for the higher stipend level. The proposed changes within this proposed rulemaking regarding the criteria for the higher stipend level would provide four bases. Under VA's proposed rule, a Primary Family Caregiver may be eligible for the higher stipend level under multiple bases but would only be required to meet one basis to be eligible for the higher stipend level.

Meeting one proposed basis for the higher stipend level does not preclude a Primary Family Caregiver from meeting one or more additional proposed bases that would also allow them to be eligible for the higher stipend level. So long as VA determines that one of the bases under § 71.40(c)(4)(i)(A)(*2*) is satisfied, the Primary Family Caregiver would be eligible for the higher stipend level.

c. Proposed Changes To Extend Transition Period for Legacy Cohort

To effectuate VA's proposed extension of the transition period for the legacy cohort as discussed earlier in this rulemaking, VA proposes to revise several paragraphs of § 71.40(c)(4)(i). Specifically, VA would amend the first sentence of the introductory text of § 71.40(c)(4)(i)(B) to remove the phrase ''for five-years beginning on October 1, 2020'' and add in its place, the phrase ''for the time period beginning on October 1, 2020 and ending on [18 months after EFFECTIVE DATE OF FINAL RULE]''. VA would make the same edit in paragraphs (c)(4)(i)(C) and (c)(4)(i)(D).

2. Stipend Adjustments

a. Adjustments to Stipend Payments Based on the Office of Personnel Management (OPM) Updates to the General Schedule (GS) Annual Rate

Current § 71.40(c)(4)(ii) explains adjustments to monthly stipend payments. Adjustments to monthly stipend payments that result from OPM's updates to the GS Annual Rate for grade 4, step 1 for the locality pay area in which the eligible veteran resides take effect prospectively following the date the update to such rate is made effective by OPM. § 71.40(c)(4)(ii)(A).

VA proposes to revise current § 71.40(c)(4)(ii)(A) to further clarify this provision and confirm through edits to the regulation text that VA will not make retroactive pay corrections in instances when OPM announces retroactive changes to the General Schedule (GS) Annual Rate tables later in the year. *See* 85 FR at 46267 (July 31, 2020). VA's proposed changes would also provide additional clarification in § 71.40(c)(4)(ii)(A) that VA believes is needed to inform Primary Family Caregivers of the specific month in which they can expect to receive a pay adjustment under this paragraph.

Under this proposal, VA would maintain the requirement in current paragraph (c)(4)(ii)(A) that VA will make stipend payment adjustments based on OPM's updates to the GS Annual Rate for grade 4, step 1 for the locality pay area in which the eligible veteran resides. To further clarify when monthly stipend payment adjustments take effect, VA proposes to revise the language that currently states that such adjustments take effect prospectively following the date the update to such rate is made effective by OPM. VA proposes to explain instead that such adjustments would take effect on the first of the month that changes to the GS Annual Rate are effective. However, if OPM publishes changes to the GS Annual Rate and such changes have a retroactive effective date, VA proposes to make those adjustments to the stipend payments effective on the first of the month following the month that OPM publishes changes to the GS Annual Rate.

Thus, VA proposes to revise § 71.40(c)(4)(ii)(A) to state that VA will adjust monthly stipend payments based on changes to the General Schedule (GS) Annual Rate for grade 4, step 1 for the locality pay area in which the eligible veteran resides. It would also state that such adjustments will take effect on the first of the month in which changes to the GS Annual Rate are effective. Proposed § 71.40(c)(4)(ii)(A) would further state that notwithstanding the previous sentence, adjustments under this paragraph will take effect on the first of the month following the month OPM publishes changes to the GS Annual Rate if such changes have a retroactive effective date.

These proposed revisions are intended to further clarify when adjustments will be made based on changes to the GS Annual Rate. Pursuant to 5 U.S.C. 5303 and 5304, the GS rates are updated and published on an annual basis by OPM. Information on the GS rates can be found at *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/.* Updates to the GS Annual Rate are typically effective on the first day of the first applicable pay period beginning on or after January 1 of each calendar year. In the past, OPM has announced and published the updated rates in December prior to implementing the new rates. This has been the case each year since October 2020 when VA implemented the term *monthly stipend rate,* which is defined in § 71.15 to mean the OPM GS Annual Rate for grade 4, step 1, based on the locality pay area in which the eligible veteran resides, divided by 12.

The proposed changes to § 71.40(c)(4)(ii)(A) would provide transparency to Primary Family Caregivers by specifying the month in which they can expect the adjustment to the monthly stipend payment based on changes to the GS Annual Rate to be effective. VA's proposed changes would make clear that if changes to the GS Annual Rate for the following calendar year are announced on December 15 and such changes take effect on January 1 of that following calendar year, VA would make adjustments to the monthly stipend payment based on those changes to the GS Annual Rate effective January 1. Similarly, under this

proposal, if changes to the GS Annual Rate for the following calendar year are announced on December 14 and such changes take effect on January 10 of the following calendar year, VA would make adjustments to the monthly stipend payment based on those changes to the GS Annual Rate effective January 1. This is the practice VA has followed for updates to the GS Annual Rate that were made effective in 2021, 2022, and 2023. Thus, if adopted as proposed, this change would not have a substantive impact upon current PCAFC participants, would clarify the timing of adjustments under paragraph (c)(4)(ii)(A) for Primary Family Caregivers, and reflect VA's current practice. While VA expects OPM will continue to provide notice of GS Annual Rate changes in December with an effective date of the first day of the first applicable pay period beginning on or after January 1 of the following calendar year, updates to and publication of, the GS Annual Rate may not always follow this timeline. In some cases, changes to the GS Annual Rate may be made retroactively. For example, Congress could enact legislation in February that makes adjustments to the GS Annual Rate with a January effective date. As a result, OPM may publish the changes to the GS Annual Rate in March and the effective date may be retroactive to January of that same year. This occurred with the 2019 GS Annual Rate change. The President issued Executive Order 13866 on March 28, 2019, that provided a retroactive pay adjustment to January 2019 as required by the Consolidated Appropriations Act, 2019 (Public Law 116–6).[21] On these rare occasions that OPM publishes changes to the GS Annual Rate and such changes have a retroactive effective date, VA proposes to make adjustments to monthly stipend payments based on those changes effective the first of the month following the month OPM publishes the changes to the GS Annual Rate.

For example, under this proposal, if changes to the GS Annual Rate are published on April 10 and are made effective retroactive to January 1, VA would apply the changes to the GS Annual Rate to the monthly stipend rate, but they would not take effect until May 1. VA is not proposing to apply the rate adjustments retroactively to January 1 because this would not be administratively feasible under VA's current systems. The Caregiver Records Management Application (CARMA) is the information technology (IT) system used by CSP to fully support PCAFC and it allows for data assessment and comprehensive monitoring of PCAFC. CARMA's ability to support PCAFC operations includes functionality related to calculations and issuance of the monthly stipend payment. The system, as designed, is not able to apply systematic retroactive calculations. To do so would require manual review and calculation of each Primary Family Caregiver's monthly stipend payment impacted by retroactive payments and would require manual updates to system data to ensure accurate tracking of retroactive payments. Such manual review would be significantly resource-intensive and would likely result in delays not only in applying retroactive adjustments but delays to all monthly stipend payments. Additionally, manual processes generally carry risk for errors and in the case of the monthly stipend payment could result in administrative errors such as incorrect payment calculations. Significant additional developer resources would be needed to perform such manual updates, potentially compromising current and future work towards additional CARMA improvements and enhancements.

Retroactive changes to the GS Annual Rate do not occur often and have not occurred in the last three years. Given the administrative burden, risk to system integrity, and potential for administrative error in payment calculations for many Primary Family Caregivers that would be expected if VA were to make retroactive stipend pay adjustments as discussed above, if OPM publishes changes to the GS Annual Rate with a retroactive effective date, VA proposes to make monthly stipend payment adjustments effective the first of the month following the month OPM publishes changes to the GS Annual Rate.

VA also notes that there also could be instances in which changes to the GS Annual Rate do not take effect because of an intervening event. For example, if changes to the GS Annual Rate are announced in November to take effect in February of the following year, but superseding legislation or an Executive Order makes ineffective such changes to the GS Annual Rate (such as a mandate in December to freeze the GS Annual Rate), no changes to the GS Annual Rate would be made based on the November announcement. Pursuant to the proposed changes to paragraph (c)(4)(ii)(A), VA would not adjust the monthly stipend payment based on the changes to the GS Annual Rate that were announced in November. In such cases, there would be no changes to the GS Annual Rate so VA would have no basis to adjust monthly stipend payments pursuant to proposed paragraph (c)(4)(ii)(A).

b. Stipend Adjustments Resulting From Reassessments

VA proposes to revise the paragraphs of § 71.40(c)(4)(ii)(C), which address the effective date for changes in the Primary Family Caregiver's monthly stipend payment resulting from a reassessment under § 71.30. VA's proposed changes to § 71.40(c)(4)(ii)(C) would make substantive revisions, such as VA's proposal to authorize a retroactive increase in the monthly stipend payment that would become effective as of the date VA receives a written reassessment request under proposed revisions to § 71.30(c), as discussed above. Other proposed changes to § 71.40(c)(4)(ii)(C), such as VA's proposed revisions to the regulatory text regarding the effective date for a decrease in the monthly stipend payment based on a reassessment, as well as relocation of provisions related to the retroactive stipend payment for Primary Family Caregivers of certain legacy participants and legacy applicants, would primarily maintain the current regulatory requirements but reorganize how those requirements are reflected in VA's regulations. Each of these proposed changes are discussed in more detail below.

i. 38 CFR 71.40(c)(4)(ii)(C)(1) and (2)—Current Requirements for Monthly Stipend Payment Increases and Decreases

Currently, paragraphs (*1*) and (*2*) of § 71.40(c)(4)(ii)(C) set forth different requirements for monthly stipend payment increases and decreases resulting from reassessments based on whether the eligible veteran is or is not a legacy participant or legacy applicant as those terms are defined in § 71.15. If the eligible veteran is a legacy participant or legacy applicant (that is, the eligible veteran meets the requirements of § 71.20(b) or (c)), monthly stipend payment increases and decreases resulting from reassessments are governed by current § 71.40(c)(4)(ii)(C)(*2*). For all other eligible veterans (that is, those determined eligible for PCAFC under the § 71.20(a) eligibility criteria that went into effect on October 1, 2020, and who are not a legacy participant or legacy applicant meeting the

[21] Executive Order for 2019 Pay Schedules, OPM, available at *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2019/executive-order-for-2019-pay-schedules/*(last visited Feb. 8, 2024); Executive Order 13866, Adjustments of Certain Rates of Pay, The White House, March 28, 2019, available at *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/retroactive-pay-executive-order-2019-adjustments-of-certain-rates-of-pay.pdf* (last visited Feb. 8, 2024).

requirements of § 71.20(b) or (c), respectively), monthly stipend increases and decreases resulting from reassessments are governed by current § 71.40(c)(4)(ii)(C)(*1*).

Under current § 71.40(c)(4)(ii)(C)(*1*), if the eligible veteran meets the requirements of § 71.20(a) only and does not meet the requirements of § 71.20(b) or (c), and a reassessment results in an increase in the Primary Family Caregiver's monthly stipend payment, the increase takes effect as of the date of the reassessment. § 71.40(c)(4)(ii)(C)(*1*)(*i*). For such an eligible veteran, in the case of a reassessment that results in a decrease in the Primary Family Caregiver's monthly stipend payment, the decrease takes effect as of the effective date provided in VA's final notice of such decrease to the eligible veteran and Primary Family Caregiver. § 71.40(c)(4)(ii)(C)(*1*)(*ii*). The effective date of the decrease is no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Primary Family Caregiver. *Id.*

Currently, paragraphs (*i*) and (*ii*) of § 71.40(c)(4)(ii)(C)(*2*) address monthly stipend payment increases and decreases, respectively, resulting from reassessments in the case of legacy participants and legacy applicants, that is, eligible veterans who meet the requirements of § 71.20(b) or (c).

Current paragraph (*i*) of § 71.40(c)(4)(ii)(C)(*2*) states that in the case of a reassessment that results in an increase in the monthly stipend payment, the increase takes effect as of the date of the reassessment. In such a case, the Primary Family Caregiver may also be eligible for a retroactive payment. The requirements governing this retroactive payment are contained in current § 71.40(c)(4)(ii)(C)(*2*)(*i*). VA provides a detailed description of these requirements later in this rulemaking in VA's discussion of its proposal to relocate these provisions to a revised § 71.40(c)(4)(iii).

Current paragraph (*ii*) of § 71.40(c)(4)(ii)(C)(*2*) states that in the case of a reassessment that results in a decrease in the monthly stipend payment and the eligible veteran meets the requirements of § 71.20(a), that is, the legacy participant or legacy applicant meets PCAFC eligibility criteria in § 71.20(a) that became effective on October 1, 2020, the new monthly stipend amount for the Primary Family Caregiver under § 71.40(c)(4)(i)(A) takes effect as of the effective date provided in VA's final notice of such decrease to the eligible veteran and Primary Family Caregiver. The effective date of the decrease will be no earlier than 60 days after October 1, 2025. § 71.40(c)(4)(ii)(C)(*2*)(*ii*). On October 1, 2025, VA will provide advanced notice of its findings to the eligible veteran and Primary Family Caregiver. *Id.*

ii. Proposed 38 CFR 71.40(c)(4)(ii)(C)(1) and (2)—Reorganization of Monthly Stipend Payment Requirements Based on Reassessment

Proposed § 71.40(c)(4)(ii)(C)(*1*) and (*2*) would continue to address increases and decreases in the monthly stipend payment that result from reassessments. However, to improve clarity and succinctness, VA proposes to reorganize paragraphs (*1*) and (*2*) to separately address monthly stipend payment increases (in revised paragraph (*1*) with the heading ''Increases'') and monthly stipend payment decreases (in revised paragraph (*2*) with the heading ''Decreases'') that may result from reassessments conducted by VA. Rather than separately addressing such increases and decreases based on whether an eligible veteran meets the requirements of § 71.20(a) only or also meets the requirements of § 71.20(b) or (c), proposed § 71.40(c)(4)(ii)(C)(*1*) and (*2*) would include provisions regarding monthly stipend payment increases and decreases, respectively, with respect to all eligible veterans and their Primary Family Caregivers.

A. Proposed 38 CFR 71.40(c)(4)(ii)(C)(1)—Effective Date of Monthly Stipend Payment Increases Based on a Reassessment

Proposed § 71.40(c)(4)(ii)(C)(*1*) would have the heading ''Increases'' and would exclude references to eligibility requirements and would instead explain that in the case of a reassessment that results in an increase in the monthly stipend payment, the increase takes effect on the earlier of the dates described in paragraphs (*i*) and (*ii*). This proposed paragraph would apply to all eligible veterans and their Primary Family Caregivers in the case of a reassessment that results in a monthly stipend payment increase—not just those described in current § 71.40(c)(4)(ii)(C)(*1)* (that is, those who meet the requirements of § 71.20(a) only and not § 71.20(b) or (c)).

As proposed in paragraph (c)(4)(ii)(C)(*1*)(*i*), the first of these two dates would be the date VA issues notice of the decision. This would be referring to the notice of the decision regarding the increase in the monthly stipend payment as a result of the reassessment. Under current § 71.40(c)(4)(ii)(C)(*1*)(*i*) and (*2*)(*i*), if a reassessment results in an increase in the monthly stipend payment, the increase takes effect as of the date of the reassessment. Since implementing this provision, VA has interpreted ''the date of the reassessment'' to mean the date a reassessment determination is made, which aligns with ''the date VA issues notice of the decision''. A reassessment can occur over multiple days, but it is not complete until the reassessment determination is made, and VA issues notice of its decision. As the current reference to ''date of the reassessment'' could be interpreted differently, such as the date VA initiates a reassessment or the date VA completes the final evaluation required for a reassessment, VA proposes to revise the current language to remove ambiguity and clarify VA's interpretation. VA proposes to revise the language to reflect that it is the date VA issues notice of the decision, not the date the reassessment was initiated, or the final evaluation required for the reassessment was completed, that serves as the effective date of the increase in the monthly stipend payment.

Proposed paragraph (*ii*) would refer to the second of the two dates in proposed § 71.40(c)(4)(ii)(C)(*1*) on which the increase in the monthly stipend payment may take effect. This would be the date VA received the written request for a reassessment pursuant to proposed § 71.30(c) from the eligible veteran or the Primary Family Caregiver of the eligible veteran. As discussed in the context of proposed changes to § 71.30, VA is proposing to amend § 71.30(c) to provide eligible veterans and Primary Family Caregivers the opportunity to submit a written request for a reassessment. Proposed § 71.40(c)(4)(ii)(C)(*1*)(*ii*) would allow for a retroactive increase in the monthly stipend payment back to the date VA received the written request for reassessment pursuant to proposed § 71.30(c), if it is the earlier date under proposed § 71.40(c)(4)(ii)(C)(*1*). If adopted as proposed, this effective date provision would apply only to reassessment requests under proposed § 71.30(c) that are received by VA on or after the effective date of the final rule adopting the provision, and VA would clarify that in proposed paragraph (c)(4)(ii)(C)(*1*)(*ii*). This would mean that the retroactive effective date back to the date of receipt of a request for reassessment for increases in the monthly stipend payment would not apply to requests submitted before the effective date of a final rule adopting this proposal, even if such a request met the requirements in proposed § 71.30(c). Additionally, this proposed paragraph

would only apply to reassessments that result in an increase in the monthly stipend payment. Proposed § 71.40(c)(4)(ii)(C)(*2*), discussed in more detail below, would provide the effective date for a decrease in the monthly stipend payment based on a reassessment, including a reassessment requested pursuant to proposed § 71.30(c).

