§ 226.2 Requesting a smaller claims proceeding.

A claimant may request consideration of a claim under the smaller claims procedures in this part at the time of filing a claim. The claimant may change its choice as to whether to have its claim considered under the smaller claims procedures or the standard Board procedures at any time before service of the *initial notice.* If the claimant changes its choice, but the *initial notice* has already been issued, the claimant shall request reissuance of the *initial notice* indicating the updated choice. Once the claimant has served the *initial notice* on any respondent, the claimant may not amend its choice without consent of the other parties and leave of the Board. A claimant's request to change its choice as to whether to have its claim considered under the smaller claims procedures or the standard Board procedures shall follow the procedures set forth in § 220.5(a)(1) of this subchapter. If the request is made following service of the *initial notice* on any respondent, the claimant's request shall indicate whether the other parties consent to the request.

■ 7. Section 226.4 is amended by revising paragraphs (a), (d)(2)(iii), and (d)(3) to read as follows:

§ 226.4 Nature of a smaller claims proceeding.

(a) *Proceeding before a Copyright Claims Officer.* Except as provided in § 222.13(e), a smaller claims proceeding shall be heard by not fewer than one Copyright Claims Officer (Officer). The Officers shall hear smaller claims proceedings on a rotating basis at the Board's discretion.

* * * * *

(d) * * *

(2) * * *

(iii) May submit witness statements that comply with § 222.15(b)(2) of this subchapter. No later than seven days before the merits conference, an opposing party may request that the witness whose statement was submitted appear at the merits conference so that the party may ask the witness questions relating to the witness's testimony. The failure of a witness to appear in response to such a request shall not preclude the presiding Officer from accepting the statement, but the presiding Officer may take the inability to question the witness into account when considering the weight of the witness's testimony.

(3) *Failure to submit evidence.* If a party fails to submit evidence in accordance with the presiding Officer's request or submits evidence that was not served on the other parties or provided by the other side, the presiding Officer may discuss this with the parties during the merits conference or may schedule a separate conference to discuss the missing evidence with the parties. The presiding Officer shall determine an appropriate remedy, if any, including but not limited to drawing an adverse inference with respect to disputed facts, pursuant to 17 U.S.C. 1506(n)(3), if it would be in the interests of justice.

* * * * *

Dated: January 2, 2024.

Shira Perlmutter,

Register of Copyrights and Director of the U.S. Copyright Office.

Approved by:

Carla D. Hayden,

Librarian of Congress.

[FR Doc. 2024–00596 Filed 1–12–24; 8:45 am]

BILLING CODE 1410–30–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AR56

85/15 Rule Calculations, Waiver Criteria, and Reports

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its educational assistance regulations by eliminating the four 85/15 rule calculation exemptions for students in receipt of certain types of institutional aid. Currently, VA regulations provide exceptions that allow certain categories of students to be considered ''non-supported'' for purposes of the 85/15 rule notwithstanding their receipt of institutional aid. In this final rule, VA is eliminating these exceptions, thus clarifying the types of scholarships that educational institutions must include in their calculations of ''supported'' students. Also, VA is revising the criteria that shall be considered by the Director of Education Service when granting an 85/15 rule compliance waiver. Lastly, VA is amending the timeline for certain educational institutions' submission of 85/15 compliance reports.

DATES: This rule is effective February 15, 2024. The provisions of this final rule shall apply to all terms that begin on or after January 16, 2025, to include all 85/15 waivers pending before VA on that date.

FOR FURTHER INFORMATION CONTACT: Thomas Alphonso, Assistant Director, Policy and Procedures Education Service, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–9800. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The 85/15 rule (38 U.S.C. 3680A(d); 38 CFR 21.4201(a)) prohibits the Department of Veterans Affairs (VA) from paying educational assistance benefits to any new students once ''more than 85 percent of the students enrolled in the [program of education] are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs.'' 38 U.S.C. 3680A(d)(1). ''Institutional aid'' refers to the financial assistance that is provided by the educational institution to the student that includes any scholarship, aid, waiver, or assistance, *but does not include loans and funds provided under section 401(b) of the Higher Education Act of 1965* or financial assistance from a third-party. ''VA aid'' refers to financial benefits paid under Chapters 30, 31, 33, 35 and 36 of Title 38 and Chapter 1606 of Title 10. VA refers to students who receive such institutional or VA aid as ''supported students.'' Conversely, no less than 15 percent of the students enrolled in the program must be attending without having any of their tuition, fees, or other charges paid to or for them by the educational institution or VA (referred to as ''non-supported students''). The 85/15 rule is a market validation tool designed to prevent schools from inflating tuition charges for VA education beneficiaries. The rule functions by requiring a school to enroll no less than 15 percent of its students paying the full tuition charge without institutional or VA aid. If a school fails to enroll enough non-supported students, the cost of the program is presumed to be out of step with the competitive market and thus too expensive for VA to continue to support due to the burden on taxpayers.

Currently, in accordance with 38 CFR 21.4201, educational institutions are required to track the percentage of supported and non-supported students enrolled in each of their approved programs and to confirm their compliance with the required 85/15 percent ratio (38 CFR 21.4201(e)–(f)). During the time that the ratio of supported to non-supported students exceeds 85 percent, no new students can be certified to receive VA education benefits for that program (38 CFR 21.4201(g)(2)). ''New students'' include

students returning after a break in enrollment unless the break is wholly due to circumstances beyond the student's control (38 CFR 21.4201(g)(6)). The 85/15 rule does allow VA to continue to pay benefits for students already enrolled in the program and receiving benefits prior to the ratio of supported students exceeding 85 percent of the total population enrolled in the program (38 CFR 21.4201(g)(2)). Further, although students receiving Veteran Readiness and Employment (38 U.S.C. chapter 31) or Survivors' and Dependents' Educational Assistance (38 U.S.C. chapter 35) benefits must be counted as supported students when calculating 85/15 rule compliance, VA notes that the rule does not prohibit the enrollment of new chapter 31 and chapter 35 students while the 85 percent ratio is exceeded. The rules regarding reporting requirements and how individual students must be assessed based on their program of education and campus location are detailed in 38 CFR 21.4201. Specifically, paragraph (e) details the rules regarding how to compute the 85/15 percent ratio, and paragraph (e)(2) provides special rules by which some students, even though they are in receipt of institutional aid, are nonetheless counted as ''non-supported students.''

