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DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 1

RIN 2900-AN95

Sharing Information Between the Department of Veterans Affairs and the Department of Defense

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document adopts as final, without change, the interim final rule published in the Federal Register on October 20, 2011. This final rule removes a Department of Veterans Affairs (VA) regulatory restriction on the sharing of certain medical information with the Department of Defense (DoD) that is not required by the applicable statute and is inconsistent with the intent and purpose of that statute.

DATES: Effective Date: [Insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Stephania Griffin, Veterans Health Administration Privacy Officer (10P2C1), Health Information Governance, Office of Informatics and Analytics, Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave., NW, Washington DC, 20420, (704) 245-2492. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Section 7332(a)(1) of title 38, United States Code, affords special protection against the disclosure of VA medical “[r]ecords of the identity, diagnosis, prognosis, or treatment of any patient or subject which are maintained in connection with the performance of any program or activity (including education, training, treatment, rehabilitation, or research) relating to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia.” However, an exception in section 7332(e) states: “The prohibitions of this section shall not prevent any interchange of records—(1) within and among those components of [VA] furnishing health care to veterans, or determining eligibility for benefits under this title; or (2) between such components furnishing health care to veterans and the Armed Forces.”

VA implemented section 7332(e) in 38 CFR 1.461(c)(1); however, in so doing, we imposed an additional restriction on the scope of information that may be exchanged between VA and DoD, limiting it to only “information pertaining to a person relating to a period when such person is or was subject to the Uniform Code of Military Justice.” This restriction was narrower than the statutory restriction, and it impeded VA’s ability to share with DoD important medical information pertaining to veterans and to coordinate their care and treatment. Further, the restriction impeded VA’s ability to fully engage in Presidential- and Congressional-supported interoperability initiatives with DoD, such as electronic health record initiatives. This regulatory limitation was not intended to have these negative results on VA’s ability to provide comprehensive high-quality

health care to veterans and, where applicable, to support DoD in similarly caring for servicemembers and military retirees.

On October 20, 2011, VA published in the Federal Register, at 76 FR 65133, an interim final rule that amended 38 CFR 1.461(c)(1) to better conform to authority granted to VA by Congress. Interested persons were invited to submit comments on or before December 19, 2011, and we received a total of 3 comments. All of the issues raised by the commenters are addressed below.

Two commenters stated general concerns regarding access to electronic medical records by DoD and the security of those records from inappropriate disclosure or access. VA is committed to the appropriate protection, use, and disclosure of information maintained and exchanged by VA in the course of official business and to ensuring the security of that information. The amendment to 38 CFR 1.461(c)(1) allows VA to fulfill Congress' clear intention that VA and DoD engage in the exchange of records, but does not affect the requirement of 38 U.S.C. 7332(e)(2) that limits VA disclosures to components of DoD that are "furnishing health care to veterans." We do not make any changes based on these comments.

One commenter asserted that this regulation would create a breach of confidentiality by allowing DoD to access a veteran's health information without authorization by the veteran. However, the commenter also agreed that it is important that VA and DoD have access to veterans' medical information to ensure continuity of care, safety, and for the provision of benefits. This regulation will ensure that this access is provided for those reasons by removing

a specific restriction that was not required by the statutory authority. In addition, VA will continue to comply with all other applicable laws and regulations regarding access to medical records, including those that limit the use and disclosure of information to specifically authorized disclosures. We do not make any changes based on this comment.

One commenter suggested that additional language be included in the final rule to prevent the misuse of information “for unintended, alternative [sic] purposes beyond medical care.” Otherwise, disclosure of information for purposes other than medical care “may deter veterans from seeking care and/or disability compensation” from VA. The suggested language focuses on the intended use of the information accessed under the rule. As we noted above, the amendment to the rule complies with the section 7332 limitations on the nature and purpose of information to be disclosed. Health care professionals, such as those accessing information through this provision, are already duty-bound to access health information consistent with law and professional standards. This rule does not limit or otherwise affect the enforcement of those laws and professional standards. Because we believe the suggested language is redundant of existing protections and because other laws and regulations govern such use and disclosure, we decline to further amend the regulation. We do not make any changes based on this comment.

Based on the rationale set forth here, and in the interim final rule, we adopt the interim final rule as a final rule without any changes.

Effect of Rulemaking

The Code of Federal Regulations, as revised by this final rule, represents the exclusive legal authority on this subject. No contrary rules or procedures are authorized. All VA guidance will be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This rule contains no collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This rule will not directly affect any small entities; only individuals could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other

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

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

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

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are: 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; and 64.013, Veterans Prosthetic Appliances.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on August 29, 2012, for publication

List of Subjects in 38 CFR Part 1

Administrative practice and procedure, Archives and records, Cemeteries, Claims, Courts, Crime, Flags, Freedom of information, Government contracts, Government employees, Government property, Infants and children, Penalties, Privacy, Reporting and recordkeeping requirements, Security measures.

Dated: August 30, 2012

Robert C. McFetridge,
Director of Regulation Policy and Management,
Office of the General Counsel,
Department of Veterans Affairs.

PART 1—GENERAL PROVISIONS

Accordingly, the interim final rule amending 38 CFR part 1, which was published at 76 FR 65133 on October 20, 2011, is adopted as a final rule without changes.

[FR Doc. 2012-21816 Filed 09/04/2012 at 8:45 am; Publication Date: 09/05/2012]