Proposed § 71.40(c)(4)(ii)(C)(*1*)(*ii*) would account for the period of time between the date VA receives a written request for reassessment under proposed § 71.30(c) and the date VA issues notice of its decision regarding the monthly stipend payment increase resulting from the reassessment. VA would strive to conduct reassessments in a timely manner following a request for a reassessment under proposed § 71.30(c), if adopted in a final rule. However, if VA experiences any delay in conducting a reassessment requested under proposed § 71.30(c), for example, because VA is responding to a surge of new applications and/or requests for reassessment following the effective date of the final rule, proposed § 71.40(c)(4)(ii)(C)(*1*)(*ii*) would ensure any monthly stipend payment increase resulting from a written request for reassessment under proposed § 71.30(c) would become effective no later than the date VA received such request. Proposed § 71.40(c)(4)(ii)(C)(*1*)(*ii*) would apply to all PCAFC participants, regardless of whether the eligible veteran is or is not a legacy participant or legacy applicant, and it would help ensure equity among eligible veterans and Primary Family Caregivers across PCAFC when a reassessment requested under proposed § 71.30(c) results in a monthly stipend payment increase. Even if there is variability among VA facilities in their ability to conduct reassessments requested under proposed § 71.30(c) in a timely manner, under proposed § 71.40(c)(4)(ii)(C)(*1*)(*ii),* the Primary Family Caregiver would receive any increased monthly stipend payment based on the reassessment back to the date VA received the request under proposed § 71.30(c). For example, if a final rule adopting this proposal becomes effective on March 31 and VA Facility A receives a written request for reassessment under proposed § 71.30(c) on April 1, and then on May 1, issues notice that the reassessment resulted in an increased monthly stipend payment, the effective date of the increase would be April 1. If VA Facility B also receives a request for reassessment under proposed § 71.30(c) on April 1, but because of a surge in such requests for reassessments, VA Facility B is not able to complete such reassessment right away, and on July 1 issues notice that the reassessment resulted in an increased monthly stipend payment, the effective date of the increase would still be April 1. As stated above, under proposed § 71.40(c)(4)(ii)(C)(*1*), the increase to the monthly stipend payment resulting from a reassessment would take effect on the earlier of either the date VA issues notice of the decision or the date VA received the written request for the reassessment pursuant to § 71.30(c) from the eligible veteran or the Primary Family Caregiver of the eligible veteran, as would be set forth in proposed paragraphs (*i*) and (*ii*), respectively.

Because of the changes VA proposes to make in paragraph (c)(4)(ii)(C)(*1*), VA proposes to revise the first sentence in the note to paragraph (c)(4)(ii)(C)(*2*) which refers to increases under paragraph (c)(4)(ii)(C)(*2*)(*i*) of this section or decreases under paragraph (c)(4)(ii)(C)(*2*)(*ii*) of this section. VA proposes to remove the referenced language and in its place, add the phrase ''adjusted pursuant to (c)(4)(ii)(C)''. This would be a technical and conforming edit to update the note to paragraph (c)(4)(ii)(C)(*2*) and provide the reader with one citation for the applicable paragraphs governing both monthly stipend payment increases and decreases resulting from a reassessment. In addition, VA proposes to remove references to October 1, 2025 in the note to paragraph (c)(4)(ii)(C)(*2*) and would add in their place, the date that is 18 months after the effective date of a final rule implementing this rulemaking. This change would align with VA's proposal to extend the transition period for members of the legacy cohort as discussed earlier in this rulemaking.

B. Proposed § 71.40(c)(4)(ii)(C)(2)—Effective Date of Monthly Stipend Payment Decrease Based on a Reassessment

Proposed paragraph (c)(4)(ii)(C)(*2*) would address instances in which a reassessment results in a decrease in the monthly stipend payment. Proposed paragraph (c)(4)(ii)(C)(*2*)(*i*) would address the effective date for such decreases generally, by incorporating the requirements from current § 71.40(c)(4)(ii)(C)(*1*)(*ii*) and would have the heading ''General''. Proposed paragraph (c)(4)(ii)(C)(*2*)(*ii*) would set forth the effective date for such decreases specifically with respect to eligible veterans who meet the requirements of § 71.20(a) and (b) or (c) (that is, those legacy participants and legacy applicants who meet the eligibility criteria in proposed § 71.20(a)) by incorporating the requirements from current § 71.40(c)(4)(ii)(C)(*2*)(*ii*) and would have the heading ''Resulting from a legacy reassessment''.

Proposed paragraph (c)(4)(ii)(C)(*2*)(*i*) would be almost identical to current § 71.40(c)(4)(ii)(C)(*1*)(*ii*), except that the paragraph would include new language referring to the effective date provision in proposed paragraph (c)(4)(ii)(C)(*2*)(*ii*) that would be unique to legacy participants and legacy applicants. Accordingly, proposed paragraph (c)(4)(ii)(C)(*2*)(*i*) would state that except as provided in § 71.40(c)(4)(ii)(C)(*2*)(*ii*), in the case of a reassessment that results in a decrease in the monthly stipend payment, the decrease takes effect as of the effective date provided in VA's final notice of such decrease to the eligible veteran and Primary Family Caregiver. It would also state that the effective date of the decrease will be no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Primary Family Caregiver. There would be no substantive change in this effective date with respect to eligible veterans who meet the requirements of § 71.20(a) only (that is, eligible veterans who are not legacy participants or legacy applicants meeting the requirements of § 71.20(b) or (c), respectively) as provided in current paragraph (c)(4)(ii)(C)(*1*)(*ii*).

Proposed paragraph (c)(4)(ii)(C)(*2*)(*ii*) would incorporate the language from current § 71.40(c)(4)(ii)(C)(*2*)(*ii*) but VA would add a reference to § 71.20(b) or (c) to clarify that this paragraph would apply with respect to eligible veterans who are legacy participants and legacy applicants and to update references to the transition period for the legacy cohort to refer to the date that is 18 months after the effective date of a final rule implementing this rulemaking as discussed earlier in this rulemaking. Also, to ensure consistency with terminology used elsewhere in part 71, proposed paragraph (c)(4)(ii)(C)(*2*)(*ii*) would refer to the ''monthly stipend payment'' instead of the term ''stipend amount'' that appears in the first sentence of current § 71.40(c)(4)(ii)(C)(*2*)(*ii*). Accordingly, proposed paragraph (c)(4)(ii)(C)(*2*)(*ii*) would state that with respect to an eligible veteran who meets the requirements of § 71.20(a) and (b) or (c), in the case of a reassessment that results in a decrease in the Primary Family Caregiver's monthly stipend payment, the new monthly stipend payment under § 71.40(c)(4)(i)(A) takes effect as of the effective date provided in VA's final notice of such decrease to the eligible veteran and Primary Family

Caregiver. It would also state that the effective date of the decrease will be no earlier than 60 days after the date that is 18 months after the effective date of a final rule under this rulemaking and that on such effective date, VA will provide advanced notice of its findings to the eligible veteran and Primary Family Caregiver.

As a result of these proposed changes to the language in proposed paragraphs (c)(4)(ii)(C)(*2*)(*i*) and (*ii*), VA would also revise paragraph (c)(4)(ii)(C)(*2*) to remove the current language (''If the eligible veteran meets the requirements of § 71.20(b) or (c), the Primary Family Caregiver's monthly stipend may be adjusted as follows:'') as it would no longer apply. VA would also add a heading in proposed paragraph (c)(4)(ii)(C)(*2*) that states ''Decreases'' to further describe the provisions proposed in § 71.40(c)(4)(ii)(C)(*2*)(*i*) and (*ii*)).

iii. Proposed Technical Edits to § 71.40(c)(4)(ii)

VA proposes to add headings to the paragraphs of § 71.40(c)(4)(ii) to assist the reader in identifying provisions. VA proposes to add the heading ''OPM updates'' to § 71.40(c)(4)(ii)(A), the heading ''Relocation'' to § 71.40(c)(4)(ii)(B), the heading ''Reassessments'' to § 71.40(c)(4)(ii)(C), and the heading ''Effective dates'' to § 71.40(c)(4)(ii)(D).

c. Legacy Retroactive Monthly Stipend Payments

Since October 1, 2020, VA has provided the retroactive payments authorized under § 71.40(c)(4)(ii)(C)(*2*)(*i*) to ensure that Primary Family Caregivers of legacy participants and legacy applicants determined to meet the requirements of current § 71.20(a) receive the benefit of any monthly stipend payment increase resulting from a reassessment as of October 1, 2020 (the effective date of the July 31, 2020 Final Rule)—regardless of when during the five-year period after October 1, 2020 their reassessment is completed. *See* 85 FR 13389 (March 6, 2020). Because it is currently within the five-year period in which VA intended to reassess legacy participants, legacy applicants, and their Family Caregivers, some reassessments have not yet occurred while others need to be repeated as a result of the *Veteran Warriors* decision. *See* 87 FR 57602 (September 21, 2022). This means there are Primary Family Caregivers of legacy participants and legacy applicants who may still qualify for a retroactive monthly stipend payment. To promote equity among all Primary Family Caregivers of legacy participants and legacy applicants, VA proposes to continue providing these retroactive monthly stipend payments, which are authorized when a reassessment described in current § 71.40(c)(4)(ii)(C)(*2*)(*i*) results in an increase in the monthly stipend payment. VA proposes to set forth the framework for these retroactive monthly stipend payments in a standalone paragraph in § 71.40(c)(4)(iii) that is distinct from the regulatory text in § 71.40(c)(4)(ii)(C) governing monthly stipend payment increases and decreases resulting from a reassessment. VA's proposed revisions seek to maintain the criteria that VA applies under current § 71.40(c)(4)(ii)(C)(*2*)(*i*) for retroactive monthly stipend payments, but also account for proposed changes to §§ 71.15 and 71.20(a)(3) in this proposed rule.

VA proposes to redesignate current paragraphs (c)(4)(iii) and (iv) of § 71.40, as paragraph (c)(4)(iv) and a new paragraph (c)(4)(v), respectively. These paragraphs explain that § 71.40 shall not be construed to create an employment relationship between the Secretary and an individual in receipt of assistance or support under part 71 and that VA will periodically assess the monthly stipend rate to determine whether it meets certain statutory requirements, respectively. VA proposes to add a new paragraph (c)(4)(iii) with the heading ''*Legacy retroactive monthly stipend payment*'' to account for the retroactive monthly stipend payments authorized under current § 71.40(c)(4)(ii)(C)(*2*)(*i*). The introduction text of proposed paragraph (c)(4)(iii) would state that VA will consider eligibility for a one-time legacy retroactive monthly stipend payment in accordance with this paragraph as part of the legacy reassessment conducted under § 71.30(e) of this part.

This proposed change would maintain the current requirements associated with retroactive monthly stipend payments as set forth in current § 71.40(c)(4)(ii)(C)(*2*)(*i*). This would include the eligibility criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) that VA has applied in place of the term *need for supervision, protection, or instruction* in 38 CFR 71.20(a)(3) and 71.40(c)(4)(i)(A)(*2*) since *Veteran Warriors.* Because these specific eligibility criteria VA applies under §§ 71.20(a)(3) and 71.40(c)(4)(i)(A)(*2*) would be replaced by new regulations if this proposed rule were adopted as final, VA proposes to maintain these specific eligibility criteria in the regulation text of proposed paragraphs (A) and (C)(*2*) of proposed § 71.40(c)(4)(iii) for purposes of determining eligibility for the retroactive monthly stipend payment under this paragraph. Maintaining the specific eligibility criteria that are in place today would ensure that VA applies the same criteria when determining eligibility for the retroactive monthly stipend payment for all Primary Family Caregivers of legacy participants and legacy applicants, as applicable, regardless of whether their eligibility for a retroactive monthly stipend payment (and the amount of such payment) is considered by VA before or after any regulation changes in this proposed rule take effect.

Accordingly, proposed § 71.40(c)(4)(iii) would set forth the specific criteria that VA currently applies to determine whether a legacy participant or legacy applicant is eligible under current § 71.20(a)(3), and whether their Primary Family Caregiver qualifies for the higher stipend level payment under current § 71.40(c)(4)(i)(A)(*2*). To be clear, as proposed, § 71.40(c)(4)(iii) would apply *only* for the purpose of determining eligibility for a one-time retroactive monthly stipend payment to Primary Family Caregivers of legacy participants and legacy applicants.

Proposed paragraph (A) of proposed § 71.40(c)(4)(iii) would set forth who may be eligible for a retroactive monthly stipend payment. Proposed paragraph (B) would incorporate the limitations from current § 71.40(c)(4)(ii)(C)(*2*)(*i*) on when the retroactive monthly stipend payment applies, with minor technical changes. Proposed paragraph (C) would set forth the amount of the retroactive payment authorized under current § 71.40(c)(4)(ii)(C)(*2*)(*i*) by incorporating the criteria VA applies to determine whether a Primary Family Caregiver qualifies for the higher stipend level payment under current § 71.40(c)(4)(i)(A). Each of these proposed paragraphs is addressed in more detail below.

In proposed § 71.40(c)(4)(iii)(A), VA would explain that, subject to proposed § 71.40(c)(4)(iii)(B), in the case of a reassessment that results in an increase in the Primary Family Caregiver's monthly stipend payment pursuant to proposed paragraph § 71.40(c)(4)(ii)(C)(*1*), the Primary Family Caregiver may be eligible for a retroactive payment amount described in proposed paragraph § 71.40(c)(4)(iii)(C) if the eligible veteran is a legacy participant or legacy applicant and meets the criteria VA applies to determine eligibility under current § 71.20(a)(3) (which may include the criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) that VA has

applied since the definition of *need for supervision, protection, or instruction* was invalidated by *Veteran Warriors*). VA proposes to continue to require that legacy participants and legacy applicants be determined to meet the eligibility criteria in current 38 CFR 71.20(a)(3) as a prerequisite for their Primary Family Caregiver to qualify for a retroactive monthly stipend payment.[22] Accordingly, proposed § 71.40(c)(4)(iii)(A) would set forth the criteria VA applies to determine eligibility under current § 71.20(a)(3) (that is, the criteria VA has applied since the definition of *need for supervision, protection, or instruction* was invalidated by *Veteran Warriors*). To make clear what those criteria are, proposed paragraph § 71.40(c)(4)(iii)(A) would refer to the eligible veteran being in need of personal care services for a minimum of six continuous months based on any one of the following: (1) an *inability to perform an activity of daily living* as such term is defined in current § 71.15; (2) a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury; or (3) a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired. For additional discussion regarding these criteria, please see VA's discussion above regarding proposed § 71.20(a)(3).

Although VA is proposing to revise two of the seven eligibility criteria found in § 71.20 (criteria in paragraph (a)(3) and (7)), only the criteria that VA applies to determine eligibility under current § 71.20(a)(3) (which may include the statutory criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii)) would be included in proposed § 71.40(c)(4)(iii)(A). That is because legacy participants and legacy applicants would already have been determined to meet criteria set forth in current and proposed § 71.20(a)(7). By carrying forward these criteria for purposes of determining whether a Primary Family Caregiver of a legacy participant or legacy applicant qualifies for the retroactive stipend payment, VA would ensure the same criteria apply to such a payment, regardless of whether the reassessment that results in a stipend increase occurs before or after the effective date of any final rule adopting changes to the regulations. The other eligibility criteria in § 71.20(a) would not be amended by this proposed rule, and thus, would not be included in proposed § 71.40(c)(4)(iii)(A).

Proposed paragraph § 71.40(c)(4)(iii)(B) would be identical to the last two sentences of current § 71.40(c)(4)(ii)(C)(*2*)(*i*). However, VA would make the following technical and conforming changes. First, proposed paragraph (B) would cite to the description of the retroactive payment in proposed new paragraph § 71.40(c)(4)(iii)(A), where applicable. Second, because VA proposes to add the criteria that VA has used in place of the definition of *need for supervision, protection, or instruction* in proposed § 71.40(c)(4)(iii)(A), VA would exclude the language that refers to the criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii), the definition of *need for supervision, protection, or instruction,* and the *Veteran Warriors* decision and would instead refer to the criteria in proposed 38 CFR 71.40(c)(4)(iii)(A). Finally, VA would remove the language ''was completed by VA before March 25, 2022, and such reassessment'', as such language may inadvertently suggest that it excludes legacy participants, legacy applicants, and their Family Caregivers who did not have a first reassessment completed by VA before March 25, 2022, which was not VA's intent. These changes would maintain current practice and, as was discussed in VA's September 21, 2022 IFR, ensure that the Primary Family Caregivers of all legacy participants and legacy applicants meeting the requirements of current § 71.20(a) receive the benefit of any monthly stipend payment increase as of October 1, 2020, regardless of when the reassessment is completed prior to September 30, 2025. 87 FR 57606 (September 21, 2022). VA would, however, revise the current text to account for the proposed extended transition period for the legacy cohort and the timeline for completing legacy reassessments (as discussed earlier in this rulemaking). VA would replace references to the five-year period beginning on October 1, 2020 with language that reflects a period beginning on October 1, 2020 and ending on the date that is 18 months after the effective date of a final rule under this rulemaking.

With these changes, proposed § 71.40(c)(4)(iii)(B) would state that if there is more than one reassessment for an eligible veteran during the period beginning on October 1, 2020 and ending on [18 months after EFFECTIVE DATE OF FINAL RULE], the retroactive payment described in proposed paragraph (c)(4)(iii)(A) applies only if the first reassessment during the aforementioned period results in an increase in the monthly stipend payment, and only as the result of the first reassessment during said period. Proposed § 71.40(c)(4)(iii)(B) would further state that notwithstanding the previous sentence, if the first reassessment during the period beginning on October 1, 2020 and ending on [18 months after EFFECTIVE DATE OF FINAL RULE] did not result in an increase in the monthly stipend payment, the retroactive payment described in proposed paragraph (c)(4)(iii)(A) applies to the first reassessment initiated by VA on or after March 25, 2022 that applies the criteria in proposed § 71.40(c)(4)(iii)(A), if such reassessment results in an increase in the monthly stipend payment, and only as a result of such reassessment.

Proposed § 71.40(c)(4)(iii)(C) would incorporate the requirements from current § 71.40(c)(4)(ii)(C)(*2*)(*i*) regarding the amount of the retroactive payment, but with conforming and clarifying changes. First, because the effective date of the increase under proposed paragraph § 71.40(c)(4)(ii)(C)(*1*) could be either of the dates in proposed paragraphs (*i*) or (*ii*) of that proposed paragraph, instead of referring to the date of the increase as the ''date of the reassessment'', VA would refer to the date of the increase as ''the effective date of the increase under paragraph (c)(4)(ii)(C)(*1*) of this section''. Second, to improve clarity, VA would specify that the amount of the retroactive payment is any difference between the amounts set forth in new proposed paragraphs (*1*) and (*2*) of proposed paragraph (c)(4)(iii)(C). Accordingly, in proposed paragraph § 71.40(c)(4)(iii)(C), VA would explain that the retroactive payment amount described in proposed paragraph (c)(4)(iii)(A) would be any difference between the amounts in proposed paragraphs (*1*) and (*2*) of paragraph (c)(4)(iii)(C) for the time period beginning on October 1, 2020 up to the effective date of the increase under proposed paragraph (c)(4)(ii)(C)(*1*), based on the eligible veteran's address on record with the Program of Comprehensive Assistance for Family Caregivers on the effective date of the increase under proposed paragraph (c)(4)(ii)(C)(*1*) and the monthly stipend rate on such date.