VA is amending 38 CFR 21.4201(e)(2) to define ''non-supported students'' and ''supported students'' and remove paragraphs (e)(2)(i) through (e)(2)(iv), which diminish the effectiveness of the market validation mechanism of the rule. Although 38 U.S.C. 3680A(d)(1) explicitly states that the 85 percent side of the ratio (*i.e.,* the supported student count) should include all students ''having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs,'' current VA regulations at 38 CFR 21.4201(e)(2) create tension with this essential goal of the 85/15 rule by providing four categories of students who are considered ''non-supported'' students notwithstanding their receipt of institutional aid. Currently, the four categories of such ''non-supported'' students are as follows: (1) non-Veteran students not in receipt of institutional aid; (2) all graduate students receiving institutional aid; (3) students in receipt of any Federal aid (other than VA benefits); and (4) undergraduate and non-college degree students receiving any assistance provided by the educational institution, if the institutional policy for granting this aid is the same for Veterans and non-Veterans alike. VA is removing all four categories.

Removal of the first and third categories will have no impact because these students are already considered ''non-supported,'' as they are not receiving institutional or VA aid. Regarding whether Federal aid (other than VA benefits), such as student loans and grants, is considered ''institutional aid,'' VA has never considered it to be institutional aid and will continue to not consider it institutional aid. Through this final rule (as further detailed below in the section titled REMOVAL OF INSTITUTIONAL AID EXEMPTION), VA is adding a regulatory definition that clarifies why it is not appropriate to classify Federal, state, or municipal grant funding as ''institutional aid.'' Therefore, recipients of these funds are to be counted as ''non-supported,'' barring receipt of other prohibited funding. Consequently, the removal of these ''exclusions,'' which are not included to begin with, amounts to a clarification of current practice since their numbers would remain on the 15 percent side of the ratio calculation.

The practical impact is in the removal of the second and fourth categories, which provide that students can be in receipt of institutional aid and still be considered non-supported. These two categories (and particularly the fourth category) have created loopholes that educational institutions have exploited since the inception of the Post-9/11 GI Bill (PGIB). The problem stems from the fact that the PGIB pays up to the full amount of tuition and fees directly to educational institutions. This is unlike prior VA educational benefits implemented since 1952, from the Korean War GI Bill through the Montgomery GI Bill, for which VA pays a one-size-fits-all stipend amount directly to the beneficiary, and the beneficiary then pays tuition, fees, or other approved education-related expenses to the school using the stipend and/or other means. Under the prior model, if the tuition and fees exceed the stipend amount, then the beneficiary incurs out-of-pocket costs. By the same token, if the tuition and fees are less than the stipend amount, then the beneficiary may apply the funds towards other education costs. When beneficiary payments are structured this way, there is no incentive for an educational institution to inflate costs, as such a tactic might drive VA beneficiaries away in a competitive free market. Conversely, since under the PGIB, VA pays the net charges for tuition and fees (subject to benefit level and statutory caps for certain types of educational institutions) directly to the educational institution, the same competitive market forces do not apply. Consequently, the only students who can serve to validate the cost effectiveness of the program are those non-supported students who are counted on the 15 percent side of the 85/15 rule. However, given that the provisions in sections 21.4201(e)(2)(ii) and (iv) stipulate that certain scholarship recipients are to be considered ''non-supported,'' a school can meet its 15 percent non-supported requirement while providing scholarships to some number of students so long as the students are graduate level, or the terms of the scholarship are such that Veterans and non-Veterans alike may qualify. These students are likewise not motivated by competitive free market forces because their actual charges for tuition and fees are reduced. Because these students are allowed, through sections 21.4201(e)(2)(ii) and (iv), to be considered ''non-supported,'' they serve as a false-positive market validation for the tuition and fee charges levied on VA. This undermines the operative mechanism of the 85/15 rule by allowing schools to inflate their tuition and fees since there is no longer an effective counterweight.

The original GI Bill (for Veterans of World War II, in effect from 1944 to 1948) also paid tuition and fees directly to schools and was fraught with abuses and overcharges by schools. After investigating the abuses of the original GI Bill, Congress, when designing the successor Korean War GI Bill, took steps to eliminate such abuses by making payments directly to students and by instituting the 85/15 rule. Now that PGIB once again pays tuition and fees directly to schools, and having witnessed the same abuses seen under the original GI Bill, VA needs to restructure its implementation of the 85/15 rule to give the rule the force it was originally intended to have when payments are being made directly to schools. As this presents an immediate exploitation of taxpayers' investment in Veterans' education and training, VA must emphasize the fundamental objective of the rule and strictly adhere to the requirement that students counted on the 15 percent side of the 85/15 rule are not ''having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs.'' VA is accomplishing this by removing all exceptions listed in section 21.4201(e)(2), thus ensuring that every student who receives institutional

or VA aid will be counted as a ''supported student.''

These changes also clarify requirements for schools, thereby making it easier for schools operating in good faith to remain in compliance. The current various classifications of students are difficult for the School Certifying Officials (SCO) at educational institutions to follow, which can lead to improper payments and overpayments. Currently, when school officials have questions about making accurate student count calculations, they must individually reach out to their state Education Liaison Representative or VA staff in Washington, DC. As a result, the guidance they receive may be delayed or vary slightly depending upon the source. Further, some schools may opt not to seek VA guidance and instead rely on their own interpretations of the 85/15 rule. All of these scenarios have resulted in non-supported calculations by schools which do not reflect the intent of the regulation's underlying statute. The removal of all four current exceptions to the ''non-supported'' side of the 85/15 ratio will simplify the calculation of the 85/15 ratio—meaning, any student receiving any funding from either VA, or the school will be considered ''supported.'' Further, these amendments will resolve related compliance process issues by removing ambiguity about the appropriate classification of students in receipt of aid. These regulatory amendments will both simplify and promote consistency in calculating and reporting 85/15 counts and will better align the regulation with its underlying statute.

There may be instances where certain schools have a large percentage of their students (both Veteran and non-Veteran alike) in receipt of institutional aid, even if the amount of the aid is insignificant. In these situations, it is unlikely that the school's institutional aid program is a subterfuge to disguise tuition inflation while complying with the 85/15 rule. In response to any concerns that such schools would be unfairly placed in noncompliance with the 85/15 rule by operation of this rule, VA notes that whenever an educational institution exceeds the 85 percent limit, it may apply for a waiver of the 85/15 rule under 38 CFR 21.4201(h). Accordingly, VA is amending section 21.4201(h) to allow an education institution to demonstrate that although its program is in violation of 85/15, its non-VA scholarship recipients are effectively serving as market validation, and, therefore, continued enrollment of new VA education beneficiaries is nonetheless in the best interest of the students and the Federal government. Consequently, the elimination of section 21.4201(e)(2) does not mean that all generous schools will be eliminated from the GI Bill. It merely means that, on a case-by-case basis, a well-intentioned generous school could be granted a waiver while simultaneously limiting the potential for miscalculations and misapplication of scholarship information, whether intentional or unintentional.

Regarding the current 85/15 waiver criteria, VA further amends the criteria found at 38 CFR 21.4201(h) by removing paragraphs (2) and (3) while leaving paragraph (1) in place and modifying paragraph (4). This is necessary because, while current regulations list four criteria to be considered, only paragraphs (1) and (4) (the availability of comparable education facilities effectively open to Veterans in the vicinity of the school requesting a waiver; and the general effectiveness of the school's program in providing educational and employment opportunities to the Veteran population it serves) are cogent indicators of a program's qualifications to obtain a waiver.

Paragraph (2) only applies to schools in receipt of a Strengthening Institutions Program grant or a Special Needs Program grant administered by the Department of Education (ED). The Strengthening Institutions Program grant is only available to accredited institutions of higher learning. However, many GI Bill-approved institutions are non-degree granting and thus ineligible for these programs. Specifically, data from a February 2023 study showed that 56% of institutions then approved for receipt of GI Bill institutions, were non-degree granting. Therefore, this criterion is irrelevant when considering waiver requests for such programs. Furthermore, the ''Special Needs Program'' grants referenced in paragraph (2) as being located in title 34, parts 624–626, of the Code of Federal Regulations no longer exist at that reference. VA rarely receives waiver requests from schools in receipt of either of these grants, so the criterion in paragraph (2) rarely is satisfied. This absence of qualifying schools therefore is not dispositive in the adjudication of waiver requests. Paragraph (3)—previous compliance history of the school—is of no independent value to VA's decision-making because if a school has failed to satisfy the criterion in paragraph (3), then the program's approval would be suspended or withdrawn by the State Approving Agency (SAA). Consequently, by default, the Director of Education Service bases decisions on waiver requests almost exclusively on a school's performance relative to the criteria in paragraphs (1) and (4). However, because paragraphs (2) and (3) are included in this regulation, schools must expend resources to address these criteria in their requests. Likewise, the Director must expend resources to respond to these criteria in his or her decision. Therefore, VA is removing paragraphs (2) and (3) to conserve both school and VA resources. It is important to note that because these criteria have been functionally irrelevant in the adjudication of waiver requests, such a removal will have no substantive effect on the likely outcome of any future waiver request decisions.

Additionally, VA is amending the list of factors to be considered in paragraph (4) because the current list is not particularly helpful to the decision maker. The list contains only two criteria, and one of them—ratio of educational and general expenditures to full-time equivalency enrollment—is difficult to ascertain and verify while also being of questionable utility. Therefore, there is only one practical and pertinent factor—the percentage of Veteran-students completing the entire course—generally left to consider. Accordingly, VA is amending the list to provide a broad range of factors that may be considered (although the list will not be all inclusive). VA is maintaining the current graduation rate factor but adding other factors of graduate employment statistics, graduate salary statistics, satisfaction of Department of Education (ED) rules regarding gainful employment (where applicable), other ED metrics (such as student loan default rate), student complaints, industry endorsements, and participation in and compliance with the Principles of Excellence program, which was established by Executive Order 13607 on April 27, 2012 (published in the **Federal Register** on May 2, 2012), to ensure that student Veterans, Service members, and family members have information, support, and protections while using Federal education benefits (where applicable), etc. This list is not exhaustive. The Director could, on a case-by-case basis, consider other factors not listed, which provide an indication of the program's general effectiveness. In addition, the Director may consider whether the educational institution's aid program appears to be consistent with or appears to undermine the 85/15 rule's tuition and fee costs market validation mechanism.

Lastly, for educational institutions organized on a term, quarter, or semester basis, the 85/15 calculations

currently must be submitted to VA no later than 30 days after the beginning of each regular school term (excluding summer sessions) or before the beginning of the following term, whichever occurs first (38 CFR 21.4201(f)(2)(i)). Educational institutions *not* organized on a standard term, quarter, or semester basis also must submit their 85/15 calculations to VA, however, no later than 30 days after the beginning of each calendar quarter to which the waiver applies (38 CFR 21.4201(f)(2)(ii)). Consequently, educational institutions with short, non-standard terms that begin and end more frequently than once per calendar quarter may have several terms that begin before VA is notified of failure to comply with the 85/15 rule. To remedy this shortcoming, VA is amending 38 CFR 21.4201(f)(1) and (f)(2)(ii) to require that educational institutions with non-standard terms submit their exemption justification reports and 85/15 percent calculations to VA no later than 30 days after the beginning of each non-standard term. This will provide VA with the opportunity to review compliance reports submitted by educational institutions before approving additional enrollments that impact compliance with the 85/15 rule. This amendment will promote accurate and up-to-date 85/15 calculations, ensure that reporting is done on a fair and consistent basis, and enable VA to base consideration of 85/15 waiver requests on relevant criteria.

In summary, the 85/15 rule was created to prevent training institutions from developing courses solely for GI Bill students and then inflating tuition charges. The 85/15 rule serves as a market validation tool by which the cost of the program is validated by demonstrating that a sufficient number of students (15 percent of the total program enrollment) are willing to pay the full cost of tuition out of pocket. These changes will strengthen the existing 85/15 rule by addressing the regulatory provisions that, over time, have been shown to be ineffective with regard to the rule's intent.

Public Comments

56 comments were received in response to VA's NPRM ''85/15 Rule Calculations, Waiver Criteria, and Reports.'' Several commenters expressed support for the rule, while several others expressed concerns. VA believes that many of the concerns are best answered via further clarification both in the responses to the substantive comments below and in changes VA is making to the proposed language from the NPRM, also discussed below.

Ensuring the Best Schools for Veterans Act of 2022

Some commenters requested that VA address Public Law 117–174, the ''Ensuring the Best Schools for Veterans Act of 2022,'' in the preamble to this rulemaking. VA acknowledges that there has been some confusion as to the content of this rulemaking due to the proximity of its NPRM's publication with the enactment of Public Law 117–174, which was signed into law on August 26, 2022. VA's NPRM ''85/15 Rule Calculations, Waiver Criteria, and Reports'' was published in the **Federal Register** (Vol. 87, No. 196) on October 12, 2022. This did not afford VA enough time to address the law in the NPRM or this final rule. While VA has effectively implemented the law and provided guidance to schools on its impacts, VA plans to address it specifically in a future rulemaking. However, VA also will address the law here, as its enactment does have major implications on the impact this rulemaking will have on schools.

Public Law 117–174 clarifies Congressional intent regarding the statutory requirements of the 35 percent exemption to the 85/15 rule. The law provides that an institution that (1) has a Veteran population less than 35 percent of its total student enrollment and (2) has most of its programs approved under section 3672 or 3675 of title 38, U.S.C., is statutorily exempt from all 85/15 requirements including reporting, computing, monitoring, and complying with 85/15 ratios. As one commenter noted, ''virtually all public and non-profit colleges and universities qualify for this exemption: they have veteran populations below 35 percent—typically well below that threshold and often in the single digits—and the majority of their programs are typically approved under section 3672 or 3675.'' VA agrees with this commenter. Due to the changes made by Public Law 117–174, presumably a large percentage of GI Bill schools will be exempt from the 85/15 rule because they are accredited schools with less than 35 percent of their student population being Veterans. The changes made by this final rule will therefore have no functional impact on these exempt schools, as the 85/15 rule is irrelevant to them. Therefore, while this rulemaking does not implement Public Law 117–174, any review, analysis, and evaluation of the 56 public comments must keep in mind the inapplicability of the changes made in this final rulemaking to a large percentage of GI Bill-approved schools that are exempt from the 85/15 requirements due to the law. As of May 25, 2023, 57 percent of all GI Bill-approved schools are exempt from 85/15 under Public Law 117–174 and therefore are unaffected by the rules contained herein (out of the 9,247 education training institutions approved for GI Bill benefits, there are 5,257 schools with 35 percent exemptions on record with the VA and more are being added each day). Thus, this rulemaking does take Public Law 117–174 into account while not attempting to implement that law.