Proposed paragraph (*1*) under § 71.40(c)(4)(iii)(C) would state the first amount that would be used to calculate

[22] In the case that a legacy participant or legacy applicant is not determined to be eligible for PCAFC under current § 71.20(a)(3), their Primary Family Caregiver would not be eligible for an increase in their monthly stipend payment under current § 71.40(c)(4)(i)(A) and thus would not qualify for a retroactive monthly stipend payment under current § 71.40(c)(4)(ii)(C)(*2*)(*i*) or proposed § 71.40(c)(4)(iii). Instead, such a Primary Family Caregiver would continue to qualify for a monthly stipend payment as set forth in paragraphs (B) or (D) of § 71.40(c)(4)(i).

the retroactive payment amount—the amount the Primary Family Caregiver was eligible to receive under paragraph (c)(4)(i)(B) or (D) of § 71.40, whichever the Primary Family Caregiver received. Primary Family Caregivers eligible for a retroactive monthly stipend payment under proposed paragraph § 71.40(c)(4)(iii) would, up to that point, have been receiving a monthly stipend under § 71.40(c)(4)(i)(B) or (D), so VA would maintain in proposed paragraph § 71.40(c)(4)(iii)(C)(*1*) this same language from current paragraph § 71.40(c)(4)(ii)(C)(*2*)(*i*).

Proposed paragraph (*2*) under § 71.40(c)(4)(iii)(C) would include the second amount that would be used to calculate the retroactive payment amount. Consistent with the calculation of the monthly stipend payment under current § 71.40(c)(4)(i)(A), this amount would be the monthly stipend rate (as that term is defined in § 71.15) multiplied by 0.625 or 1.00. Under current § 71.40(c)(4)(i)(A), the monthly stipend payment is the monthly stipend rate multiplied by 0.625 unless the eligible veteran is unable to self-sustain in the community, in which case the monthly stipend rate is multiplied by 1.00. As VA proposes to remove the term *unable to self-sustain in the community* and its definition from § 71.15, proposed § 71.40(c)(4)(iii)(C)(*2*) would include the criteria from that definition, as VA has applied that term and its definition since the definition of *need for supervision, protection, or instruction* was invalidated in *Veteran Warriors.* Please see VA's earlier discussion on the higher stipend level criteria in proposed § 71.40(c)(4)(i)(A)(*2*) for additional discussion on how VA interpreted and applied that section and the basis for a determination that an eligible veteran is *unable to self-sustain in the community* since the *Veteran Warriors* decision.

Accordingly, proposed paragraph § 71.40(c)(4)(iii)(C)(*2*) would refer to the monthly stipend rate multiplied by 0.625, but also specify that if the eligible veteran meets at least one of the following criteria, the monthly stipend rate would be multiplied by 1.00: (*i*) the eligible veteran requires personal care services each time they complete three or more of the seven activities of daily living (ADL) listed in the definition of an ''inability to perform an activity of daily living'' as such term is defined in 38 CFR 71.15 (2021), and is fully dependent on a caregiver to complete such ADLs; (*ii*) the eligible veteran has a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury on a continuous basis; or (*iii*) the eligible veteran has a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired on a continuous basis. Including this language in proposed § 71.40(c)(4)(iii)(C)(*2*) would maintain the same criteria that VA applies when determining the retroactive monthly stipend payment under current § 71.40(c)(4)(ii)(C)(*2*)(*i*). Maintaining these requirements would promote equity in calculating such payments among all Primary Family Caregivers who qualify to receive them, because the same requirements would apply regardless of whether the reassessment and retroactive monthly stipend payment determination occurs before or after the date that any regulation changes would take effect, if adopted as proposed. To be clear, proposed § 71.40(c)(4)(iii)(C)(*2*) would apply *only* for the purpose of calculating the retroactive monthly stipend payment for Primary Family Caregivers of legacy participants and legacy applicants when they are eligible to receive such a payment.

H. 38 CFR 71.45 Revocation and Discharge of Family Caregivers

In § 71.45, VA describes the bases for revocation and discharge of a Family Caregiver from PCAFC, the associated effective dates, and instances in which benefits are continued after revocation or discharge, as applicable. In this rulemaking, VA proposes several amendments to § 71.45 to address additional bases for revocation and discharge and to make other substantive and technical edits as explained below.

VA first proposes technical changes to § 71.45 to modify certain references to ''days'' to instead reference ''months''. Specifically, VA proposes to make these changes in VA's regulations that authorize the continuation of caregiver benefits in certain cases of revocation and discharge. These changes would ensure VA's regulations are consistent with the manner in which VA calculates the monthly stipend payment during these continued benefit periods. For reference, the term monthly stipend rate is defined in § 71.15 to refer to the applicable OPM GS Annual Rate divided by 12. Pursuant to this definition, each Primary Family Caregiver's monthly stipend payment is the same amount each month, regardless of the number of days in the month. Accordingly, the IT system supporting CSP, CARMA, applies a monthly rate when VA calculates and issues monthly stipend payments to Primary Family Caregivers, including monthly stipend payments authorized during a period of continued benefits following revocation and discharge under § 71.45. Although VA's regulations in § 71.45 currently refer to continuation of caregiver benefits for 30, 60, or 90 days, depending on the basis for revocation or discharge, VA currently calculates stipends for those time periods by equating 30, 60, and 90 days to one, two, and three months, respectively. This approach aligns with VA's current IT functionality and avoids manual processes that would be required to apply a prorated daily rate for 30-, 60-, or 90-day periods of continued caregiver benefits, which would be resource intensive and could result in delays and errors. VA believes that the costs associated with applying a prorated daily rate would be significant, especially when compared to the nominal differences between applying the monthly stipend rate as compared to a prorated daily rate in calculating stipends during periods of continued benefits. To ensure VA's regulations conform with current practice, VA proposes to replace references to 30, 60, and 90 days with one, two, and three months, respectively, in the context of § 71.45 provisions that address the continuation of caregiver benefits after revocation or discharge. VA identifies these specific proposed changes throughout the discussion below on proposed changes to § 71.45, where applicable.

1. Proposed Revisions to § 71.45(a) Regarding Revocation of a Family Caregiver

VA proposes to revise § 71.45(a) to add a basis for revocation of a Family Caregiver and, in § 71.45(a)(3), to revise the time period for continuing benefits and to remove the opt out provision.

a. Proposed Basis for Revocation When an Eligible Veteran or Family Caregiver No Longer Resides in a State

Current § 71.45(a)(1) establishes the bases for revocation of a Family Caregiver, and paragraphs (i) through (iii) of § 71.45(a)(1) set forth the bases on which VA may revoke the designation of a Family Caregiver—for cause, noncompliance, and VA error, respectively. VA proposes to add another basis for revocation of a Family Caregiver under a new paragraph (iv) of § 71.45(a)(1).

Proposed § 71.45(a)(1)(iv) would state that VA will revoke the designation of a Family Caregiver when the eligible veteran or Family Caregiver no longer resides in a State. In addition, VA proposes to include a note that states that if an eligible veteran no longer resides in a State, VA will revoke the

designation of each of the eligible veteran's Family Caregivers. As explained above, VA proposes to define the term State in § 71.15 (consistent with the definition of such term in 38 U.S.C. 101(20)). Therefore, the term State in proposed § 71.45 (that is, in proposed § 71.45(a)(1)(iv) and in proposed § 71.45(a)(2)(v), discussed below) would have the meaning set forth in proposed § 71.15 and 38 U.S.C. 101(20).

As explained in current 38 CFR 71.10(b), benefits under PCAFC and PGCSS are provided only to those individuals residing in a State as that term is defined in 38 U.S.C. 101(20). Therefore, an individual residing outside a State is not eligible for PCAFC or the benefits associated with PCAFC, and VA currently revokes the designation of the Family Caregiver when the Family Caregiver or the eligible veteran no longer resides in a State, consistent with 38 CFR 71.10(b). Because current § 71.45 does not contain a specific basis for revocation or discharge based on the Family Caregiver or eligible veteran no longer residing in a State, unless another basis of revocation or discharge applies pursuant to § 71.45(f), revocation on this basis is carried out pursuant to current § 71.45(a)(1)(ii)(E), which is a ''catch-all category'' for requirements under part 71 that are not otherwise accounted for in § 71.45(a) or (b). 85 FR 13396 (March 6, 2020). VA explained in its March 6, 2020 Proposed Rule that, if VA found that ''this basis for revocation is frequently relied upon, then VA would consider proposing additional specific criteria for revocation or discharge under this section in a future rulemaking.'' *Id.* While the frequency of cases in which a PCAFC participant has moved and resided outside of a State has not been exceedingly high, such instances have occurred with enough frequency that VA believes a specific basis for revocation should apply. This change, if adopted, would help ensure transparency regarding revocation when a PCAFC participant resides outside of a State and, along with proposed § 71.45(a)(2)(v), identify the specific requirements associated with revocation on this basis. VA also asserts that this proposal would improve VA's ability to track the frequency of revocation on this basis. Thus, through this rulemaking, VA proposes to add a basis for revocation based on the eligible veteran or Family Caregiver no longer residing in a State.

VA proposes to establish this as a basis for revocation rather than a basis for discharge. This is because, as discussed in VA's March 6, 2020 Proposed Rule, the term ''discharge'' is commonly used in health care settings to describe the process that occurs when a patient no longer meets the criteria for the level of care being provided or when a patient is transferred to another facility or program to receive care. *See* 85 FR 13394 (March 6, 2020). VA further explained that revocation would apply to removals based on a VA error or a deliberate action or inaction on the part of the eligible veteran or Family Caregiver. *Id.* Because residing outside of a State is an action taken by an eligible veteran, Family Caregiver, or both, VA believes revocation is the appropriate categorization for this new basis.

Proposed § 71.45(a)(1)(iv) would include a note specifying, consistent with current practice, that in such instances when the eligible veteran no longer resides in a State, VA would revoke the designation of each of the eligible veteran's Family Caregivers. This is because approval and designation of a Family Caregiver is conditioned upon the eligible veteran remaining eligible for PCAFC. *See* 38 CFR 71.25(f). If the veteran or servicemember is no longer eligible for PCAFC, VA would have no basis to continue providing PCAFC benefits to their caregiver(s). Consistent with all other bases for revocation and discharge, if the eligible veteran no longer meets PCAFC eligibility criteria, each of the approved and designated Family Caregivers of the eligible veteran are discharged or revoked as appropriate. However, if a Family Caregiver no longer resides in a State, the eligible veteran could remain eligible for PCAFC if the eligible veteran and at least one Family Caregiver continues to reside in a State.

Current § 71.45(a)(2) explains that benefits available through PCAFC will continue to be provided to the Family Caregiver until the date of revocation and further sets forth the revocation date for the various revocation bases under § 71.45(a)(1).

In order to address the additional basis for revocation VA proposes in paragraph § 71.45(a)(1)(iv), as described above, VA also proposes to add a new paragraph § 71.45(a)(2)(v) to set forth the revocation date in the case of revocation on the basis of a PCAFC participant no longer residing in a State. Proposed § 71.45(a)(2)(v)(A) would explain that in the case of a revocation based on § 71.45(a)(1)(iv) (that is, when the eligible veteran or Family Caregiver no longer resides in a State), the date of revocation would be the earlier of the following dates, as applicable: (1) the date the eligible veteran no longer resides in a State; or (2) the date the Family Caregiver no longer resides in a State. VA believes that it is reasonable to stop benefits as of the earlier of these two dates because PCAFC is not available to individuals who reside outside of a State.

Proposed § 71.45(a)(2)(v)(B) would explain that if VA cannot identify the date the eligible veteran or Family Caregiver, as applicable, no longer resides in a State, the date of revocation based on paragraph (a)(1)(iv) of § 71.45 would be the earliest date known by VA that the eligible veteran or Family Caregiver, as applicable, no longer resides in a State, but no later than the date on which VA identifies the eligible veteran or Family Caregiver, as applicable, no longer resides in a State.

VA makes determinations that the Family Caregiver or eligible veteran no longer reside in a State based on information a CSP Team receives directly from the eligible veteran and/or Family Caregiver(s), or through information received indirectly such as through information available in medical record documentation. It is expected, and it has been VA's experience, that eligible veterans and/or their Family Caregiver(s) inform VA of a relocation out of a State prior to such move occurring so that VA staff can assist them with planning to transition out of PCAFC. VA staff may be able to offer support or resources regarding transferring the care of the eligible veteran, help facilitate medical appointments prior to an eligible veteran's move, or engage in other such activities to plan for participants to transition out of PCAFC. However, such direct notification to VA of an anticipated move outside of a State may not always occur. In some cases, CSP Teams have learned of a planned move not because the CSP Team was directly informed but through other means. For example, the eligible veteran may update the demographic information contained in their health record to reflect a new address which is outside of a State or may contact their primary care team to cancel an upcoming appointment due to their relocation outside of a State. Similarly, the Family Caregiver may inform an eligible veteran's health care provider after the relocation out of a State has occurred such that they have already moved and no longer reside in a State. This information is usually identified at the time the eligible veteran and Family Caregiver(s) are contacted to schedule a wellness contact.

Overpayments may result in cases of revocation based on proposed § 71.45(a)(1)(iv) and (a)(2)(v) because

information about an eligible veteran's and/or Family Caregiver's relocation out of a State is not always communicated in advance. An overpayment could result when there is a delay between the date an eligible veteran or Family Caregiver no longer resides in a State and the date that VA becomes aware of the relocation and initiates revocation accordingly. Pursuant to §§ 71.45(d) and 71.47, VA would seek to recover overpayments of benefits, as applicable, including in cases of revocation under proposed § 71.45(a)(1)(iv). This is the case when overpayments occur as a result of other bases of revocation or discharge. To prevent situations such as this, VA encourages eligible veterans and Family Caregivers to notify their CSP Team in advance of any changes that may impact their ongoing PCAFC eligibility.

VA would not provide a period of 60-day advanced notice or a period of continued benefits in the case of revocation under this proposed basis. This is because, as VA explained in its July 31, 2020 Final Rule, it is not feasible to provide PCAFC benefits outside of a State, and VA incorporates that discussion by reference here. *See* 85 FR at 46227 (July 31, 2020). VA believes that this proposed approach to effectuate the revocation pursuant to proposed § 71.45(a)(2)(v) and to recover any overpayments is reasonable. Discontinuing benefits as close as possible to the date the individual no longer resides in a State, if not on such date, would minimize the amount of overpayment subject to recoupment.

b. Proposed Revision to Time Period for Continuing Benefits and Removal of Opt Out in § 71.45(a)(3)

Current § 71.45(a)(3) describes the continuation of benefits in the case of revocation based on VA error under § 71.45(a)(1)(iii). Specifically, current paragraph (a)(3) states that in the case of revocation based on VA error under paragraph (a)(1)(iii) of § 71.45, caregiver benefits will continue for 60 days after the date of revocation unless the Family Caregiver opts out of receiving such benefits. Paragraph (a)(3) also states that continuation of benefits under this paragraph will be considered an overpayment and VA will seek to recover overpayment of such benefits as provided in § 71.47.

VA proposes to revise the first sentence in paragraph (a)(3) to correct for challenges VA has experienced associated with the current regulation text. As proposed, the first sentence of paragraph (a)(3) would state that in the case of revocation based on VA error under paragraph (a)(1)(iii) of § 71.45, caregiver benefits will continue for two months after the date VA issues notice of revocation. VA explains proposed revisions below.

First, VA proposes to replace ''after the date of revocation'' with ''after the date VA issues notice of revocation'' in the regulation text. This revision would change the start date for the period of continued benefits. VA's intent with the current language was to provide advance notice prior to terminating benefits, even if such benefits would be considered an overpayment and subject to recoupment. As explained in the March 6, 2020 Proposed Rule, ''[t]his extended period of benefits would give the Family Caregiver time to adjust before benefits are terminated'', as ''[i]n such cases, the Family Caregiver may have come to rely on the benefits that were authorized as a result of a VA error.'' 85 FR 13397 (March 6, 2020). However, the phrase ''60 days after the date of revocation'' does not allow for the continuation of benefits if the effective date of revocation is in the past. For example, if in July, VA learns of and initiates revocation based upon a VA error that was made in January, the revocation date would be in January. Providing benefits for 60 days beyond the date of revocation would not allow for the advanced notice period that VA intended to authorize in § 71.45(a)(3) because the 60-day period would already have passed. By replacing ''60 days after the date of revocation'' with ''two months after the date VA issues notice of revocation'' in proposed § 71.45(a)(3), VA believes the proposed revised text would permit VA to provide advance notice before PCAFC benefits are discontinued and resolve this issue with the current regulation text and any confusion it has caused.

In the aforementioned example, under proposed paragraph (a)(3), if VA issues notice of revocation in July, the date of revocation would still be in January, but caregiver benefits would continue to be provided for two months after the date in July that VA issues notice of revocation. All benefits provided following the date of revocation in January would still be considered an overpayment, including the benefits provided during the two months after the date in July that VA issues notice of revocation, and VA seeks to recover overpayment of such benefits as provided in § 71.47. As provided in the last sentence of current § 71.45(a)(3), which VA does not propose to revise in this proposed rule, continuation of benefits under § 71.45(a)(3) will be considered an overpayment and VA will seek to recover overpayment of such benefits as provided in § 71.47.