VA makes no changes to the rule based on these comments.

Implementation of Revised 85/15 Rule

One commentor expressed concern regarding the lack of information provided to schools about the ''timeline'' of the implementation of the proposed rulemaking.

VA disagrees that insufficient notice of a potential change has been provided. VA has provided ample information concerning the implementation process of the proposed rule to the public, which includes schools, via the rulemaking process. Further, a VA communications plan was executed following the NPRM's publication to encourage its primary stakeholders, schools, to both acquaint themselves with and comment on the rulemaking.

The notification of the implementation of a proposed rulemaking was conducted pursuant to the Administrative Procedure Act's notice and comment process for agency rulemaking, found in 5 U.S.C. 553. This ''notice and comment'' process requires Government agencies to notify the public through the **Federal Register** of a proposed new or revised rule, and to accept and consider public comments. VA's proposal to revise its educational assistance regulations in the rulemaking titled ''AR56—85/15 Rule Calculations, Waiver Criteria, and Reports'' was submitted to the **Federal Register** and published on October 12, 2022. This published ''notice of proposed rulemaking'' announced the proposed regulation to the public, provided a detailed description of the planned regulation and its legal basis, and allowed the public the opportunity to submit written comments concerning the proposed regulation.

However, as a prudential matter, VA believes it is in the best interest of the students, schools, and the Federal government to provide schools with an extended amount of time after publication of the final rule to prepare for and mitigate any impacts these new rules may have. Therefore, VA will delay the applicability date to one year after the publication of this final rule to

ensure both that VA will have adequate time to train schools as much as needed about the regulatory provisions herein and that schools will have enough time to implement any necessary changes in their policies to comply with these provisions.

Definition of ''Institutional Aid''

One commentor requested that VA revise the definition of ''institutional aid'' in 38 CFR 21.4201(e)(2) by narrowing it to the receipt of tuition and mandatory fees only.

In response, VA notes that 38 U.S.C. 3680A(d)(1) explicitly states that ''other charges paid to or for [students] by the educational institution'' are to be included in the 15 percent calculation; therefore, VA is required by law to include charges other than tuition and mandatory fees in its definition of institutional aid. Excluding ''other charges'' would require Congressional action to amend the statutory language.

As such, VA makes no changes to the rule based on this comment.

Definition of ''Supported Students''

Some commenters opposed VA making any changes to the definition of ''supported students,'' concerned that classifying students in receipt of any type of institutional aid, regardless of monetary amount, as ''supported'' will significantly increase the amount of supported students.

In contrast, one commentor noted how the existing language ''seems to favor schools'' by letting them claim students in receipt of institutional aid as non-supported, which helps them reach the required 15 percent, and how it ''creates space for institutions looking to raise tuition prices by disguising supported students'' as non-supported.

VA agrees that by categorizing students in receipt of any institutional aid, regardless of monetary amount, as ''supported,'' the number of supported students, as counted for the 85/15 rule, will increase, and in some cases, this could result in a significant increase of supported students for individual institutions and programs. However, VA makes no changes based on these comments, as this is the unavoidable impact of these changes to more closely align to the statutory language.

As stated in the preamble to the NPRM, VA is aligning this regulation more directly with the language of 38 U.S.C. 3680A(d)(1), which explicitly states that the 85 percent side of the ratio (*i.e.,* the supported student count) should include all students ''having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs.'' The original language for the exemptions was introduced in 1979 with changes through the current language, which was last updated in 1990. The Secretary has the authority to make these exceptions under 38 U.S.C. 3680A(d)(2) if they are ''in the interest of the eligible veteran and the Federal Government.'' Recent enforcement actions by the Department of Justice (DOJ) show that the loopholes created by the existing language are no longer in the interest of beneficiaries or the Federal Government.[1]

Additionally, VA believes the impact on institutions will be significantly less than commenters opposing the proposed definition of ''supported'' may believe. VA agrees that the proposed definition could be more problematic for institutions if it were applicable to a large portion of institutions. However, a large portion of training facilities are exempt from the 85/15 rule because they qualify for the 35 percent exemption. Furthermore, as discussed in the Ensuring the Best Schools for Veterans Act of 2022 section of this preamble, Public Law 117–174 clarifies Congressional intent regarding the statutory requirements of the 35 percent exemption to the 85/15 rule and broadens the exemption. Moreover, any educational institution exceeding the 85/15 threshold has the option to apply for a waiver, as provided in 38 U.S.C. 3680A(d)(2) and 38 CFR 21.4201(h).

VA makes no changes to the rule based on these comments.

85/15 Calculation/Exception Categories

A few commentors disagreed with the calculation of the 85/15 percent ratio. Specifically, commentors were opposed to the removal of the exception category found in 38 CFR 21.4201(e)(2)(iv), which allows students receiving certain institutional scholarships to be counted as ''non-supported,'' resulting in these students being included on the 15 percent (non-supported) side of the ratio calculation. One commentor stated that the elimination of this exception category would ''artificially inflate the number of students counted on the 85 percent [supported] side of the equation.''

VA disagrees with these comments. The exemption in section 21.4201(e)(2)(iv) has been causing supported students to be undercounted in 85/15 calculation; therefore, its removal will result in a more accurate count. Students receiving institutional aid always should have been counted as ''supported.'' This has been the case since the creation of the 85/15 rule. The 85 percent rule, which can be found at 38 U.S.C. 3680A, was enacted in 1952 to combat predatory school abuses following implementation of the Servicemen's Readjustment Act of 1944. The removal of this exception category returns the 85/15 rule to its original intent of serving as a market validation tool to prevent schools from inflating tuition charges for Veterans using VA educational assistance. VA finds that the exception category in 38 CFR 21.4201(e)(2)(iv) created loopholes which have been exploited by some schools—exploitation that has been exacerbated under the Post-9/11 GI Bill. Closing this loophole is one of the primary purposes of this rulemaking.

Furthermore, removal of the exception in 38 CFR 21.4201(e)(2)(iv) likely will not significantly increase the ratio of ''supported'' students enrolled in a program because Veterans statistically make up a small percentage of most schools' overall student populations. According to data from the Postsecondary National Policy Institute (PNPI), as of academic year (AY) 2015–16, only 4.9 percent of undergraduate students were Veterans—a small portion of the population attending schools.[2] Also, though some schools with a significant population of disadvantaged students who are receiving institutional aid may result in the educational institution exceeding the 85/15 threshold, the educational institution has the option to apply for an 85/15 waiver, as provided in 38 U.S.C. 3680A(d) and 38 CFR 21.4201.

VA makes no changes to the rule based on these comments.

35 Percent Exemption

Some commenters requested for VA to clarify in the final rule that the changes proposed by the rulemaking do not apply to institutions that qualify for the 35 percent exemption, in order to

[1] See, *e.g.,* Florida Academy Agrees To Pay $512,000 To Resolve Misrepresentation Claims Impacting Veterans' Post-9/11 Tuition Subsidy Program (Jan. 27, 2020), *https://www.justice.gov/usao-mdfl/pr/florida-academy-agrees-pay-512000-resolve-misrepresentation-claims-impacting-veterans;* Universal Helicopters Inc. and Dodge City Community College Agree to Pay $7.5 Million to Settle False Claims Act Allegations Related to Post-9/11 GI Bill Funding (Aug. 15, 2022), *https://www.justice.gov/opa/pr/universal-helicopters-inc-and-dodge-city-community-college-agree-pay-75-million-settle-false;* Justice Department Announces Enforcement Action Involving Over $100 Million in Losses to Department of Veterans Affairs (Sept. 16, 2022), *https://www.justice.gov/opa/pr/justice-department-announces-enforcement-action-involving-over-100-million-losses-department.*

[2] Veterans Fact Sheet, Postsecondary National Policy Institute, available at *https://pnpi.org/wp-content/uploads/2022/11/VeteransFactSheet-Nov-2022.pdf.*

provide clarity for School Certifying Officials (SCO) and Education Liaison Representatives (ELR).

VA concurs with these comments and has explained the impact of the 35 percent exemption in the preamble. For further clarification, please refer to the Ensuring the Best Schools for Veterans Act of 2022 section above. While portions of the newly enacted law and this rulemaking do overlap, as stated earlier, this rulemaking is not implementing the provisions of Public Law 117–174, Ensuring the Best Schools for Veterans Act of 2022. Additionally, VA did not address the 35 percent exemption in the NPRM because VA was not proposing any changes to the 35 percent exemption at the time of publication. However, to alleviate further confusion, VA will address comments regarding the 35 percent exemption.

Some commenters requested for VA to create an exemption that if the total Veteran student ratio is under 35 percent, then the institution would be exempt from having to track the 85/15 ratios.

The 35 percent exemption to all schools is found in statute. Public Law 117–174 modified the statutory requirements of the 35 percent exemption to the 85/15 rule. As the law clarifies, if an institution that (1) has a Veteran population less than 35 percent of its total student enrollment and (2) has most of its programs approved under section 3672 or 3675 of title 38 U.S.C., that institution is statutorily exempt from all 85/15 requirements including reporting, computing, monitoring, and complying with 85/15 ratios. Therefore, this law exempts many schools from the requirement of tracking the 85/15 ratios. VA will address the law more specifically in a future rulemaking, to include consideration of adding a blanket statement of situations in which a school is exempt from having to track 85/15 ratios in VA's regulations.

Some commenters stated concerns that VA is putting more stock in the 35 percent waiver to circumvent the 85/15 reporting and requested that VA find a better way to punish bad actors. One commenter stated that the 35 percent exemption undermines the 85/15 rule because there is no market validation price checking mechanism for campuses that enroll fewer than 35 percent Veteran students overall.

VA notes that the 85/15 ratio and the 35 percent exemption are statutorily mandated. Further, VA did not intend this rule as an enforcement action to ''punish bad actors'' but rather is revising the 85/15 ratio criteria to better leverage the 85/15 rule as a market validation tool and to better serve the interests of benefit recipients and the Federal government.

Some commenters also requested VA add new language to 38 CFR 21.4201 for further clarification of the 35 percent exemption.

VA will not be adding new language regarding the 35 percent exemption at this time, as the language for the exemption already exists at 38 CFR 21.4201(c)(4). VA did not address the 35 percent exemption in this rulemaking because this rulemaking does not modify said language. However, with the enactment of Public Law 117–174, Congress modified the language that authorizes the 35 percent exemption. VA will address these changes in a future rulemaking.

VA makes no changes to the rule based on these comments.

Lack of Student Choice

Several commentors expressed concern that proposed changes to the 85/15 rule could limit choices of undergraduate and graduate Veteran and non-Veteran students. The commenters stated that removing the four exceptions to the 85/15 rule—most notably the fourth exception category in 38 CFR 21.4201(e)(2)(iv), ''undergraduate and non-college degree students receiving any assistance provided by the educational institution''—and classifying all students in receipt of any type of institutional aid as ''supported'' will significantly increase the ratio of ''supported'' students enrolled in a program. This increase of students counted as supported would, according to these commentors, lead to program suspension due to violation of the 85/15 rule, which would bar new students from enrolling in programs that align with their interests.

VA does not disagree with these commenters' assertions that this rulemaking could produce new violations of the 85/15 rule and possibly new suspensions. However, Congress intentionally chose to enact a statute that limits choices for GI Bill students when ''more than 85 percent of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs.'' 38 U.S.C. 3680A(d)(1). As previously stated in this preamble and the preamble to the NPRM, this rulemaking is realigning VA's regulation with the existing statute to close loopholes that VA has determined are not in the interest of benefit recipients or the Federal Government.

For additional clarification, a school exceeding the 85 percent threshold will not impact any currently enrolled students because the statute explicitly states that it applies only to students ''not already enrolled.'' However, the statute explicitly functions to limit available options for students by preventing the enrollment of new GI Bill students when a school exceeds the 85 percent threshold.

Furthermore, VA will not speculate on the number of choices that will be available after these changes. Some schools with a significant population of students receiving institutional aid may end up exceeding the 85/15 threshold. In those cases, the school has the option to apply for an 85/15 waiver as provided in 38 U.S.C. 3680A(d) and 38 CFR 21.4201. In addition, a program suspended for violating the 85/15 rule retains all its current students. Only future enrollments are potentially affected. Furthermore, Public Law 117–174, discussed in the Ensuring the Best Schools for Veterans Act of 2022 section of this preamble, exempts a large portion of training facilities from the 85/15 requirements.

VA makes no changes to this rule based on these comments.