Second, VA proposes to remove the language in § 71.45(a)(3) regarding the ability of the Family Caregiver to opt out of receiving continued benefits for 60 days after the date of revocation, in the case of revocation due to VA error. VA acknowledges that the number of revocations on this basis is very small. However, when they do occur, VA generally does not receive the Family Caregiver's decision to opt out of receiving continued benefits for the 60-day period, specifically the monthly stipend payment, with sufficient time for VA to stop the issuance of the monthly stipend payment. This means that VA, despite not knowing if the Primary Family Caregiver intends to opt out, must either proceed with issuing the continued monthly stipend payment or place a hold on issuing the payment until the Primary Family Caregiver's opt out decision is received, the latter of which effectively pauses the monthly stipend payment and thereby interferes with the intended purpose of this extended benefit period. Because it has proven to be unworkable, VA proposes to remove this language concerning the ability of the Family Caregiver to opt out of receiving continued benefits for the 60 days after the date of revocation. VA believes that the number of instances in which this basis for revocation applies will continue to be very small, and the costs associated with providing the option to opt out outweigh any benefits of maintaining this provision. The current manual process in place to execute the opt out is resource intensive and unsustainable. If this proposed change is adopted in a final rule, VA would ensure the change is communicated to PCAFC participants at the time of approval and designation of a Family Caregiver and periodically throughout their PCAFC participation. Again, continuation of benefits under this paragraph will be considered an overpayment and VA will seek to recover overpayment of such benefits as provided in § 71.47.

Finally, current paragraph (a)(3) provides for 60 days of continued benefits in the case of revocation based on VA error under paragraph (a)(1)(iii). However, VA proposes to remove the language ''60 days'' and in its place, add the language ''two months''. VA's rationale for this change is explained in more detail above and is proposed because of the manner in which VA calculates monthly stipend payments.

As proposed, paragraph (a)(3) would state that in the case of revocation based on VA error under paragraph (a)(1)(iii) of § 71.45, caregiver benefits will continue for two months after the date VA issues the notice of revocation. It

would also state that continuation of benefits under this paragraph will be considered an overpayment and VA will seek to recover overpayment of such benefits as provided in § 71.47.

2. Proposed Revisions to § 71.45(b) Regarding Discharge of a Family Caregiver

Paragraph (b) of § 71.45 addresses bases for discharge, dates of discharge, rescission of certain discharge requests, and continuation of benefits following discharge. Under paragraph (b)(1), VA proposes to make several changes regarding discharge due to the eligible veteran, including the addition of new bases for discharge. VA also proposes to add an additional basis for discharge due to the Family Caregiver under paragraph (b)(2) and to allow for rescission of a discharge request under paragraph (b)(3). These and other proposed changes to § 71.45(b) are discussed below.

a. Proposed Revisions to Discharge Based on Institutionalization of the Eligible Veteran

Current § 71.45(b)(1) addresses the bases for discharge due to the eligible veteran. Under this paragraph, a Family Caregiver will be discharged when the eligible veteran does not meet the requirements of § 71.20(a)(1) through (4) because of improvement in their condition or otherwise, or when the eligible veteran dies or is institutionalized. *See* § 71.45(b)(1)(i)(A) and (B). VA proposes to make several revisions to paragraph (b)(1) as it relates to discharge based on death or institutionalization.

First, VA would remove the last sentence from current § 71.45(b)(1)(i)(B) that explains that in the instance of institutionalization of the eligible veteran, notification to VA of such institutionalization must indicate whether the eligible veteran is expected to be institutionalized for 90 or more days from the onset of institutionalization. VA has found that it is not necessary for such notice to indicate whether the eligible veteran is expected to be institutionalized for 90 or more days from the onset of institutionalization as VA has other means of collecting this information. What is most critical is that VA receive notification of institutionalization of the eligible veteran. At that point, VA can work with the eligible veteran and/or Family Caregiver to obtain additional information that may be necessary for purposes of determining whether discharge should be initiated and also facilitate other appropriate actions, such as referrals for additional support, as applicable.

VA therefore proposes to remove the requirement to indicate whether the eligible veteran is expected to be institutionalized for 90 days or more from the onset of institutionalization when providing notice to VA of such institutionalization as VA has found it to be unnecessary and potentially burdensome. VA does not anticipate any changes to PCAFC administration or the practical application of this basis of discharge if this requirement is removed as proposed.

While VA is proposing to remove the last sentence of § 71.45(b)(1)(i)(B), VA's regulations would still include the requirement that VA must receive notification of death or institutionalization of the eligible veteran as soon as possible but not later than 30 days from the date of death or institutionalization. Failure to provide timely notification of death or institutionalization of an eligible veteran, as required by § 71.45(b)(1)(i)(B), could result in overpayments of benefits to the Family Caregiver, which are subject to recoupment pursuant to § 71.47.

VA also proposes to make a clarifying edit to current § 71.45(b)(1)(ii)(B), which explains that for discharges based on paragraph (b)(1)(i)(B) (that is, those discharges due to the death or institutionalization of the eligible veteran), the date of discharge will be the earliest of the specified dates, as applicable, which includes under current paragraph (*2*), the date that institutionalization begins, if it is determined that the eligible veteran is expected to be institutionalized for a period of 90 days or more.

VA proposes to revise § 71.45(b)(1)(ii)(B)(*2*) to refer to the date that the institutionalization begins, if it is ''known on such date'' that the eligible veteran is expected to be institutionalized for a period of 90 days or more. VA proposes to revise the current language from ''if it is determined'' to ''if it is known on such date'' to make clear that the discharge would take effect on the date the institutionalization begins under paragraph (b)(1)(ii)(B)(*2*) only when it is known at the onset of institutionalization that such institutionalization will be for 90 days or more. This aligns with how VA has implemented paragraph (b)(1)(ii)(B)(*2*) since this provision became effective. Therefore, this proposed change would not result in a change to VA's current practice but would clarify how VA has implemented the date of discharge.

b. Proposed Additional Bases for Discharge of a Family Caregiver Due to the Eligible Veteran

Under § 71.45(b)(1), VA proposes to include two new bases for discharging the Family Caregiver. First, proposed § 71.45(b)(1)(i)(C) would include an existing basis for discharge based on a Family Caregiver's request for discharge due to domestic violence (DV) or intimate partner violence (IPV) perpetrated by the eligible veteran against the Family Caregiver. Current § 71.45(b)(3)(iii)(B) accounts for such basis within the context of discharge based on the request of the Family Caregiver. Such paragraph explains that if the Family Caregiver requests discharge due to DV or IPV perpetrated by the eligible veteran against the Family Caregiver, caregiver benefits will continue for 90 days after the date of discharge when any of the following can be established: (1) the issuance of a protective order, to include interim, temporary and/or final protective orders, to protect the Family Caregiver from DV or IPV perpetrated by the eligible veteran; (2) a police report indicating DV or IPV perpetrated by the eligible veteran against the Family Caregiver or a record of an arrest related to DV or IPV perpetrated by the eligible veteran against the Family Caregiver; or (3) documentation of disclosure of DV or IPV perpetrated by the eligible veteran against the Family Caregiver to a treating provider (for example, physician, dentist, psychologist, rehabilitation therapist) of the eligible veteran or Family Caregiver, Intimate Partner Violence Assistance Program (IPVAP) Coordinator, therapist or counselor.

VA would move this basis from current § 71.45(b)(3)(iii) to new proposed paragraphs (b)(1)(i)(C), (b)(1)(ii)(C), and (b)(1)(iii)(B), as this basis for discharge is due to the eligible veteran. VA does not propose to make any substantive changes to the provisions in current paragraph (b)(3)(iii)(B). Using language in current paragraph (b)(3)(iii)(B), proposed paragraph (b)(1)(i)(C) would state that the Family Caregiver will be discharged based on the Family Caregiver requesting discharge due to DV or IPV perpetrated by the eligible veteran against the Family Caregiver. As discussed below, proposed paragraph (b)(1)(ii)(C) would provide the date of discharge on this basis, and proposed paragraphs (b)(1)(iii)(B)(*1*) through (*3*) would include the language in current paragraph (b)(3)(iii)(B)(*1*) through (*3*) regarding the documentation that would be required to be provided to VA for the

Family Caregiver to receive three months of continued benefits.

Because VA proposes to add new paragraph (b)(1)(i)(C), which would not require a VA determination but rather would be described as a request from the Family Caregiver, VA would make conforming edits to paragraphs (b)(1)(i) and (b)(1)(i)(A). In paragraph (b)(1)(i), VA would remove the language ''when VA determines'' and replace it with ''based on''. Thus, as proposed, paragraph (b)(1)(i) would state that except as provided in paragraph (f) of § 71.45, the Family Caregiver will be discharged from Program of Comprehensive Assistance for Family Caregivers based on any of the following.

Paragraph (b)(1)(i)(A) currently addresses situations where the eligible veteran does not meet the requirements of § 71.20 because of improvement in the eligible veteran's condition or otherwise. Because of VA's proposed changes to paragraph (b)(1)(i), VA proposes to add language to make clear that paragraph (b)(1)(i)(A) is a VA determination. Thus, VA proposes to revise § 71.45(b)(1)(i)(A) to add ''VA determines''. Proposed paragraph (b)(1)(i)(A) would state that except as provided in paragraphs (a)(1)(ii)(A) and (b)(1)(i)(B) of § 71.45, VA determines the eligible veteran does not meet the requirements of § 71.20 because of improvement in the eligible veteran's condition or otherwise.

Because proposed paragraph (b)(1)(i) would set forth additional bases for discharge due to the eligible veteran (that is, bases in addition to those set forth in current paragraph (b)(1)(i)(A) and (B)), VA also proposes to remove the ''or'' at the end of current paragraph (b)(1)(i)(A) and to replace the period at the end of current paragraph (b)(1)(i)(B) with a semicolon. These proposed changes to paragraphs (b)(1)(i) and (b)(1)(i)(A), and to the punctuation at the end of paragraph (b)(1)(i)(B) would be technical revisions that are not intended to have a substantive impact.

The second basis VA proposes to add to § 71.45(b)(1)(i) is for cases where VA determines that unmitigated personal safety issues exist for the Family Caregiver due to DV or IPV by the eligible veteran against the Family Caregiver. This would be added in a new proposed paragraph (b)(1)(i)(D). This basis of discharge would be applied by VA to initiate discharge due to DV or IPV by the eligible veteran against the Family Caregiver when VA determines that unmitigated personal safety issues exist for the Family Caregiver. Currently in such circumstances, VA may initiate revocation (rather than discharge) of the Family Caregiver for cause or noncompliance, in which case extended benefits would not be available for the Family Caregiver. VA believes that including this new basis for discharge would better support Family Caregivers who may be determined no longer eligible for PCAFC because of factors resulting from DV or IPV, and proposes to include a provision for extended benefits as discussed below. The addition of this basis for discharge would provide a standard process when VA determines that unmitigated personal safety issues exist for the Family Caregiver due to DV or IPV.

In VA's experience working with participants in PCAFC, VA has identified instances of severe and/or escalating violence by the eligible veteran directed at the Family Caregiver, but the Family Caregiver does not request discharge and attempts to continue to provide personal care services to the eligible veteran. VA also identified instances where the existence or threat of violence impacts the Family Caregiver's ability to provide required personal care services, and/or the eligible veteran's willingness to receive personal care services from the Family Caregiver. VA has also witnessed the detrimental impacts that DV and IPV can have on the well-being of both the Family Caregiver as well as the eligible veteran, which can negatively impact the caregiving relationship. This is not to suggest that any act which may be considered violent or aggressive inherently impacts one's ability to provide or receive personal care services. DV and IPV occur on a spectrum of frequency and severity and may range from verbal insults to physical violence. Such acts of aggression toward the Family Caregiver may occur when the Family Caregiver is attempting to provide personal care services, or at unrelated and isolated times.

It is not VA's intent with proposed § 71.45(b)(1)(i)(D) to discharge a Family Caregiver solely due to the presence of DV or IPV. In fact, VA encourages identification and disclosure of DV or IPV and would continue to encourage such disclosure if this proposed change is adopted in a final rule so that additional support and resources can be made available to the Family Caregiver during PCAFC participation. The determination of whether to initiate discharge under this basis would be a clinical determination made by VA that would include consideration of the frequency and/or severity of the DV or IPV. VA would rely on clinical guidelines when making determinations as to whether unmitigated personal safety issues exist for the Family Caregiver under proposed § 71.45(b)(1)(i)(D). These guidelines would include but are not limited to consideration of the risk of harm or lethality to the Family Caregiver, the impact of DV or IPV on the Family Caregiver's ability to provide personal care services and the quality of such services. VA also would take into consideration whether the dynamic between the eligible veteran and Family Caregiver poses a safety risk to VA staff such that home visits as part of this program could not be safely conducted, as such a safety risk may be indicative of the frequency and/or severity of the DV or IPV.

VA may become aware of DV or IPV against a Family Caregiver through various means, including but not limited to during evaluations of PCAFC eligibility and wellness contacts, through disclosure to VA by the eligible veteran or Family Caregiver; through observations; through information provided to VA by family members, friends, providers, or others; or through chart reviews. If this proposed basis for discharge is adopted in a final rule and VA identifies DV or IPV, VA would attempt to work with the eligible veteran and Family Caregiver, as applicable, to identify supports and services that may be available to meet their needs, including potential referral to the local IPVAP coordinator, and safety planning.

VA proposes to add this new discharge basis for instances when DV or IPV by the eligible veteran against the Family Caregiver presents personal safety issues for the Family Caregiver, which are unmitigated. As in cases where the Family Caregiver requests discharge pursuant to proposed § 71.45(b)(1)(i)(C), this new proposed discharge basis under § 71.45(b)(1)(i)(D) would also be included under § 71.45(b)(1) because the reason for discharge would be due to the eligible veteran. This would make clear that the behaviors of the eligible veteran are the reason for the discharge on this basis.

VA welcomes and request public comment on this proposed basis for discharge when VA determines that unmitigated safety issues exist for the Family Caregiver due to DV or IPV by the eligible veteran and what VA should consider in making these determinations if this proposed basis is adopted in a final rule.

Additionally, because VA proposes to add additional bases for discharge due to the eligible veteran under new proposed paragraphs § 71.45(b)(1)(i)(C) and (D) (that is, when the Family

Caregiver requests discharge due to DV or IPV perpetrated by the eligible veteran against the Family Caregiver and when VA determines unmitigated personal safety issues exist for the Family Caregiver due to DV or IPV by the eligible veteran against the Family Caregiver), VA proposes to add paragraphs (b)(1)(ii)(C) and (D) to address the dates of discharge associated with these two new proposed bases.

VA proposes to add § 71.45(b)(1)(ii)(C) to state that for discharge based on paragraph (b)(1)(i)(C) (that is, when the Family Caregiver requests discharge due to DV or IPV perpetrated by the eligible veteran against the Family Caregiver), the date of discharge would be the present or future date provided by the Family Caregiver or the date of the Family Caregiver's request for discharge if the Family Caregiver does not provide a date. Proposed § 71.45(b)(1)(ii)(C) would also state that if the request does not include an identified date of discharge, VA would contact the Family Caregiver to request a date, and if unable to successfully obtain this date, discharge would be effective as of the date of the request. This would be consistent with current paragraph (b)(3)(ii) which explains the discharge date in instances when the Family Caregiver requests discharge, including due to DV or IPV.

Proposed § 71.45(b)(1)(ii)(D) would explain that for discharge based on paragraph (b)(1)(i)(D) (that is, discharge of the Family Caregiver based on VA determining that unmitigated personal safety issues exist for the Family Caregiver due to DV or IPV by the eligible veteran against the Family Caregiver), the date of discharge would be the date VA issues notice of its determination. This would refer to the date VA issues notice of its determination that unmitigated personal safety issues exist for the Family Caregiver due to DV or IPV by the eligible veteran against the Family Caregiver, such that VA is discharging the Family Caregiver. VA proposes to use the date VA issues notice of its determination because in these situations VA would be making this determination as it sees significant risk to safety and the well-being of the Family Caregiver. Once a determination is made that unmitigated personal safety issues exist for the Family Caregiver, VA does not propose to provide a period of advanced notice prior to discharge. However, VA does not believe that, in general, a decision by VA to discharge on this basis would be unexpected. This is because, as discussed previously, VA encourages identification and disclosure of DV or IPV at the earliest opportunity so that support and resources can be made available. VA would work with the Family Caregiver, and the eligible veteran, as applicable, to identify needs and options, and through these interactions, would discuss the impact such DV or IPV within the caregiving relationship could have on PCAFC participation. Further, VA would ensure that this basis for discharge is communicated to PCAFC participants upon approval and designation of a Family Caregiver, and periodically throughout their participation in PCAFC, as VA does with all other discharge and revocation reasons. If this basis for discharge is adopted in a final rule, VA would also ensure it is reviewed with the Family Caregiver and eligible veteran when DV or IPV is identified. It is VA's intent that the provision of such information would assist the Family Caregiver in making informed decisions related to their caregiving role.

Current § 71.45(b)(1)(iii) explains that caregiver benefits will continue for 90 days after the date of discharge for those Family Caregivers discharged pursuant to the bases in paragraph (b)(1)(i). Because of the additional bases for discharge that VA proposes to add to paragraph (b)(1)(i) (that is, when the Family Caregiver requests discharge due to DV or IPV perpetrated by the eligible veteran against the Family Caregiver and when VA determines unmitigated personal safety issues exist for the Family Caregiver due to DV or IPV by the eligible veteran against the Family Caregiver), VA proposes to add new paragraphs (b)(1)(iii)(A) and (B) to address the continuation of benefits for discharges pursuant to proposed paragraph (b)(1)(i). VA would move the current language from § 71.45(b)(1)(iii) into a new proposed paragraph (b)(1)(iii)(A), which would state that except as provided in paragraph (b)(1)(iii)(B) of § 71.45, caregiver benefits will continue for three months after the date of discharge. This proposed text would be consistent with the current extension of benefits in paragraph (b)(1)(iii) for current discharges made pursuant to current § 71.45(b)(1)(i)(A) and (B). However, VA would replace ''90 days'' with ''three months'' to align with VA's process for calculating and paying monthly stipend payments. VA's rationale for this change is explained in more detail above.

Because proposed paragraph (b)(1)(iii)(B) would address continuation of benefits for discharges only under proposed paragraph (b)(1)(i)(C), as discussed below, the language in proposed paragraph (b)(1)(iii)(A) would apply to discharges pursuant to new proposed § 71.45(b)(1)(i)(D) (that is, discharges based on VA determining that unmitigated personal safety issues exist for the Family Caregiver due to DV or IPV by the eligible veteran against the Family Caregiver). Accordingly, Family Caregivers discharged pursuant to proposed paragraph (b)(1)(i)(D) would receive three months of caregiver benefits after the date of discharge, as set forth in new proposed paragraph (b)(1)(iii)(A). VA proposes to provide caregiver benefits for three months after the date of discharge on the basis of proposed § 71.45(b)(1)(i)(D) to align with the three months of continued benefits that VA would provide to Family Caregivers who request discharge due to DV or IPV pursuant to proposed § 71.45(b)(1)(i)(C) (so long as other requirements are met), as discussed below. This approach would ensure Family Caregivers are eligible for the same period of continued benefits when discharge is due to DV or IPV, regardless of whether VA initiates the discharge pursuant to proposed § 71.45(b)(1)(i)(D) or it is requested by the Family Caregiver under proposed § 71.45(b)(1)(i)(C).

VA recognizes that the monthly stipend payment is a benefit Primary Family Caregivers may rely upon. However, VA does not want the monthly stipend payment to serve as an incentive to remain in an unsafe caregiving relationship. Like the 90-day extension of benefits under current § 71.45(b)(3)(iii)(B), a three-month extension of benefits after discharge under proposed § 71.45(b)(1)(i)(D) may help to mitigate concerns a Family Caregiver may have about the loss of the monthly stipend payment and health care benefits. *See* 85 FR 13401 (March 6, 2020). VA believes that three months is an appropriate period of time to transition out of receiving PCAFC benefits in the case of discharge pursuant to proposed § 71.45(b)(1)(i)(D). Additionally, access to PCAFC benefits, such as counseling services, may be especially useful to support the Family Caregiver during the three-month period following discharge on the basis of proposed § 71.45(b)(1)(i)(D).

Proposed paragraph (b)(1)(iii)(B) would address continuation of benefits for discharges under proposed paragraph (b)(1)(i)(C) (that is, when the Family Caregiver requests discharge due to DV or IPV perpetrated by the eligible veteran against the Family Caregiver). Consistent with current § 71.45(b)(3)(iii), under proposed paragraph (b)(1)(iii)(B), in the case of discharge based on new proposed paragraph (b)(1)(i)(C), caregiver benefits

would continue for one month after the date of discharge unless one of the criteria in proposed paragraph (b)(1)(iii)(B)(*1*) through (*3*) is established, in which case caregiver benefits would continue for three months after the date of discharge. VA proposes to move to proposed paragraph (b)(1)(iii)(B) the language regarding continuation of benefits in instances when the Family Caregiver requests discharge due to DV or IPV that is included in current paragraph (b)(3)(iii)(B)(*1*) through (*3*), which describes the requirements for the provision of 90 days of continued benefits when the discharge is due to DV or IPV. This language would be added to proposed paragraphs (b)(1)(iii)(B)(*1*) through (*3*) with minor modifications. Current paragraphs (b)(3)(iii)(A) and (B) refer to the extended benefit time periods as ''30 days'' and ''90 days'', respectively. However, consistent with VA's previous explanation, VA proposes to use ''one month'' and ''three months'' to describe the time periods for the continued caregiver benefits in new proposed paragraph (b)(1)(iii)(B).

Thus, proposed paragraph (b)(1)(iii)(B) would state that in the case of discharge based on paragraph (b)(1)(i)(C) of § 71.45, caregiver benefits will continue for one month after the date of discharge. Proposed paragraph (b)(1)(iii)(B) would further state that notwithstanding the previous sentence, caregiver benefits will continue for three months after the date of discharge when any of the following can be established: (1) the issuance of a protective order, to include interim, temporary and/or final protective orders, to protect the Family Caregiver from DV or IPV perpetrated by the eligible veteran, (2) a police report indicating DV or IPV perpetrated by the eligible veteran against the Family Caregiver or a record of an arrest related to DV or IPV perpetrated by the eligible veteran against the Family Caregiver, or (3) documentation of disclosure of DV or IPV perpetrated by the eligible veteran against the Family Caregiver to a treating provider (*e.g.,* physician, dentist, psychologist, rehabilitation therapist) of the eligible veteran or Family Caregiver, Intimate Partner Violence Assistance Program (IPVAP) Coordinator, therapist, or counselor.

c. Proposed Additional Basis for Discharge of a Family Caregiver Due to the Family Caregiver

Current paragraph § 71.45(b)(2) describes conditions for discharge of the Family Caregiver due to the Family Caregiver. Current paragraph (b)(2)(i) addresses the only basis for such discharge now—death or institutionalization of the Family Caregiver. VA proposes to revise paragraph (b)(2)(i) to add an additional basis for discharge due to the Family Caregiver being unable to provide personal care services, among other things, and to reorganize the bases for discharge into separate new paragraphs (A) and (B) of § 71.45(b)(2)(i).

This new proposed basis for discharge due to the Family Caregiver would account for instances in which VA determines the Family Caregiver is not able to carry out specific personal care services, core competencies, or additional care requirements. To be approved and designated as a Family Caregiver, the individual must demonstrate the ability to carry out the specific personal care services, core competencies, and additional care requirements required by the eligible veteran under § 71.25(c)(2), so VA proposes to use the same language in describing this new basis for discharge in proposed § 71.45(b)(2)(i)(B). To clarify, a situation that would qualify for this new proposed discharge basis, in which a Family Caregiver is unable to carry out the enumerated actions, is intended to be different than a situation in which a Family Caregiver is unwilling to do so. A Family Caregiver who is unwilling to provide personal care services required by the eligible veteran would be subject to revocation pursuant to § 71.45(a)(1)(i)(D) (authorizing revocation for cause when VA determines that the Family Caregiver is unwilling to provide personal care services to the eligible veteran).

Additionally, VA does not presume a Family Caregiver's inability to carry out the specific personal care services, core competencies, or additional care requirements needed by the eligible veteran is a matter of noncompliance under § 71.45(a)(1)(ii)(E). VA considers noncompliance to be the direct result of a deliberate action or inaction on the part of the eligible veteran or Family Caregiver. *See* 85 FR 13395 (March 6, 2020). Such inability may not be deliberate on the part of the Family Caregiver as such Family Caregiver may be unable to carry out the specific personal care services, core competencies, or additional care requirements despite making significant effort to do so. In these circumstances, for the reasons described below, VA believes a distinct basis for discharge is appropriate and should apply.

This new proposed basis for discharge would not add new criteria or make changes to how criteria are currently evaluated during reassessments. This proposed change, if made final and effective, would allow VA to provide Family Caregivers with a period of advanced notice and a three-month period of extended benefits when the specific eligibility criteria are determined not to be met. Without this new basis, there is no standard period of extended benefits. As VA explained above, the term ''discharge'' is commonly used in health care settings to describe what happens when a patient no longer meets criteria for the level of care being provided. *See* 85 FR 13394 (March 6, 2020). Discharge may be appropriate when there is a change in circumstances, such as when VA identifies that the Family Caregiver is unable to carry out personal care services needed by the eligible veteran, which may be due to a decline in their abilities or a change in the eligible veteran's needs. In each of these cases, the basis for the Family Caregiver not being able to carry out specific personal care services, core competencies or additional care requirements is due to changes in condition (of the eligible veteran or Family Caregiver). For example, a Family Caregiver may find themselves not able to adequately perform hands-on assistance with one or more ADL due to the increased amount of strength required as the eligible veteran's conditions progress. In such instance, VA believes discharge under proposed § 71.45(b)(2)(i)(B) would be appropriate.

Because VA proposes to add this new basis for discharge due to the Family Caregiver in a new § 71.45(b)(2)(i)(B) and to include the basis for discharge based on death or institutionalization under a new § 71.45(b)(2)(i)(A), VA proposes to revise the introductory text in paragraph (b)(2)(i) to provide a general overview of discharge due to the Family Caregiver. Accordingly, as proposed, § 71.45(b)(2)(i) would state that except as provided in paragraph (f) of § 71.45, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Family Caregivers based on any of the bases for discharge due to the Family Caregiver which VA would list in proposed new paragraphs (A) and (B).

Except as explained below, VA proposes to add the remaining text in current § 71.45(b)(2)(i) in new paragraph (b)(2)(i)(A), which would explain that one basis for discharge under paragraph (b)(2)(i) is death or institutionalization of the Family Caregiver. VA would also include in proposed paragraph (b)(2)(i)(A) the note from current paragraph (b)(2)(i), which explains that VA must receive notification of death or institutionalization of the Family

Caregiver as soon as possible but not later than 30 days from the date of death or institutionalization. However, VA proposes to remove the last sentence of current paragraph (b)(2)(i), which states that notification of institutionalization must indicate whether the Family Caregiver is expected to be institutionalized for 90 or more days from the onset of institutionalization. Consistent with VA's rationale for removing this requirement in proposed revisions to § 71.45(b)(1)(i)(B), which addresses institutionalization of an eligible veteran, VA has found that this information is not necessary for such notice to indicate whether the individual is expected to be institutionalized for 90 days or more from the onset of institutionalization of a Family Caregiver. What is most critical is that VA receives notification of such institutionalization. Once VA has been notified, it can work with the eligible veteran and/or Family Caregiver to obtain additional information that may be necessary for purposes of determining whether discharge should be initiated and also facilitate other appropriate actions, such as referrals for additional support, as applicable. Thus, VA would remove the requirement for a notification of institutionalization to indicate whether the Family Caregiver is expected to be institutionalized for 90 or more days as it would be unnecessary. Also, while VA is proposing to remove the last sentence of current § 71.45(b)(2)(i), VA's regulations (at proposed § 71.45(b)(2)(i)(A)) would still include the requirement that VA must receive notification of death or institutionalization of the Family Caregiver as soon as possible but not later than 30 days from the date of death or institutionalization. Failure to provide timely notification of death or institutionalization of a Family Caregiver, as set forth in current § 71.45(b)(2)(i) and proposed § 71.45(b)(2)(i)(A), or an eligible veteran, as set forth in § 71.45(b)(1)(i)(B), could result in overpayments of benefits to the Family Caregiver, which are subject to recoupment pursuant to § 71.47.

Proposed new paragraph § 71.45(b)(2)(i)(B) would then explain the new additional basis for discharge. Proposed paragraph (B) would explain that a Family Caregiver would be discharged from PCAFC when VA determines the Family Caregiver is not able to carry out specific personal care services, core competencies, or additional care requirements. Current § 71.45(b)(2)(ii) provides the date of discharge in cases of discharge based on death or institutionalization of the Family Caregiver. As explained below, VA proposes to reorganize and revise the language in current § 71.45(b)(2)(ii) and to include in this paragraph VA's proposed discharge date that would apply to the additional basis for discharge in proposed § 71.45(b)(2)(i)(B).

First, VA proposes to keep the title of current paragraph (b)(2)(ii) (that is, ''Discharge date''), but move the introductory sentence in current paragraph (b)(2)(ii) to a new paragraph (A) and clarify that it applies to discharges based on proposed paragraph (b)(2)(i)(A) (that is, discharges due to the death or institutionalization of the Family Caregiver). Thus, proposed (b)(2)(ii)(A) would state that in the case of discharge based on paragraph (b)(2)(i)(A) of § 71.45, the date of discharge will be the earliest of the following dates, as applicable. In proposed paragraphs (b)(2)(ii)(A)(*1*) through (*3*), VA would add the existing discharge date provisions in the case of death or institutionalization of the Family Caregiver found in current paragraphs (b)(2)(ii)(A) through (C). VA proposes to maintain that language, but make one change, as explained below.

Current § 71.45(b)(2)(ii)(B) states that the date of discharge may be the date that the institutionalization begins, if it is determined that the Family Caregiver is expected to be institutionalized for a period of 90 days or more. As explained above, VA proposes to move this language to proposed paragraph (b)(2)(ii)(A)(*2*). Consistent with, and for the same reasons provided in VA's discussion above regarding the proposed changes to similar language in § 71.45(b)(1)(ii)(B)(*2*), VA proposes to revise this language in its new paragraph (proposed paragraph (b)(2)(ii)(A)(*2*)) to replace ''if it is determined'' with ''if it is known on such date''.

Second, because VA is proposing to move language in current paragraph (b)(2)(ii)(B) to paragraph (b)(2)(ii)(A)(*2*), VA would add new proposed paragraph (b)(2)(ii)(B) to refer to the discharge date applicable to the additional proposed discharge basis in proposed paragraph (b)(2)(i)(B) (that is, discharge based on a VA determination that the Family Caregiver is not able to carry out specific personal care services, core competencies, or additional care requirements). Proposed new paragraph (b)(2)(ii)(B) would state that in the case of discharge based on proposed paragraph (b)(2)(i)(B), the date of discharge would be provided in VA's final notice of such discharge to the eligible veteran and Family Caregiver, and that such date would be no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Family Caregiver that the Family Caregiver is not able to carry out specific personal care services, core competencies, or additional care requirements. If discharged under the proposed new basis in § 71.45(b)(2)(i)(B), Family Caregivers would have three months of continued benefits after the date of discharge, as explained below.

The proposed 60-day advanced notice period would allow a period of time between the date VA provides notice of its findings that the Family Caregiver is not able to carry out specific personal care services, core competencies, or additional care requirements, and the date of discharge. Such time may allow for further training or evaluation of the Family Caregiver's abilities, as applicable. If the Family Caregiver is able to demonstrate the ability to carry out specific personal care services, core competencies, or additional care requirements prior to VA issuing final notice of discharge, this would obviate VA's issuance of a final notice. A 60-day advanced notice period would also be consistent with advanced notice periods provided in cases of revocation for noncompliance under § 71.45(a)(2)(iii) and discharge under § 71.45(b)(1)(ii)(A).

Because VA is proposing to move language in current paragraph (b)(2)(ii)(C) to proposed paragraph (b)(2)(ii)(A)(*3*), VA would remove paragraph (C) from § 71.45(b)(2)(ii).

Current § 71.45(b)(2)(iii) addresses continuation of benefits for Family Caregivers who are discharged pursuant to paragraph (b)(2) based on institutionalization of the Family Caregiver. In such cases, benefits continue for 90 days after the date of discharge. VA proposes to revise ''90 days'' to ''three months'' in this paragraph consistent with VA's previous explanation about this change. VA would further revise this paragraph to address continuation of benefits with respect to the new basis for discharge in proposed § 71.45(b)(2)(i)(B) (that is, if VA determines the Family Caregiver is not able to carry out specific personal care services, core competencies, or additional care requirements), so that those discharged on such basis would also have three months of continued benefits.

Providing three months of continued benefits after the date of discharge would be consistent with VA's current and proposed regulations regarding continuation of benefits when VA initiates discharges. For example, this is consistent with the continued benefits for those discharged under current

paragraph (b)(2)(i) and proposed § 71.45(b)(2)(i)(A) based on institutionalization of the Family Caregiver. This would also be consistent with current § 71.45(b)(1)(iii) and proposed § 71.45(b)(1)(iii)(A) based on improvements in an eligible veteran's condition, among other reasons under § 71.45(b)(1)(i)(A). VA believes there are parallels between a Family Caregiver's discharge when there is a change in the eligible veteran's functioning under paragraph (b)(1)(i)(A) (for example, due to improvement in the eligible veteran's condition) and this new proposed discharge basis due to changes in the Family Caregiver's ability to carry out specific personal care services, core competencies, or additional care requirements needed by the eligible veteran. In both cases, the discharge of the Family Caregiver is not and would not be due to any intentional or willful action but rather a change in an individual's functioning. This change may be due to a change in an eligible veteran's care needs, a change in the abilities of the Family Caregiver, or both. VA therefore proposes to apply the same three-month period of continued benefits for both bases. Thus, in § 71.45(b)(2)(iii), VA proposes to replace ''paragraph (b)(2)(ii)(B) or (C)'' with ''paragraphs (b)(2)(ii)(A)(*2*) or (*3*) or (b)(2)(ii)(B)'' to refer to discharge based on institutionalization of the Family Caregiver and VA's new proposed basis of discharge based on a VA determination that the Family Caregiver is not able to carry out specific personal care services, core competencies, or additional care requirements.

d. Conforming Revisions to § 71.45(b)(3) and Proposed Opportunity for Family Caregiver To Request Rescission

Current § 71.45(b)(3) describes conditions for discharge of the Family Caregiver by request of the Family Caregiver, and current paragraph (i) addresses requests for discharge by the Family Caregiver. As VA proposes to address requests of the Family Caregiver for discharge due to DV or IPV in proposed paragraphs (b)(1)(i)(C), (b)(1)(ii)(C), and (b)(1)(iii)(B), instead of paragraph (b)(3), VA would add a note to paragraph (b)(3)(i) to explain that requests of the Family Caregiver for discharge due to DV or IPV perpetrated by the eligible veteran against the Family Caregiver will be considered under paragraph (b)(1) of § 71.45. This would make clear to the public that, if changes to the regulations are adopted as proposed, such requests would be considered under paragraph (b)(1) and not paragraph (b)(3).

Current § 71.45(b)(3)(iii) sets forth requirements for the continuation of caregiver benefits for discharges under paragraph (b)(3). More specifically, current § 71.45(b)(3)(iii)(A) explains that except as provided in current paragraph (b)(3)(iii)(B) of § 71.45, caregiver benefits will continue for 30 days after the date of discharge, while current paragraph (b)(3)(iii)(B) addresses the continuation of caregiver benefits in instances of a Family Caregiver's request for discharge due to DV or IPV when certain documentation is established. As discussed above, VA is proposing to move the language in current § 71.45(b)(3)(iii)(B)(*1*) through (*3*) to proposed paragraphs (b)(1)(iii)(B)(*1*) through (*3*). Therefore, VA proposes to remove paragraphs (A) and (B) of § 71.45(b)(3)(iii) and revise paragraph (b)(3)(iii) to state that if the Family Caregiver requests discharge under this paragraph, caregiver benefits would continue for one month after the date of discharge. This would not be expected to be a substantive change because Family Caregivers discharged pursuant to § 71.45(b)(3) would continue to receive the same period of continued benefits—whether under proposed paragraph (b)(3)(iii) or proposed paragraphs (b)(1)(iii)(B). In addition, VA proposes to change ''30 days'' to ''one month'' consistent with VA's other proposed changes discussed above.