Removal of Institutional Aid Exemption

A few commentors were concerned that the removal of the fourth exception category from being considered supported (the exception for institutional aid) would negatively impact students eligible for grants provided by Federal programs, such as Federal Work Study (FWS) (34 CFR parts 673 and 675), the Federal Supplemental Educational Opportunity Grants (FSEOG) (34 CFR part 676), and the Workforce Innovation and Opportunity Act (WIOA) (Pub. L. 113–128). FWS and FSEOG are Federal grant programs that require the institution to contribute a proportion of the funds paid to the recipient, meaning that when the fourth exception category is removed, such grant recipients would be considered in receipt of institutional aid and therefore counted on the ''supported'' side of the 85/15 calculation. The commenter opined that this provision would discourage training institutions from participating in these federally funded programs, which would adversely affect both students and the training institution.

VA acknowledges the validity of these comments and recognizes the importance of other Federal programs that benefit students and schools alike; the FWS program provides a source of

part-time income for undergraduate and graduate students with financial need, and the FSEOG program, a Title IV campus-based program, provides grants to eligible students who demonstrate exceptional financial need and encourages training institutions to provide grants to low-income undergraduate students.

The WIOA was enacted in July 2014 ''to bring about increased coordination among Federal workforce development and related programs . . . [and] to provide a combination of education and training services to prepare individuals for work and to help them improve their prospects in the labor market.'' Congressional Research Service, The Workforce Innovation and Opportunity Act and the One-Stop Delivery System (Sept. 26, 2022), available at *https://crsreports.congress.gov/product/pdf/R/R44252.* Titles I and III of the WIOA are administered by the Department of Labor's Employment and Training Administration (ETA), and Titles II and IV of the WIOA are administered by ED. The annual Congressional appropriation for these programs is a formulaic allotment to states administered by ETA and ED who, in turn, distribute the funding to schools per the WIOA program requirements. Importantly, no grants are awarded directly to individuals, and there are no ''matching'' requirements for the states or the recipient training institution.

Even though making changes based on these comments will not impact the scope of this rulemaking, VA understands the confusion to stakeholders resulting from the proposed removal of language previously included in the third exception category (''Students in receipt of any Federal aid (other than Department of Veterans Affairs benefits).''). VA will continue to consider Federal aid (other than VA benefits) as distinct from ''institutional aid.'' VA considers Federal aid to include state and municipal funds, as well as institutional matching funds pursuant to participation in such Federal, state, or municipal grant programs. In this final rule, VA is adding regulatory text clarifying that ''institutional aid'' does not include Federal, state, or municipal grant funding, nor does it include matching funds provided by the educational institution pursuant to participation in such Federal, state, or municipal grant programs. As such, grants to students under WIOA and other similar programs mentioned by the commentors will be counted as ''non-supported,'' barring receipt of other prohibited funding.

This categorization of other Federal funding is being informed by similar statutory language concerning institutional aid found in the Post-9/11 GI Bill and at 38 U.S.C. 3313(c)(1)(A)(II). These provisions refer to relevant financial assistance provided by the educational institution to the student as including any scholarship, aid, waiver, or assistance, but do not include loans and funds provided under section 401(b) of the Higher Education Act of 1965 or financial assistance from a third party. VA believes the additional language concerning ''institutional aid'' is consistent with the concepts embodied by Congress in section 3313.

Moreover, while students in receipt of Federal financial aid count on the ''non-supported'' side of the 85/15 ratio, VA reiterates that pursuant to Public Law 117–174, many, if not most, accredited schools are likely to be exempt from the 85/15 reporting requirements altogether.

Impact on Low-Income and Disadvantaged Students and the Schools That Serve Them

Several commenters indicated that this rulemaking would impose a hardship on low-income students who rely on financial aid to attend an educational institution. Specifically, those commenting expressed the following concerns for low-income students who need scholarships and other financial assistance or aid to pay tuition and fees: (1) institutions will be forced to decrease the amount of financial assistance provided to low-income students to comply with the 85/15 rule which is unfair to these students because their financial assistance is ''counted against them'' when enrolled at an educational institution, and (2) ''under-privileged'' and ''indigent'' students will not have access to educational programs without the use of institutional financial aid. One commentor stated that institutions will be forced to decrease the amount of financial assistance provided to low-income students to stay within the 85/15 rule calculations. Another commentor pointed out that students needing scholarships and financial aid to attend an educational institution should not have their financial assistance counted against them when seeking enrollment at an institution.

Under this rulemaking, supported students are defined as students who have all or part of their tuition, fees or other charges paid for them by the educational institution, or by VA under title 38, U.S.C., or under title 10, U.S.C. As such, only students receiving ''VA aid'' and ''institutional aid'' will be counted as supported students. Per statute, when a school chooses to grant institutional aid to a student, the student must be counted as supported, which is the exact intent of the law. Hence, if the school chooses to go over the 85 percent threshold in a specific program of education, future GI Bill students will be impacted. Those students receiving Federal financial aid other than from VA or the educational institution will remain counted as non-supported students for the 85/15 calculations. As a result, there will be no impact to students who are in receipt of non-VA Federal aid such as need-based grants, Federal direct subsidized or non-subsidized loans, or non-institutional financial aid such as third-party loans or scholarships. Those categories of students already are considered non-supported students in 85/15 calculations and will remain on the 15 percent side of the ratio calculation.

Any schools with a significant population of disadvantaged students who receive institutional aid, which might result in the educational institution violating the 85 percent limitation of ''supported students'' under this rulemaking, may apply for a waiver, which, as a result of this rulemaking, will be a more straightforward process. Specifically, under the amendments to 38 CFR 21.4201(h), VA may grant a waiver of the 85 percent limitation when favorable consideration is made on the educational institution's performance relative to the criteria of ''availability of comparable alternative educational facilities effectively open to veterans in the vicinity of the school requesting a waiver'' and ''the general effectiveness of the school's program in providing educational and employment opportunities to the veteran population it serves.'' Whereas there currently are four criteria that must be addressed in order to obtain this waiver, this final rule reduces the number of criteria that must be addressed.

Several comments expressed concern that by removing the third category (''students in receipt of any Federal Aid (other than VA benefits)'') from VA's current regulatory definition of ''non-supported'' students at section 21.4201(e)(2), this rule would negatively impact two-year institutions that serve low-income or underserved populations that need Federal financial aid to attend school. One commenter stated that this change would force schools to choose between the underprivileged and Veteran populations. Another commentor was concerned that programs such as the WIOA would now be counted on the supported side of the

calculation because of the removal of the third category. The commenter stated that many programs attractive to WIOA beneficiaries would also be attractive to Veterans, and therefore may cause the schools to lose prospective students.

As stated above, students receiving Federal financial aid and/or aid from WIOA or similar Federal programs will be not considered ''supported'' for the 85/15 calculations. As previously stated, supported students are only those students who are having all or part of their tuition, fees or other charges paid for them by the educational institution, or by VA under title 38, U.S.C., or under title 10, U.S.C. According to the PNPI, in the AY 2015–16, only 5.1 percent of students enrolled at minority-serving institutions (MSI) were Veterans.[3] Additionally, in 2020, the Department of Health and Human Services published a list of MSIs that shows the majority are public institutions.[4]

Furthermore, Public Law 117–174, discussed in the Ensuring the Best Schools for Veterans Act of 2022 section of this preamble, exempts a large portion of training facilities from the 85/15 requirements.