VA proposes to add new paragraph (iv) to paragraph (b)(3) entitled, ''Recission'', to explain that VA will allow the Family Caregiver to rescind their request for discharge and be reinstated if the rescission is made within 30 days of the date of discharge. Proposed paragraph (b)(3)(iv) would further state that if the Family Caregiver expresses a desire to be reinstated more than 30 days from the date of discharge, a new joint application would be required, and that this ability to rescind requests for discharge would not apply to requests for discharge under paragraph (b)(1)(i)(C) of § 71.45. If adopted as proposed, this provision would be consistent with how VA handles and allows rescission of discharge requests from eligible veterans or their surrogates pursuant to current § 71.45(b)(4)(iii).

VA has found that it is not uncommon for an eligible veteran to request discharge of their Family Caregiver as a result of a disagreement or argument. Additionally, it is not uncommon for the eligible veteran to rescind such request a few days later. *See* 85 FR 13402 (March 6, 2020). The same situation could also result when the Family Caregiver requests discharge and then rescinds the request. VA proposes to provide the same 30-day period that is given to eligible veterans to Family Caregivers to allow for rescission of such a request.

However, VA would also include language in proposed § 71.45(b)(3)(iv) to state that this paragraph would not apply to requests for discharge under proposed paragraph (b)(1)(i)(C). As explained above, proposed paragraph (b)(1)(i)(C) would address Family Caregiver requests for discharge due to DV or IPV perpetrated by the eligible veteran against the Family Caregiver. VA would not allow rescission of such requests under proposed paragraph (b)(3)(iv). This is because a request for discharge by the Family Caregiver due to DV or IPV would be considered an acknowledgement by the Family Caregiver that a safety concern exists, and such safety concern could impact the Family Caregiver's ability and/or willingness to provide the required personal care services to the eligible veteran, as well as the eligible veteran's willingness to receive personal care services from the Family Caregiver. Allowing the recission of such request could perpetuate a situation where either or both the eligible veteran and Family Caregiver is at risk of harm. Additionally, in some cases when DV or IPV is known to exist, recission of such request could be due to coercion or other forms of control of the Family Caregiver by the eligible veteran. Although proposed § 71.45(b)(3)(iv) would not allow a Family Caregiver to rescind a discharge request made under proposed paragraph (b)(1)(i)(C), the eligible veteran and Family Caregiver could re-apply for PCAFC by submitting a new joint application, at which point VA would consider their eligibility for PCAFC.

e. Proposed Revisions to Discharge of the Family Caregiver by Request of the Eligible Veteran or Eligible Veteran's Surrogate

Current § 71.45(b)(4) addresses discharge of the Family Caregiver if an eligible veteran or their surrogate requests discharge of the Family Caregiver. Current § 71.45(b)(4)(iv) explains that caregiver benefits will continue for 30 days after the date of discharge, which is the present or future date of discharge provided by the eligible veteran or eligible veteran's surrogate according to § 71.45(b)(4)(ii).

VA proposes to replace the reference to ''30 days'' with ''one month'' in § 71.45(b)(4)(iv) consistent with other proposed changes in § 71.45. VA's rationale for this change is explained in more detail above. VA also proposes to add language to § 71.45(b)(4)(iv) to

allow for three months of continued benefits when DV or IPV perpetrated by the eligible veteran against the Family Caregiver can be established based on the requirements in proposed paragraph (b)(1)(iii)(B)(*1*) through (*3*).

In the instance that DV or IPV is being perpetrated against the Family Caregiver by the eligible veteran and either one requests discharge, VA believes the same period of continued caregiver benefits should apply—regardless of whether the discharge is requested by the Family Caregiver under proposed paragraph (b)(1)(i)(C) or by the eligible veteran under paragraph (b)(4). If any of the requirements in proposed paragraph (b)(1)(iii)(B)(*1*) through (*3*) can be established, VA believes there should be a three-month period of extended benefits for the Family Caregiver after the date of discharge when the eligible veteran requests the discharge. VA believes this change would provide consistency across discharge bases.

To maintain consistency with proposed § 71.45(b)(1)(iii)(B), VA proposes to require the same information as is required under such proposed paragraph to establish that DV or IPV has occurred, when determining whether three months of continued caregiver benefits after the date of discharge should be provided to the Family Caregiver pursuant to proposed § 71.45(b)(4)(iv) when the eligible veteran or their surrogate requests discharge of the Family Caregiver. Thus, this would include by reference, (1) the issuance of a protective order, to include interim, temporary and/or final protective orders, to protect the Family Caregiver from DV or IPV perpetrated by the eligible veteran; (2) a police report indicating DV or IPV perpetrated by the eligible veteran against the Family Caregiver or a record of an arrest related to DV or IPV perpetrated by the eligible veteran against the Family Caregiver; or (3) documentation of disclosure of DV or IPV perpetrated by the eligible veteran against the Family Caregiver to a treating provider (*e.g.,* physician, dentist, psychologist, rehabilitation therapist) of the eligible veteran or Family Caregiver, Intimate Partner Violence Assistance Program (IPVAP) Coordinator, therapist, or counselor.

This proposed change to reference the requirements in proposed § 71.45(b)(1)(iii)(B)(*1*) through (*3*) under proposed § 71.45(b)(4)(iv) would ensure that a Family Caregiver that is discharged due to DV or IPV perpetrated by an eligible veteran against the Family Caregiver is given the same access to continued benefits when necessary documentation/requirements are met whether it is the Family Caregiver or the eligible veteran (or their surrogate) that requests discharge from PCAFC.

Thus, as proposed, § 71.45(b)(4)(iv) would state that caregiver benefits will continue for one month after the date of discharge. It would also state that notwithstanding the previous sentence, caregiver benefits will continue for three months after the date of discharge when any of the requirements in paragraph (b)(1)(iii)(B)(*1*) through (*3*) can be established.

3. Multiple Bases for Revocation or Discharge

Paragraph (f) of § 71.45 describes how VA addresses instances in which there are multiple bases for revocation or discharge. Current § 71.45(f) states that in the instance that a Family Caregiver may be both discharged pursuant to any of the criteria in paragraph (b) of § 71.45 and have his or her designation revoked pursuant to any of the criteria in paragraph (a) of § 71.45, the Family Caregiver's designation will be revoked pursuant to paragraph (a). Further, it states that in the instance that the designation of a Family Caregiver may be revoked under paragraph (a)(1)(i) and paragraph (a)(1)(ii) or (iii) of § 71.45, the designation of the Family Caregiver will be revoked pursuant to paragraph (a)(1)(i), and that in the instance that the designation of a Family Caregiver may be revoked under paragraphs (a)(1)(ii) and (iii) of § 71.45, the designation of the Family Caregiver will be revoked pursuant to paragraph (a)(1)(iii). Finally, paragraph (f) states that in the instance that a Family Caregiver may be discharged under paragraph (b)(1), (2), (3), or (4) of § 71.45, the Family Caregiver will be discharged pursuant to the paragraph most favorable to the Family Caregiver.

VA proposes to revise § 71.45(f) to require that in instances where multiple bases exist, VA would apply the basis of revocation or discharge with the earliest effective date. VA would no longer necessarily effectuate a revocation over a discharge and would always apply the basis with the earliest effective date, whether the basis falls under discharge or revocation. As proposed, § 71.45(f) would state that in the instance a Family Caregiver may have their designation revoked or be discharged pursuant to one or more of the criteria in paragraphs (a) or (b) of § 71.45, respectively, the Family Caregiver's designation will be revoked or the Family Caregiver will be discharged, as applicable, pursuant to the basis that would result in the earliest date of revocation or discharge.

VA proposes this change for several reasons. First, once a basis for discharge or revocation exists, VA does not believe it is practical or appropriate to delay the discharge or revocation of a Family Caregiver's designation simply because an additional basis exists. For example, in the event a Family Caregiver submits a request for discharge on July 1 that is to take effect July 21, and the eligible veteran dies on July 15, under proposed § 71.45(f), the date of discharge would be July 15. VA does not believe it would be reasonable to maintain the Family Caregiver's designation after the death of the eligible veteran. Second, it would simplify the existing language in § 71.45(f) as it relates to revocation and discharge by creating a consistent rule that applies to all situations where multiple bases exist thereby accounting for existing and newly proposed bases for revocation and discharge, including those proposed in this rulemaking.

Finally, VA's proposal would remove the standard of ''most favorable to the Family Caregiver'', which could be subjective and difficult to apply, and would replace it with a more straightforward rule that requires VA to apply the ''basis that would result in the earliest date of revocation or discharge'', leaving less discretion to VA.

VA acknowledges that its proposed changes to paragraph (f) would change VA's current practice as it relates to discharges. The last sentence of current paragraph (f) states that in the instance that a Family Caregiver may be discharged under paragraph (b)(1), (2), (3), or (4) of this section, the Family Caregiver will be discharged pursuant to the paragraph most favorable to the Family Caregiver. In proposing this language, VA explained that it would address the infrequent instances where multiple requests for discharge are received by VA, and one basis is more favorable to the Family Caregiver. 85 FR 13404 (March 6, 2020). VA proposes to modify this provision and to no longer apply this rule because there are limited instances in which multiple discharge bases exist. When these instances have occurred, they have generally involved a discharge that is requested due to DV or IPV. To address these specific scenarios, VA has proposed changes to § 71.45(b)(4)(iv) and (b)(1)(iii)(B), as discussed above, to allow Family Caregivers to receive three months of continued benefits if DV or IPV is established (and the applicable requirements are met) regardless of whether discharge is requested by the eligible veteran or their surrogate under § 71.45(b)(4)(i) or by the Family Caregiver under proposed § 71.45(b)(1)(i)(C). With these amendments, if the eligible veteran and

Family Caregiver both submit requests to VA for the Family Caregiver to be discharged on July 7, the same period of continued benefits would apply on the basis of either discharge request, such that VA would no longer be faced with determining which discharge basis is ''most favorable to the Family Caregiver'' and thereby limiting the impact of removing this subjective standard, if proposed changes to § 71.45(f) are adopted in a final rule. VA expects the proposed revisions to § 71.45(f) would provide clarity about which basis for revocation or discharge applies when weighing multiple bases.

VA solicits comments from the public on all aspects of this proposed rule. In particular, VA asks the following question on specific aspects of this proposal.

1. Among other changes to § 71.45, VA has proposed adding as a new basis for discharge, a VA determination that unmitigated personal safety issues exist for the Family Caregiver due to DV or IPV by the eligible veteran against the Family Caregiver. What models or standards could VA use to determine whether discharge from PCAFC may be appropriate due to DV or IPV?

I. 38 CFR 71.55 Home Visits and Emergency Declarations

Through an IFR published in the FR on June 5, 2020, VA added a new rule under § 71.60 to provide flexibility in the modality by which VA conducted PCAFC home visits for the duration of the National Emergency related to Coronavirus Disease-2019 (COVID–19) declared by the President on March 13, 2020 (COVID–19 National Emergency). 85 FR 34522 (June 5, 2020). Section 71.60 states that notwithstanding the requirements in part 71, for the duration of the National Emergency related to COVID–19 declared by the President on March 13, 2020, VA may complete visits to the eligible veteran's home under part 71 through videoconference or other available telehealth modalities. This change was intended to help reduce the risk of exposure to and transmission of COVID–19 to individuals involved in PCAFC, as well as members of their households and others with whom they came into contact. 85 FR 34523 (June 5, 2020). This was especially important given the vulnerable population of veterans served by PCAFC. *Id.* As the COVID–19 National Emergency has come to an end, § 71.60 is no longer operable.

The COVID–19 National Emergency demonstrated the importance of mitigating and reducing vulnerabilities for those applying for or participating in PCAFC as well as VA staff in the event of future emergencies. In the case of in-person home visits, the need for these alternative measures is not limited to emergencies involving public health risks, like the COVID–19 National Emergency. Natural disasters and other weather-related emergencies can also have a direct impact on VA's ability to safely conduct in-home visits. When emergency conditions are such that travel and/or entry into a person's home would expose individuals to avoidable safety or public health risks, having alternative options to complete a home visit is vital.

VA therefore proposes to provide flexibility for VA to complete home visits under part 71 through telehealth in cases where a Federal, State, or local authority has declared an emergency involving certain safety or public health risks. In these situations, VA would utilize this flexibility to complete home visits required under part 71 when needed to help protect the health and safety of VA staff and individuals applying for or participating in a program under part 71. This would include home visits required under §§ 71.25(e), 71.30, and 71.40(b)(2).

VA proposes to add § 71.55 to part 71 with the heading, ''Home visits and emergency declarations.'' Proposed § 71.55 would state that notwithstanding the requirements in part 71, for the duration of and in the locations covered by an emergency declaration, VA may complete home visits under part 71 through telehealth as defined in 38 CFR 17.417(a)(4). It would also state that for purposes of this new proposed section, *emergency declaration* would refer to any emergency, declared by a Federal, State, or local authority, involving a safety or public health risk that impacts in-person interaction between VA staff and individuals applying for or participating in a program under part 71, including but not limited to: (a) natural disasters and weather-related emergencies when travel to, from, or within, or time spent in the affected area would pose a safety risk; and (b) emergencies related to influenza, coronavirus, respiratory illness, or other contagions that pose a public health risk.

As proposed, § 71.55 would align with the text in § 71.60 with some changes and additions. First, § 71.60 refers to ''videoconference or other available telehealth modalities.'' However, in proposed § 71.55 VA would refer to *telehealth* as that term is defined in 38 CFR 17.417(a)(4). Per § 17.417(a)(4), the term *telehealth* means ''the use of electronic information or telecommunications technologies to support clinical health care, patient and professional health-related education, public health, and health administration.'' The phrase ''telehealth modalities'', as used in § 71.60, could be interpreted as applying only to traditional telehealth modalities, such as video, store-and-forward, and remote patient monitoring. So as not to suggest that § 71.55 would authorize use of only those specific modalities, proposed § 71.55 would not use that term and would instead reference the broader definition of *telehealth* as it is defined in § 17.417(a)(4). Although proposed § 71.55 would not specifically reference ''videoconference'' as § 71.60 does, VA believes that through policy, it could establish an expectation that videoconference be the primary mode of *telehealth* used for completing home visits if this proposal is adopted in a final rule. However, in cases where videoconference is not possible, proposed § 71.55 would provide VA with flexibility to use other means of *telehealth,* such as telephone, to complete home visits under this section.

Under proposed § 71.55, VA would also define the term *emergency declaration* for purposes of this section. As proposed, *emergency declaration* would refer, in part, to any emergency declared by a Federal, State, or local authority. This differs from § 71.60 which only applied to the COVID–19 National Emergency even though State and local authorities also issued emergency declarations related to COVID–19.[23] When VA published the IFR that established § 71.60, the COVID–19 National Emergency was applicable nationwide, such that there was no need to reference other emergency declarations and orders related to COVID–19. However, as VA seeks to provide flexibility in the case of emergency declarations that may be more limited in scope than at a national level, VA believes it is prudent for proposed § 71.55 to encompass any Federal, State, or local emergency declaration, so long as it involves a safety or public health risk as described in this proposal. VA also includes the phrase ''in the locations covered by an emergency declaration'' in the first sentence of proposed § 71.55 to account for emergencies with localized impacts

[23] *See, for example,* Executive Order 2023–01 (COVID–19 Executive Order No. 116), State of Illinois (Jan. 6, 2023), available at *https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-01.2023.html* (last visited Feb. 8, 2024) and Orange County, Florida Emergency Executive Order No. 2021–36 Regarding COVID–19, Orange County, Florida (Oct. 20, 2021), available at *https://www.orangecountyfl.net/portals/0/library/Emergency-Safety/docs/coronavirus/2021-36%20EEO-CMcert.pdf* (last visited Feb. 8, 2024).

(for instance, State-wide, or in one or two counties) as well as those on a larger scale (for example, nationwide). This language would make clear that the flexibility under proposed § 71.55 would apply only to those locations covered by the emergency declaration. Additionally, proposed § 71.55 would state that the flexibility would be authorized ''for the duration of'' the emergency declaration, phrasing which in § 71.60 describes the extent of the flexibility authorized.

Although proposed § 71.55 uses the term *emergency declaration,* the terminology used within emergency declarations may vary. For example, Locality A may ''promulgate'' or ''declare'' a state of emergency while Locality B may ''order'' actions in response to an emergency.[24] Additionally, Locality C may use the phrase ''state of emergency'' while Locality D may use ''public emergency''.[25] To be inclusive of the various terms used in emergency declarations of Federal, State, and local authorities involving specified safety or public health risks, if proposed § 71.55 were adopted in a final rule, VA would expect to interpret and apply the term *emergency declaration* to encompass terms such as public health emergency, health emergency, and disaster emergency, and VA would expect to interpret and apply the term *declared* to encompass terms such as orders, announcements, proclamations, and pronouncements.

If adopted, VA intends to leverage the flexibilities proposed in § 71.55 specifically during emergencies involving a safety or public health risk that impacts in-person interaction between VA staff and individuals participating in a program under part 71. In proposed paragraphs (a) and (b) of § 71.55, VA would provide examples of emergencies that involve the types of safety and public health risks that may warrant use of the flexibility afforded by proposed § 71.55, such as natural disasters and weather-related emergencies, and emergencies related to contagions such as the coronavirus or other respiratory illness. However, under proposed § 71.55, the safety or public health risk must also impact in-person interaction between VA staff and individuals applying for or participating in a program under part 71. In this regard, an emergency declaration by the Federal government related to a national supply chain shortage for baby food, for example, would not alone authorize VA to complete part 71 home visits through telehealth under proposed § 71.55, as the risks associated with such an emergency would not impact in-person interaction between VA staff and individuals applying for or participating in a program under part 71 who participate in in-person home visits. On the contrary, an emergency declaration issued by a State or locality because of a hurricane that impacts roadways and the ability to travel safely could involve a safety or public health risk that impacts in-person interaction between VA staff and individuals applying for or participating in a program under part 71 who engage in in-person home visits. For the duration of and in the locations covered by such an emergency declaration, proposed § 71.55 would allow VA to complete home visits through telehealth.

J. Other Technical Edits

VA proposes to make several technical edits to remove and replace gender specific language throughout part 71 with gender-neutral language. These proposed revisions have no substantive impact as they are grammatical and technical corrections that would conform to VA's goal to ensure its regulations are gender neutral in alignment with Executive Order 13988 of January 20, 2021, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. *See* 86 FR 7023 (January 25, 2021).

In § 71.15 VA proposes to revise the definition of *personal care services* to replace the language ''his or her'' with the word ''their''. In § 71.20 introductory text, and paragraphs (a), (b), and (c), VA proposes to remove the language ''he or she'' and add in its place, the language ''the veteran or servicemember''. In § 71.45(b)(3)(i), VA proposes to remove the language ''his or her'' and add, in its place, the word ''their''.

Other technical edits include a proposed amendment to § 71.20(a)(2), to add the word ''space'' to the list of the branches of the U.S. Armed Forces to account for inclusion of the Space Force and proposed amendment to § 71.25 to add the associated information collection control number to the end of the section. The Office of Management and Budget (OMB) previously approved the information collection associated with § 71.25 under control number 2900–0768 (Program of Comprehensive Assistance for Family Caregivers (PCAFC), VA Form 10–10CG).

III. Executive Orders 12866, 13563 and 14094

Executive Order 12866 (Regulatory Planning and Review) directs 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 rule is a significant regulatory action under Executive Order 12866, Section 3(f)(1), 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.*

IV. 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). The factual basis for this certification is because this rule proposes changes to eligibility requirements in and other updates to 38 CFR part 71, under which VA provides assistance and support

[24] Compare, for example, State of Florida, Office of the Governor, Executive Order No. 23–171, Emergency Management—Invest 93L (Aug. 26, 2023), available at *https://www.flgov.com/wp-content/uploads/2023/08/EO-23-171-1.pdf* (last visited Feb. 8, 2024) (in which a ''state of emergency'' was ''declared'') with The State of Georgia, Executive Order 06.22.21.01 (June 22, 2021), available at *https://gov.georgia.gov/document/2021-executive-order/06222101/download* (last visited Feb. 8, 2024) (listing various matters as ''ordered'' and referring to a ''Public Health State of Emergency'').

[25] Compare, for example, State of Maine, Proclamation to Renew the State of Civil Emergency (June 11, 2021), available at *https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/Proclamation%20to%20Renew%20the%20State%20of%20Civil%20Emergency%20-%20June%2011%202021.pdf* (last visited Feb. 8, 2024) (declaring a ''state of civil emergency''); with Government of the District of Columbia, Mayor's Order No. 2022–043 (Mar. 17, 2022), available at *https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/2022043-Extension-of-Public-Emergency-for-COVID19.pdf* (last visited Feb. 8, 2024) (extending a ''public emergency'').

services through PCAFC and PGCSS for certain caregivers of eligible veterans and covered veterans. The beneficiaries of PCAFC and PGCSS are not small entities, and small entities would not be impacted by this proposed rule. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

V. 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 proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

VI. Paperwork Reduction Act

This proposed rule includes provisions constituting a revision to a current/valid collection of information under the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521) that requires approval by OMB. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review and approval.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. If OMB does not approve the collection of information as requested, VA will immediately remove the provisions containing the collection of information or take such other action as is directed by OMB.

Comments on the revised collection of information contained in this rulemaking should be submitted through *www.regulations.gov.* Comments should be sent within 60 days of publication of this rulemaking. The collection of information associated with this rulemaking can be viewed at: *www.reginfo.gov/public/do/PRAMain.*

OMB is required to make a decision concerning the collection of information contained in this rulemaking between 30 and 60 days after publication of this rulemaking in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the provisions of this rulemaking.

The Department considers comments by the public on a new collection of information in—

- Evaluating whether the revised collection of information is necessary for the proper performance of the functions of VA, including whether the information will have practical utility;
- Evaluating the accuracy of VA's estimate of the burden of the revised collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (for example, permitting electronic submission of responses).

The collections of information associated with this rulemaking contained in 38 CFR 71.25(a), 71.30(c), and 71.45 are described immediately following this paragraph, under their respective titles. This revised information collection has a current PRA clearance under OMB control number 2900–0768.

Title: Program of Comprehensive Assistance for Family Caregivers (PCAFC) (VA Form 10–10CG).

OMB Control No: 2900–0768.

CFR Provision: 38 CFR 71.25(a).

- *Summary of collection of information:* The revised collection of information in proposed 38 CFR 71.25(a) would require veterans, servicemembers and caregivers to submit a new joint application to participate in PCAFC and receive benefits. VA is proposing changes to PCAFC eligibility requirements. These changes are expected to result in an influx of new applications in the initial year of implementation, including from applicants who have previously applied and been denied. The number of applications submitted to VA is expected to fall back to more typical numbers after the initial influx.
- *Description of need for information and proposed use of information:* VA will use the information collected to conduct an assessment of program eligibility for applicants.
- *Description of likely respondents:* Veterans, servicemembers, and caregivers.
- *Estimated number of respondents:* 140,671 annually.
- *Estimated frequency of responses:* Once per year.
- *Estimated average burden per response:* 15 minutes.
- *Estimated total annual reporting and recordkeeping burden:* 35,168 hours.

Title: Program of Comprehensive Assistance for Family Caregivers (PCAFC) (Requests for Reassessment).

OMB Control No: 2900–0768.

CFR Provision: 38 CFR 71.30(c).

- *Summary of collection of information:* The revised collection of information in proposed 38 CFR 71.30(c) would set forth a process for eligible veterans and Primary Family Caregivers to request reassessment for continued eligibility.
- *Description of need for information and proposed use of information:* VA will use the information collected to initiate a reassessment under 38 CFR 71.30 on behalf of the requester. While a written request is not required, if a written request is received, such written request may support an earlier effective date for any increased benefits for which the Family Caregiver may be eligible based on the reassessment.
- *Description of likely respondents:* Veterans, servicemembers, and caregivers.
- *Estimated number of respondents:* 2,800 annually.
- *Estimated frequency of responses:* Once per year.
- *Estimated average burden per response:* 3 minutes.
- *Estimated total annual reporting and recordkeeping burden:* 140 hours.

Title: Program of Comprehensive Assistance for Family Caregivers (PCAFC) (Requests for Discharge).

OMB Control No: 2900–0768.

CFR Provision: 38 CFR 71.45.

- *Summary of collection of information:* The revised collection of information in proposed 38 CFR 71.45 requires veterans, servicemembers and caregivers to submit requests for discharge verbally or in writing to PCAFC. If such request for discharge is due to cases of DV or IPV by the eligible veteran against the Family Caregiver, the provision of a protective order, police report, or documentation by a treating provider of disclosure of DV or IPV may be provided to support the provision of extended benefits to the Family Caregiver upon the discharge.
- *Description of need for information and proposed use of information:* VA will use the information collected to determine the date of discharge for a caregiver.
- *Description of likely respondents:* Veterans, servicemembers, and caregivers.
- *Estimated number of respondents:* 1,710 annually.

• *Estimated frequency of responses:* Once per year.

• *Estimated average burden per response:* 5 minutes.

• *Estimated total annual reporting and recordkeeping burden:* 143 hours.

Total Estimated cost to respondents per year: VA estimates the total annual cost to respondents to be $1,115,997.48 (35,451 burden hours × $31.48 per hour).

*To estimate the total information collection burden cost, VA used the May 2023 Bureau of Labor Statistics (BLS) mean hourly wage code—''00–0000 All Occupations,'' available at *https://www.bls.gov/oes/2023/may/oes_nat.htm.*

The time estimate for the Federal Government to process VA Form 10–10CG is 15 minutes. The time estimate for the Federal Government to process requests for reassessment is 3 minutes and requests for discharge is 5 minutes. This equates to a time estimate of 35,451 hours. The annual cost to the Federal Government is estimated at $1,769,004.90 (35,451 hours × $49.90 per hour, based on the Atlanta 2024 hourly rate table for a grade 12, step 5 employee).

The annual total cost to the public and the government is expected to be $2,885,002.38.

List of Subjects in 38 CFR Part 71

Administrative practice and procedure, Claims, Health care, Health facilities, Health professions, Mental health programs, Public assistance programs, Travel and transportation expenses, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, signed and approved this document on November 15, 2024, 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.

Consuela Benjamin,

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

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 71 as set forth below:

PART 71—CAREGIVERS BENEFITS AND CERTAIN MEDICAL BENEFITS OFFERED TO FAMILY MEMBERS OF VETERANS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 38 U.S.C. 501, 1720G, unless otherwise noted.

* * * * *

§ 71.10 [Amended]

■ 2. In § 71.10, amend paragraph (b) by removing the language ''as that term is defined in 38 U.S.C. 101(20)''.

■ 3. Amend § 71.15 by:

■ a. Adding definitions for ''Activity of daily living or activities of daily living (ADL)'', ''State'', and ''Typically requires'' in alphabetical order.

■ b. Removing the definitions of ''Inability to perform an activity of daily living (ADL)'', ''Need for supervision, protection, or instruction'', and ''Unable to self-sustain in the community''.

■ c. Revising the definitions of ''Institutionalization'', ''Joint application'', ''Legacy applicant'', ''Legacy participant'', and ''Serious injury''.

■ d. In the definition of ''Personal care services'', removing the language ''his or her'' and adding, in its place, the language ''their''.

The revisions and additions read as follows:

§ 71.15 Definitions.

Activity of daily living or activities of daily living (ADL) means any of the following functions or tasks for self-care usually performed in the normal course of a day:

(1) Dressing or undressing;

(2) Bathing;

(3) Grooming;

(4) Adjusting any special prosthetic or orthopedic appliance (this does not include the adjustment of appliances that nondisabled persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.);

(5) Toileting or attending to toileting;

(6) Eating; or

(7) Mobility.

* * * * *

Institutionalization means being institutionalized in a setting outside the home residence to include a hospital, rehabilitation facility, jail, prison, medical foster home, nursing home, or other similar setting as determined by VA.

* * * * *

Joint application means an application for the Program of Comprehensive Assistance for Family Caregivers in such form and manner as the Secretary of Veterans Affairs considers appropriate.

Legacy applicant means a veteran or servicemember who submits a joint application for the Program of Comprehensive Assistance for Family Caregivers that is received by VA before October 1, 2020 and for whom a Family Caregiver(s) is approved and designated on or after October 1, 2020 so long as the Primary Family Caregiver approved and designated for the veteran or servicemember on or after October 1, 2020 pursuant to such joint application (as applicable) continues to be approved and designated as such. If a new joint application is received by VA on or after October 1, 2020 that results in approval and designation of the same or a new Primary Family Caregiver, the veteran or servicemember would no longer be considered a legacy applicant. Effective [18 months after EFFECTIVE DATE OF FINAL RULE], the veteran or servicemember is no longer considered a legacy applicant.

Legacy participant means an eligible veteran whose Family Caregiver(s) was approved and designated by VA under this part as of the day before October 1, 2020 so long as the Primary Family Caregiver approved and designated for the eligible veteran as of the day before October 1, 2020 (as applicable) continues to be approved and designated as such. If a new joint application is received by VA on or after October 1, 2020 that results in approval and designation of the same or a new Primary Family Caregiver, the veteran or servicemember would no longer be considered a legacy participant. Effective [18 months after EFFECTIVE DATE OF FINAL RULE], the veteran or servicemember is no longer considered a legacy participant.

* * * * *

Serious injury means any of the following as assigned by VA:

(1) A service-connected disability rated at 70 percent or more;

(2) Any service-connected disabilities that result in a combined rating of 70 percent or more; or

(3) Any service-connected disability or disabilities that result in a total disability rating for compensation based on individual unemployability.

State has the meaning given that term in 38 U.S.C. 101(20).

Typically requires means a clinical determination which refers to that which is generally necessary.

* * * * *

■ 4. Amend § 71.20 by:

■ a. In the introductory text and paragraph (a) introductory text, removing the language ''he or she'' and in its place, adding the language ''the veteran or servicemember''.

■ b. In paragraph (a)(2), removing the language ''or air'' and in its place, adding the language ''air, or space''.

■ c. Revising paragraphs (a)(3)(i) and (ii), (a)(7), (b), and (c).

■ d. Adding new paragraph (a)(3)(iii).

The revisions and additions read as follows:

§ 71.20 Eligible veterans and servicemembers.

(a) * * *

(3) * * *

(i) The individual typically requires hands-on assistance to complete one or more ADL;

(ii) The individual has a frequent need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury; or

(iii) The individual typically requires regular or extensive instruction or supervision to complete one or more ADL.

* * * * *

(7) The individual receives ongoing care from a primary care team or will do so within 120 days of the date VA designates a Family Caregiver. If the individual is unable to receive such care due, at least in part, to an event or action within VA's control, VA may extend this 120-day period.

(b) Beginning on October 1, 2020 through [18 months after EFFECTIVE DATE OF FINAL RULE], a veteran or servicemember is eligible for a Primary Family Caregiver or Secondary Family Caregiver under this part if the veteran or servicemember is a legacy participant.

(c) Beginning on October 1, 2020 through [18 months after EFFECTIVE DATE OF FINAL RULE], a veteran or servicemember is eligible for a Primary Family Caregiver or Secondary Family Caregiver under this part if the veteran or servicemember is a legacy applicant.

* * * * *

■ 5. Amend § 71.25 by:

■ a. Revising the section heading.

■ b. Adding the words ''Family Caregivers'' after the word ''Primary'' in the first sentence of paragraph (a)(1).

■ c. Removing the last sentence of paragraph (a)(1).

■ d. Adding paragraphs (a)(1)(i) and (ii).

■ e. Revising paragraph (a)(2)(i).

■ f. Revising the last sentence of paragraph (a)(2)(ii).

■ g. Revising paragraphs (a)(3)(i) and (ii).

■ h. Revising paragraph (b) introductory text.

■ i. Revising paragraph (b)(2)(ii).

■ j. Adding the information collection control number to the end of the section.

The revisions and additions read as follows:

§ 71.25 Approval and designation of Primary Family Caregivers and Secondary Family Caregivers.

(a) * * *

(1) * * *

(i) Individuals interested in serving as Family Caregivers must be identified as such on the joint application, and no more than three individuals may serve as Family Caregivers at one time for an eligible veteran, with no more than one serving as the Primary Family Caregiver and no more than two serving as Secondary Family Caregivers.

(ii) A currently approved Secondary Family Caregiver for the eligible veteran may apply for designation as the Primary Family Caregiver by submitting a new joint application along with the eligible veteran.

(2) * * *

(i) Upon receiving such application, except as provided in paragraphs (a)(2)(i)(A) and (B) of this section, VA (in collaboration with the primary care team to the maximum extent practicable) will perform the evaluations required to determine the eligibility of the applicants under this part, and if eligible, determine the applicable monthly stipend payment under § 71.40(c)(4).

(A) VA will not evaluate a veteran's or servicemember's eligibility under § 71.20 as part of the application process when:

(1) A joint application is received to designate a Secondary Family Caregiver for an eligible veteran who already has a designated Primary Family Caregiver; or

(2) A joint application is received that seeks to change the designation of a current Secondary Family Caregiver for an eligible veteran to designation as the Primary Family Caregiver for that same eligible veteran so long as the eligible veteran has been determined to meet the eligibility criteria under § 71.20(a) or § 71.20(a) (2021) (which may have applied the statutory criteria in 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) in place of the criterion in § 71.20(a)(3)(ii)).

(B) Upon receipt of a joint application that seeks to designate a current Secondary Family Caregiver as the Primary Family Caregiver for the same eligible veteran, VA will determine which evaluations under this section are necessary to assess the individual's eligibility as the Primary Family Caregiver.

(ii) * * * VA may extend the 90-day period based on VA's inability to complete the eligibility evaluations, provide necessary education and training, or conduct the initial home-care assessment, when such inability is, at least in part, due to VA's action.

(3) * * *

(i) A joint application under this part is evaluated in accordance with the statutes and regulations in effect on the date VA receives such joint application.

(ii) Notwithstanding paragraph (a)(3)(i) of this section, in rendering a determination under this part, based on the regulations that were in effect from October 1, 2020 through [EFFECTIVE DATE OF FINAL RULE]:

(A) The definition of ''joint application'' in § 71.15 that became effective [EFFECTIVE DATE OF FINAL RULE] applies.

(B) The definition of ''need for supervision, protection, or instruction'' in § 71.15 does not apply. In its place, the following criteria apply:

(1) A need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury; or

(2) A need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired.

(b) *Eligibility to serve as Primary Family Caregiver or Secondary Family Caregiver.* In order to serve as a Primary Family Caregiver or Secondary Family Caregiver, the applicant must meet all of the following requirements:

* * * * *

(2) * * *

(ii) Someone who lives with the eligible veteran full-time or will do so within 120 days of the date VA designates the individual as a Family Caregiver.

* * * * *

(The Office of Management and Budget has approved the information collection requirement in this section under control number 2900–0768)

■ 6. Amend § 71.30 by:

■ a. Revising paragraphs (a), (b), and (c).

■ b. Adding a heading to paragraph (d).

■ c. Revising paragraph (e).

The revisions and additions read as follows:

§ 71.30 Reassessment of Eligible Veterans and Family Caregivers.

(a) *General.* The eligible veteran and each Family Caregiver will be reassessed by VA (in collaboration with the primary care team to the maximum extent practicable) to determine their continued eligibility for participation in PCAFC under this part. Reassessments will include consideration of the monthly stipend payment under § 71.40(c)(4)(i)(A), if applicable. Reassessments may include a visit to the eligible veteran's home.

(b) *Frequency of reassessment.* Except as provided in paragraph (c) of this section, VA will reassess an eligible veteran's continued eligibility under § 71.20(a)(3) not more frequently than

every two years unless such a reassessment is necessary for VA to evaluate the Family Caregiver's ability to carry out specific personal care services, core competencies, or additional care requirements.

(c) *Requests for reassessment.* Reassessments may occur when an eligible veteran or a Primary Family Caregiver of an eligible veteran submits to VA a written request indicating that a reassessment is requested, and such request contains the signature of the eligible veteran or the Primary Family Caregiver.

(d) *Required participation.* * * *

(e) *Legacy reassessments.* For purposes of this paragraph, a legacy reassessment is a reassessment of an eligible veteran who meets the requirements of § 71.20(b) or (c) (*i.e.,* is a legacy participant or a legacy applicant) that is conducted to determine whether such individual meets the requirements of § 71.20(a) for purposes of continued eligibility. Legacy reassessments are conducted in accordance with the requirements outlined in paragraph (a) of this section.