One commenter stated that counting students receiving institutional aid as ''supported'' would discourage schools from offering funds to lower income students or risk having Veteran students locked out of the programs they are interested in.

In response, VA notes students receiving institutional aid have been classified by statute as ''supported'' since the inception of the statute creating the 85/15 rule. The 85 percent rule was enacted in 1952 to combat predatory school abuses found to occur following the implementation of the Servicemen's Readjustment Act of 1944. The statutory authority for the 85/15 rule currently resides in 38 U.S.C. 3680A, where it was added by Public Law 102–568, the ''Veterans Benefits Act of 1992.'' VA has no authority to remove ''students receiving institutional aid'' from being counted as ''supported''; only Congress does.

Some commenters expressed concerns that the changes to the 85/15 calculations would negatively impact institutional revenue by requiring extensive and possibly duplicative manhours from SCOs (in addition to VA employees) when computing the 85/15 calculations and the 35 percent exemptions.

VA disagrees with this statement. To the extent the commenters' concern is having to revise calculations for prior years, VA notes that 85/15 calculations are done point forward. Calculations that have already been reported for completed or in-progress terms need not be recalculated. To the extent the commenters are concerned about duplication of effort, VA notes this rulemaking has been designed to minimize burdens on both schools and the government while still accomplishing the objective of strengthening the 85/15 rule. By removing the exceptions, the calculation process will be streamlined and more straightforward, enabling SCOs and VA employees to calculate and review easily. Finally, the NPRM did not address the 35 percent exemption, and this rulemaking does not make any changes to the portions of the regulation that address this rule.

Additionally, Public Law 117–174, discussed in the Ensuring the Best Schools for Veterans Act of 2022 section of this preamble, exempts a large portion of training facilities from the 85/15 requirements. As one commenter noted, ''virtually all public and non-profit colleges and universities qualify for this exemption: they have veteran populations below 35 percent—typically well below that threshold and often in the single digits—and the majority of their programs are typically approved under section 3672 or 3675.''

Furthermore, according to the PNPI, in 2021, only 6.4 percent of the U.S. population aged 18 or over were Veterans of the U.S. military. For the AY 2015–2016, only 4.9 percent of undergraduates were Veterans. At for-profit institutions during the same period, this figure was slightly higher at 9.2 percent; however, this percentage is still well below the 35 percent mark established by statute.[5] This means that a large portion of those schools previously reporting 85/15 ratios will not be impacted by this rulemaking, as they will be exempt from reporting.

VA makes no changes to the rule based on these comments.

Administrative Burden

Many commenters opposed VA's 85/15 rule, due to the administrative burden it poses on a school's VA Certifying Official(s). However, one commenter provided a counterpoint, stating that ''the removal of these four exemptions will provide clarity and efficiency to the certification process, reducing the workload of administrators and minimizing categorization mistakes.''

VA acknowledges the administrative burden placed on schools that are required to submit 85/15 calculations. However, this rulemaking is not increasing the current burden of having to report 85/15 calculations. Furthermore, the removal of all four current exceptions to the ''non-supported'' side of the 85/15 ratio simplifies the calculation of the 85/15 ratio and clarifies requirements for schools, thereby making it easier for schools to remain in compliance. In theory, this should lighten the existing administrative burden. Also, the administrative burden of having to submit 85/15 calculations will be reduced due to the implementation of ''Ensuring the Best Schools for Veterans Act of 2022,'' since this law exempts most accredited schools from 85/15 requirements if their GI Bill student enrollment is lower than 35 percent of the total student population.

VA makes no changes to the rule based on these comments.

Waiver Process

There were several comments concerning the amendments to 85/15 waiver criteria. One commenter disagreed with the retention of the criterion in 38 CFR 21.4201(h)(1) and the elimination of the waiver criterion in paragraph (3), stating that for paragraph (1), they believed that the unavailability of another similar program in the vicinity of a non-compliant program would not be an indicator of a program's quality or outcome. This commenter stated that the criterion in paragraph (3) should be retained and its language revised to refer to the ''past performance'' of an institution, rather than to past compliance. The commenter further stated that in the adjudication of waiver requests, the consideration of an institution's past performance would protect students from predatory schools.

VA disagrees with the commenter's recommendations. VA maintains that the criterion in paragraph (1) (''the availability of comparable schools open to Veterans in the vicinity of the school requesting a waiver'') is a valid and quantifiable criterion to evaluate whether an institution should be granted a waiver. The availability of comparable schools nearby also provides effective market validation of tuition costs because this factor compares the cost-effectiveness of programs at comparable schools.

As to the commenter's suggestion to keep the criterion in paragraph (3) but amend the language to state ''past

[3] Veterans Fact Sheet, supra note 2.

[4] 2020 List of Minority Serving Institutions, U.S. Department of Health and Human Services, available at *https://www.minorityhealth.hhs.gov/assets/PDF/2020_Minority_Serving_Institutions.pdf.*

[5] Veterans Fact Sheet, supra note 2.

performance'' instead of the past compliance of an institution, VA believes that making this distinction is not useful or logical. VA and/or SAAs often learn of past performance issues through their compliance actions. In some cases, non-compliance with VA law or policy leads to the suspension or withdrawal of program approval, giving a clear indication of a past performance issue. Further, ''performance'' compliance or lack thereof is always documented and is a clear measure of past performance. Regardless, VA concludes that retaining paragraph (3) with either the existing or suggested revision is not necessary altogether since the revision to the criterion in 38 CFR 21.4201(h)(4) (''general effectiveness of the school's program in providing educational and employment opportunities to the Veteran population it serves'') adds the factor of an educational institution's participation in and compliance with the Principles of Excellence program established by Executive Order 13607. This added factor to the paragraph (4) criterion will provide comprehensive performance indicators to evaluate an educational institution's general effectiveness and protect students from predatory schools while using Federal education benefits.

Another commenter objected to the revision of the list of factors to be considered in the ''general effectiveness of the school's program'' criterion in 38 CFR 21.4201(h)(4), stating that the current factors are required to comply with Principles of Excellence and, as such, should remain in the criteria considered in the 85/15 waiver decision process. The commenter also opposed maintaining the existing graduation rate factor in paragraph (4), stating that this factor may not accurately measure the success of student outcomes since there are instances of students attending, but not graduating from, community college because they attended the community college only to prepare for entry into a university.

VA disagrees with these comments. The current list of factors contained in 38 CFR 21.4201(h)(4), including the ''ratio of educational and general expenditures to full-time equivalency enrollment,'' largely is not useful when deciding on a waiver and should be revised. As stated in the rulemaking, the current graduation rate factor will be retained and the list expanded to include other factors such as graduate employment, graduate salary, gainful employment, student complaints, and industry endorsements, as these factors are strong and logical indicators of an educational institution's general effectiveness.

As to the commenter's opposition to retaining the existing graduation rate factor, this factor is still both relevant and applicable to most waiver request determinations. Further, this amendment expands the current list of factors that may be considered to include not only graduate employment but graduate salary, gainful employment, student complaints, and industry endorsements. Additionally, under this rulemaking, VA will have authority to weigh other unlisted factors on a case-by-case basis. Thus, there are ample metrics provided by this rulemaking to minimize the significance of the number of students who transfer to, and then graduate from, another educational institution.

Another commenter stated that a school seeking a waiver would be detrimental to Veterans due to the ''additional amount of time'' expended to seek a waiver. This commenter indicated that a student's program would be suspended pending the waiver determination and that Veterans would be unable to enroll or attend classes in the affected programs.

VA does not agree with this statement since the rulemaking simplifies the waiver application process by decreasing the number of waiver criteria. Therefore, the process of waiver application will be simplified for the educational training institute and for VA to adjudicate. Additionally, as previously stated in this preamble, with the enactment of Public Law 117–174, it is likely that fewer educational training institutes will be seeking waivers, as many are now exempt from tracking the 85/15 ratio.

VA makes no changes to the rule based on these comments.

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 rulemaking 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.*

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612). Notwithstanding data collection limitations regarding the number of schools that are classified as small entities, VA's certification is based on the fact that students will continue to provide revenue to schools regardless of whether they are classified as supported or non-supported. Should a school already at or near the statutory 85/15 ratio limit find that a reclassification of students from ''non-supported'' to ''supported'' will alter its ratio to the point where it will fall out of compliance with the 85/15 rule, the school can recruit additional non-supported students to restore that ratio. While needing to recruit more non-supported students is an effect on schools, it does not qualify as a significant economic impact. 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. Nonetheless, VA acknowledges that the provisions in this rulemaking may create some uncertainty and reactive behavior from both Veteran students and personnel within institutions of higher learning.

Unfunded Mandates

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

Paperwork Reduction Act

Although this final rule contains collections of information under the provisions of the Paperwork Reduction

Act of 1995 (44 U.S.C. 3501–3521), there are no provisions associated with this rulemaking constituting any new collection of information or any revisions to the existing collections of information. The collections of information for 38 CFR 21.4201 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control numbers 2900–0896 and 2900–0897.

Assistance Listing

The Assistance Listing numbers and titles for the programs affected by this document are 64.027, Post-9/11 Veterans Educational Assistance; 64.028, Post-9/11 Veterans Educational Assistance; 64.032, Montgomery GI Bill Selected Reserve; Reserve Educational Assistance Program; 64.117, Survivors and Dependents Educational Assistance; 64.120, Post-Vietnam Era Veterans' Educational Assistance; and 64.124, All-Volunteer Force Educational Assistance.

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not satisfying the criteria under 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces claims, Colleges and universities, Education, Employment, Reporting and recordkeeping requirements, Schools, Veterans, Vocational education.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on January 8, 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.

Luvenia Potts,

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 amends 38 CFR part 21 as set forth below:

PART 21—VETERAN READINESS AND EMPLOYMENT AND EDUCATION

Subpart D—Administration of Educational Assistance Programs

■ 1. The authority citation for part 21, subpart D continues to read as follows:

Authority: 10 U.S.C. 2141 note, ch. 1606; 38 U.S.C. 501(a), chs. 30, 32, 33, 34, 35, 36, and as noted in specific sections.

■ 2. Amend § 21.4201 by revising paragraphs (e)(2), the introductory text of paragraph (f)(1), and paragraphs (f)(2)(ii) and (h) to read as follows:

§ 21.4201 Restrictions on enrollment; percentage of students receiving financial support.

* * * * *

(e) * * *

(2) *Assigning students to each part of the ratio.* In accordance with the provisions of paragraph (a) of this section, *non-supported students* are those students enrolled in the course who are having none of their tuition, fees or other charges paid for them by the educational institution, or by VA under title 38, U.S.C., or under title 10, U.S.C., while *supported students* are those students enrolled in the course who are in receipt of institutional aid or VA educational assistance benefits (*i.e.,* having all or part of their tuition, fees or other charges paid for them by the educational institution, or by VA under chapter 36, title 38, United States Code, or under title 10, United States Code.). *Institutional aid* does not include Federal, state, or municipal grant funding, nor does it include matching funds provided by the educational institution through participation in such Federal, state, or municipal grant programs. Recipients of these funds are to be counted as non-supported students barring receipt of other institutional aid or VA educational assistance benefits.

* * * * *

(f) * * * (1) Schools must submit to VA all calculations (those needed to support the exemption found in paragraph (c)(4) of this section as well as those made under paragraph (e)(3) of this section). If the school is organized on a term, quarter, or semester basis, it shall make that submission no later than 30 days after the beginning of the first term for which the school wants the exemption to apply. If the school is organized on a non-standard term basis, it shall make its submission no later than 30 days after the beginning of the first non-standard term for which the school wishes the exemption to apply. A school having received an exemption found in paragraph (c)(4) of this section shall not be required to certify that 85 percent or less of the total student enrollment in any course is receiving Department of Veterans Affairs assistance:

* * * * *

(2) * * *

(ii) If a school is organized on a non-standard term basis, reports must be received by the Department of Veterans Affairs no later than 30 days after the beginning of each non-standard term.

* * * * *

(h) *Waivers.* Schools which desire a waiver of the provisions of paragraph (a) of this section for a course where the number of full-time equivalent supported students receiving VA education benefits equals or exceeds 85 percent of the total full-time equivalent enrollment in the course may apply for a waiver to the Director, Education Service. When applying, a school must submit sufficient information to allow the Director, Education Service, to judge the merits of the request against the criteria shown in this paragraph. This information and any other pertinent information available to VA shall be considered in relation to these criteria:

(1) Availability of comparable alternative educational facilities effectively open to veterans in the vicinity of the school requesting a waiver.

(2) General effectiveness of the school's program in providing educational and employment opportunities to the particular veteran population it serves. Factors to be considered should include, but are not limited to: percentage of veteran-students completing the entire course, graduate employment statistics, graduate salary statistics, satisfaction of Department of Education requirements regarding gainful employment (where applicable), other Department of Education metrics (such as student loan default rate), student complaints, industry endorsements, participation in and compliance with the Principles of Excellence program, established by Executive Order 13607 (where applicable), etc.

(3) Whether the educational institution's aid program appears to be consistent with or appears to undermine the 85/15 rule's tuition and fee costs market validation mechanism.

[FR Doc. 2024–00629 Filed 1–12–24; 8:45 am]

BILLING CODE 8320–01–P