(1) If the eligible veteran meets the requirements of § 71.20(b) or (c) (*i.e.,* is a legacy participant or a legacy applicant), VA will conduct a legacy reassessment for the eligible veteran and each Family Caregiver within the time period beginning on October 1, 2020 and ending on [18 months after EFFECTIVE DATE OF FINAL RULE]. Notwithstanding the previous sentence, a legacy reassessment will not be completed if at some point before such reassessment is completed the eligible veteran no longer meets the requirements of § 71.20(b) or (c).

(2) If the eligible veteran meets the requirements of § 71.20(a), the legacy reassessment will include consideration of the monthly stipend payment under § 71.40(c)(4)(i)(A) and whether the Primary Family Caregiver is eligible for a one-time retroactive stipend payment pursuant to § 71.40(c)(4)(iii).

■ 7. Amend § 71.40 by:

■ a. Adding a heading to paragraph (c)(4)(i)(A)(*1*).

■ b. Revising paragraph (c)(4)(i)(A)(*2*).

■ c. Revising the first sentence of paragraphs (c)(4)(i)(B) introductory text, (c)(4)(i)(C), and (c)(4)(i)(D).

■ d. Revising paragraph (c)(4)(ii)(A).

■ e. Adding headings to paragraphs (c)(4)(ii)(B) and (C) introductory text.

■ f. Revising paragraphs (c)(4)(ii)(C)(*1*) and (*2*), and the note to paragraph (c)(4)(ii)(C)(*2*).

■ g. Adding a heading to paragraph (c)(4)(ii)(D).

■ h. Redesignating paragraphs (c)(4)(iii) and (iv) as paragraphs (c)(4)(iv) and (v).

■ i. Adding new paragraph (c)(4)(iii).

The revisions and additions read as follows:

§ 71.40 Caregiver benefits.

* * * * *

(c) * * *

(4) * * *

(i) * * *

(A) * * *

(*1*) *Level 1 Stipend.* * * *

(*2*) *Level 2 Stipend.* Notwithstanding paragraph (c)(4)(i)(A)(*1*) of this section, the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 1.00 if VA determines that:

(*i*) The eligible veteran typically requires personal care services to complete three or more distinct ADL, and for each distinct ADL, the eligible veteran either is substantially dependent on the Primary Family Caregiver for hands-on assistance or requires extensive instruction or supervision from the Primary Family Caregiver; or

(*ii*) The eligible veteran has a frequent need for supervision or protection on a continuous basis from the Primary Family Caregiver based on the eligible veteran's symptoms or residuals of neurological or other impairment or injury.

(B) Except as provided in paragraph (c)(4)(i)(C) of this section, for the time period beginning on October 1, 2020 and ending on [18 months after EFFECTIVE DATE OF FINAL RULE], if the eligible veteran meets the requirements of § 71.20(b) or (c), (*i.e.,* is a legacy participant or a legacy applicant), the Primary Family Caregiver's monthly stipend is calculated based on the clinical rating in 38 CFR 71.40(c)(4)(i) through (iii) (2019) and the definitions applicable to such paragraphs under 38 CFR 71.15 (2019).

* * *

* * * * *

(C) For the time period beginning on October 1, 2020 and ending on [18 months after EFFECTIVE DATE OF FINAL RULE], if the eligible veteran meets the requirements of § 71.20(a) and (b) or (c), the Primary Family Caregiver's monthly stipend is the amount the Primary Family Caregiver is eligible to receive under paragraph (c)(4)(i)(A) or (B) of this section, whichever is higher.

* * *

(D) Notwithstanding paragraphs (c)(4)(i)(A) through (C) of this section, for the time period beginning on October 1, 2020 and ending on [18 months after EFFECTIVE DATE OF FINAL RULE], if the eligible veteran meets the requirements of § 71.20(b), the Primary Family Caregiver's monthly stipend is not less than the amount the Primary Family Caregiver was eligible to receive as of the day before October 1, 2020 (based on the eligible veteran's address on record with the Program of Comprehensive Assistance for Family Caregivers on such date) so long as the eligible veteran resides at the same address on record with the Program of Comprehensive Assistance for Family Caregivers as of the day before October 1, 2020. * * *

(ii) * * *

(A) *OPM updates.* VA will adjust monthly stipend payments based on changes to the General Schedule (GS) Annual Rate for grade 4, step 1 for the locality pay area in which the eligible veteran resides. Such adjustments will take effect on the first of the month in which changes to the GS Annual Rate are effective. Notwithstanding the previous sentence, adjustments under this paragraph will take effect on the first of the month following the month OPM publishes changes to the GS Annual Rate if such changes have a retroactive effective date.

(B) *Relocation.* * * *

(C) *Reassessments.* * * *

(*1*) *Increases.* In the case of a reassessment that results in an increase in the monthly stipend payment based on paragraph (c)(4)(i)(A) of this section, the effective date of the increase is the earlier of the following dates:

(*i*) The date VA issues notice of the decision.

(*ii*) In the case of a written request for reassessment pursuant to § 71.30(c) that is received by VA on or after [EFFECTIVE DATE OF FINAL RULE], the date VA received such request from the eligible veteran or the Primary Family Caregiver of the eligible veteran.

(*2*) *Decreases*—(*i*) *General.* Except as provided in paragraph (c)(4)(ii)(C)(*2*)(*ii*) of this section, in the case of a reassessment that results in a decrease in the monthly stipend payment, the decrease takes effect as of the effective date provided in VA's final notice of such decrease to the eligible veteran and Primary Family Caregiver. The effective date of the decrease will be no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Primary Family Caregiver.

(*ii*) *Resulting from a legacy reassessment.* With respect to an eligible veteran who meets the requirements of § 71.20(a) and (b) or (c), in the case of a reassessment that results in a decrease in the Primary Family Caregiver's monthly stipend payment, the new stipend amount under paragraph (c)(4)(i)(A) of this section takes effect as of the effective date provided in VA's

final notice of such decrease to the eligible veteran and Primary Family Caregiver. The effective date of the decrease will be no earlier than 60 days after [18 months after EFFECTIVE DATE OF FINAL RULE]. On [18 months after EFFECTIVE DATE OF FINAL RULE], VA will provide advanced notice of its findings to the eligible veteran and Primary Family Caregiver.

Note 1 to paragraph (c)(4)(ii)(C)(*2*): If an eligible veteran who meets the requirements of § 71.20(b) or (c) is determined, pursuant to a reassessment conducted by VA under § 71.30, to not meet the requirements of § 71.20(a), the monthly stipend payment will not be adjusted under paragraph (c)(4)(ii)(C) of this section. Unless the Family Caregiver is revoked or discharged under § 71.45 before the date that is 60 days after [18 months after EFFECTIVE DATE OF FINAL RULE], the effective date for discharge of the Family Caregiver of a legacy participant or legacy applicant under § 71.45(b)(1)(ii) will be no earlier than 60 days after [18 months after EFFECTIVE DATE OF FINAL RULE]. On [18 months after EFFECTIVE DATE OF FINAL RULE], VA will provide advanced notice of its findings to the eligible veteran and Family Caregiver.

(D) *Effective dates.* * * *

(iii) *Legacy retroactive monthly stipend payment.* VA will consider eligibility for a one-time legacy retroactive monthly stipend payment in accordance with this paragraph as part of the legacy reassessment conducted under § 71.30(e) of this part.

(A) Subject to paragraph (c)(4)(iii)(B) of this section, in the case of a reassessment that results in an increase in the Primary Family Caregiver's monthly stipend payment pursuant to paragraph (c)(4)(ii)(C)(*1*) of this section, the Primary Family Caregiver may be eligible for a retroactive payment amount described in paragraph (c)(4)(iii)(C) of this section if the eligible veteran is a legacy participant or legacy applicant and is in need of personal care services for a minimum of six continuous months based on any one of the following:

(*1*) An *inability to perform an activity of daily living* as such term is defined in 38 CFR 71.15 (2021).

(*2*) A need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury.

(*3*) A need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired.

(B) If there is more than one reassessment for an eligible veteran during period beginning on October 1, 2020 and ending on [18 months after EFFECTIVE DATE OF FINAL RULE], the retroactive payment described in paragraph (c)(4)(iii)(A) applies only if the first reassessment during the aforementioned period results in an increase in the monthly stipend payment, and only as the result of the first reassessment during said period. Notwithstanding the previous sentence, if the first reassessment during the period beginning on October 1, 2020 and ending on [18 months after EFFECTIVE DATE OF FINAL RULE] did not result in an increase in the monthly stipend payment, the retroactive payment described in paragraph (c)(4)(iii)(A) of this section applies to the first reassessment initiated by VA on or after March 25, 2022 that applies the criteria in paragraph (c)(4)(iii)(A) of this section, if such reassessment results in an increase in the monthly stipend payment, and only as a result of such reassessment.

(C) The retroactive payment amount described in paragraph (c)(4)(iii)(A) of this section is any difference between the amounts in paragraphs (*1*) and (*2*) of this paragraph (c)(4)(iii)(C) of this section for the time period beginning on October 1, 2020 up to the effective date of the increase under paragraph (c)(4)(ii)(C)(*1*) of this section, based on the eligible veteran's address on record with the Program of Comprehensive Assistance for Family Caregivers on the effective date of the increase under paragraph (c)(4)(ii)(C)(*1*) of this section and the monthly stipend rate on such date.

(*1*) The amount the Primary Family Caregiver was eligible to receive under paragraph (c)(4)(i)(B) or (D) of this section, whichever the Primary Family Caregiver received; and

(*2*) The monthly stipend rate multiplied by 0.625. Notwithstanding the previous sentence, if the eligible veteran meets at least one of the following criteria, the monthly stipend rate is multiplied by 1.00:

(*i*) The eligible veteran requires personal care services each time they complete three or more of the seven activities of daily living (ADL) listed in the definition of an ''inability to perform an activity of daily living'' as such term is defined in 38 CFR 71.15 (2021), and is fully dependent on a caregiver to complete such ADLs.

(*ii*) The eligible veteran has a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury on a continuous basis.

(*iii*) The eligible veteran has a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired on a continuous basis.

* * * * *

■ 8. Amend § 71.45 by:
■ a. Adding paragraphs (a)(1)(iv) and (a)(2)(v).
■ b. Revising the first sentence in paragraph (a)(3).
■ c. Revising paragraphs (b)(1)(i).
■ d. Revising paragraph (b)(1)(ii)(B)(*2*).
■ e. Adding paragraphs (b)(1)(ii)(C) and (D).
■ f. Revising paragraph (b)(1)(iii).
■ g. Revising paragraphs (b)(2)(i) through (iii).
■ h. In paragraph (b)(3)(i), removing the language ''his or her'' and adding in its place the language ''their''.
■ i. Adding a note to paragraph (b)(3)(i).
■ j. Revising paragraph (b)(3)(iii).
■ k. Adding paragraph (b)(3)(iv).
■ l. Revising paragraphs (b)(4)(iv), and (f).

The revisions and additions read as follows:

§ 71.45 Revocation and discharge of Family Caregivers.

(a) * * *

(1) * * *

(iv) *Residing outside a State.* VA will revoke the designation of a Family Caregiver when the eligible veteran or Family Caregiver no longer resides in a State. Note: If an eligible veteran no longer resides in a State, VA will revoke the designation of each of the eligible veteran's Family Caregivers.

(2) * * *

(v)(A) In the case of a revocation based on paragraph (a)(1)(iv) of this section, the date of revocation will be the earlier of the following dates, as applicable:

(*1*) The date the eligible veteran no longer resides in a State.

(*2*) The date the Family Caregiver no longer resides in a State.

(B) If VA cannot identify the date the eligible veteran or Family Caregiver, as applicable, no longer resides in a State, the date of revocation based on paragraph (a)(1)(iv) of this section will be the earliest date known by VA that the eligible veteran or Family Caregiver, as applicable, no longer resides in a State, but no later than the date on which VA identifies the eligible veteran or Family Caregiver, as applicable, no longer resides in a State.

(3) *Continuation of benefits.* In the case of revocation based on VA error under paragraph (a)(1)(iii) of this section, caregiver benefits will continue for two months after the date VA issues the notice of revocation. * * *

(b) * * *

(1) * * *

(i) *Bases for discharge.* Except as provided in paragraph (f) of this section,

the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Family Caregivers based on any of the following:

(A) Except as provided in paragraphs (a)(1)(ii)(A) and (b)(1)(i)(B) of this section, VA determines the eligible veteran does not meet the requirements of § 71.20 because of improvement in the eligible veteran's condition or otherwise;

(B) Death or institutionalization of the eligible veteran. Note: VA must receive notification of death or institutionalization of the eligible veteran as soon as possible but not later than 30 days from the date of death or institutionalization;

(C) The Family Caregiver requests discharge due to domestic violence (DV) or intimate partner violence (IPV) perpetrated by the eligible veteran against the Family Caregiver; or

(D) VA determines unmitigated personal safety issues exist for the Family Caregiver due to DV or IPV by the eligible veteran against the Family Caregiver.

(ii) * * *

(B) * * *

(*2*) Date that the institutionalization begins, if it is known on such date that the eligible veteran is expected to be institutionalized for a period of 90 days or more.

* * * * *

(C) For discharge based on paragraph (b)(1)(i)(C) of this section, the date of discharge will be the present or future date provided by the Family Caregiver or the date of the Family Caregiver's request for discharge if the Family Caregiver does not provide a date. If the request does not include an identified date of discharge, VA will contact the Family Caregiver to request a date. If unable to successfully obtain this date, discharge will be effective as of the date of the request.

(D) For discharge based on paragraph (b)(1)(i)(D) of this section, the date of discharge will be the date VA issues notice of its determination.

(iii) *Continuation of benefits.* (A) Except as provided in paragraph (b)(1)(iii)(B) of this section, caregiver benefits will continue for three months after the date of discharge.

(B) In the case of discharge based on paragraph (b)(1)(i)(C) of this section, caregiver benefits will continue for one month after the date of discharge. Notwithstanding the previous sentence, caregiver benefits will continue for three months after the date of discharge when any of the following can be established:

(*1*) The issuance of a protective order, to include interim, temporary and/or final protective orders, to protect the Family Caregiver from DV or IPV perpetrated by the eligible veteran.

(*2*) A police report indicating DV or IPV perpetrated by the eligible veteran against the Family Caregiver or a record of an arrest related to DV or IPV perpetrated by the eligible veteran against the Family Caregiver.

(*3*) Documentation of disclosure of DV or IPV perpetrated by the eligible veteran against the Family Caregiver to a treating provider (*e.g.,* physician, dentist, psychologist, rehabilitation therapist) of the eligible veteran or Family Caregiver, Intimate Partner Violence Assistance Program (IPVAP) Coordinator, therapist, or counselor.

(2) * * *

(i) *Bases for discharge.* Except as provided in paragraph (f) of this section, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Family Caregivers based on any of the following:

(A) Death or institutionalization of the Family Caregiver. Note: VA must receive notification of death or institutionalization of the Family Caregiver as soon as possible but not later than 30 days from the date of death or institutionalization.

(B) VA determines the Family Caregiver is not able to carry out specific personal care services, core competencies, or additional care requirements.

(ii) *Discharge date.* (A) In the case of discharge based on paragraph (b)(2)(i)(A) of this section, the date of discharge will be the earliest of the following dates, as applicable:

(1) Date of death of the Family Caregiver.

(2) Date that the institutionalization begins, if it is known on such date that the Family Caregiver is expected to be institutionalized for a period of 90 days or more.

(3) Date of the 90th day of institutionalization.

(B) In the case of discharge based on paragraph (b)(2)(i)(B) of this section, the date of discharge will be provided in VA's final notice of such discharge to the eligible veteran and Family Caregiver, and such date will be no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Family Caregiver that the Family Caregiver is not able to carry out specific personal care services, core competencies, or additional care requirements.

(iii) *Continuation of benefits.* Caregiver benefits will continue for three months after date of discharge in paragraph (b)(2)(ii)(A)(*2*) or (*3*) or (b)(2)(ii)(B) of this section.

(3) * * *

(i) * * *

Note to paragraph (b)(3)(i): Requests of the Family Caregiver for discharge due to DV or IPV perpetrated by the eligible veteran against the Family Caregiver will be considered under paragraph (b)(1) of this section.

* * * * *

(iii) *Continuation of benefits.* Caregiver benefits will continue for one month after the date of discharge.

(iv) *Rescission.* VA will allow the Family Caregiver to rescind their request for discharge and be reinstated if the rescission is made within 30 days of the date of discharge. If the Family Caregiver expresses a desire to be reinstated more than 30 days from the date of discharge, a new joint application is required. This ability to rescind requests for discharge does not apply to requests for discharge under paragraph (b)(1)(i)(C) of this section.

(4) * * *

(iv) *Continuation of benefits.* Caregiver benefits will continue for one month after the date of discharge. Notwithstanding the previous sentence, caregiver benefits will continue for three months after the date of discharge when any of the requirements in paragraph (b)(1)(iii)(B)(1) through (3) can be established.

* * * * *

(f) *Multiple bases for revocation or discharge.* In the instance that a Family Caregiver may have their designation revoked or be discharged pursuant to one or more of the criteria in paragraphs (a) or (b) of this section, respectively, the Family Caregiver's designation will be revoked or the Family Caregiver will be discharged, as applicable, pursuant to the basis that would result in the earliest date of revocation or discharge.

■ 9. Add § 71.55 to read as follows:

§ 71.55 Home visits and emergency declarations.

Notwithstanding the requirements in this part, for the duration of and in the locations covered by an emergency declaration, VA may complete home visits under this part through telehealth as defined in 38 CFR 17.417(a)(4). For purposes of this section, *emergency declaration* refers to any emergency, declared by a Federal, State, or local authority, involving a safety or public health risk that impacts in-person interaction between VA staff and individuals applying for or participating in a program under this part, including but not limited to:

(a) Natural disasters and weather-related emergencies when travel to, from, or within, or time spent in the affected area would pose a safety risk; and

(b) Emergencies related to influenza, coronavirus, respiratory illness, or other contagions that pose a public health risk.

[FR Doc. 2024–28079 Filed 12–5–24; 8:45 am]

BILLING CODE 8320–01–P