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Thank you for the opportunity[1] to provide comments on OIRA's review of the Department of Veterans Affairs' (VA) final rule "Reproductive Health Services"[2] that provides taxpayer-funded medical benefits coverage for abortion and abortion counseling for veterans and certain beneficiaries.

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In this rule, the VA amended its regulations to remove the statutorily required exclusions on abortion and abortion counseling in veterans' medical benefits packages and for Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) beneficiaries[3] and now provides taxpayer-funded abortion and abortion counseling benefits when "the life or the health of the pregnant veteran would be endangered if the pregnancy were carried to term, or the pregnancy is the result of an act of rape or incest."[4]

Today, we will share 6 points of interest to OIRA and the VA. As we will discuss, the VA failed to establish a need for its rulemaking. The rule and its purported preemption of state abortion laws is contrary to law and raises concerns under the major questions doctrine. The VA's rule has a flawed regulatory impact analysis, overstated its benefits, and failed to consider its harms.

1. The VA failed to establish need for its rulemaking.

- For all rulemaking, federal administrative agencies are required to engage in "reasoned decision making."[5] Agencies must identify a need and demonstrate how the rule meets that need. As such, for the VA to justify replacing its current regulations, it must provide specific evidence as to how the current regulations are causing harm or burdens and how the new rule would remedy the

[1] As OMB cancelled a previous EO 12866 meeting it scheduled with EPPC on another rule, we are glad you are willing to hear EPPC scholars' input on this rule. *See* Rachel N. Morrison, "Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion," National Review, Oct. 8, 2021, https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/.
[2] 87 Fed. Reg. 55287 (Sept. 9, 2022), https://www.federalregister.gov/documents/2022/09/09/2022-19239/reproductive-health-services.
[3] 87 Fed. Reg. at 55287 (beneficiaries include "certain spouses, children, survivors, and caregivers of veterans"); Regulatory Impact Analysis (RIA) at 4.
[4] 87 Fed. Reg. at 55288.
[5] *Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015).

alleged defects without causing equal or greater harms and burdens.[6] As we will demonstrate, the VA failed to establish a need for its rulemaking.

- *Purported need.* The VA's interim final rule (IFR) claimed that "[a]fter *Dobbs*, certain States have begun to enforce existing abortion bans and restrictions on care, and are proposing and enacting new ones, creating *urgent risks* to the lives and health of pregnant veterans and CHAMPVA beneficiaries in these States."[7] As such, the VA issued the IFR "because it has determined that providing access to abortion-related medical services is needed to protect the lives and health of veterans."[8] This is a rule in search of an "urgent" problem.

- Dobbs *does not create a need for rulemaking.* This rule is a political response to *Dobbs*.[9] *Dobbs* returned the issue of abortion "to the people and their elected representatives,"[10] not unelected government bureaucrats to impose novel abortion policies via administrative fiat. Policy preferences post-*Dobbs* for tax-payor-funded abortion contrary to state law is not an urgent problem necessitating rulemaking (much less good cause for an IFR[11]).

- *State abortion laws do not create a need for rulemaking.* No state abortion law prohibits treatment for ectopic pregnancies, miscarriage, and to save the life of a mother. Since no state abortion law prohibits abortion if it is necessary to save the mother's life, the VA's justification that this rulemaking is necessary to save the lives of pregnant women is arbitrary and capricious.

- *The VA failed to identify a single case in which a woman could not access an abortion.* The VA claimed that absent its rulemaking, "veterans will face serious threats to their life and health."[12] The VA failed to provide evidence of any "serious threats." The IFR was published more than two months after the Supreme Court issued its *Dobbs* decision, yet the IFR failed to cite a single veteran or CHAMPVA beneficiary who faced "serious threats" or was harmed during that time, undercutting the purported need for the rulemaking (and the issuance of an IFR).

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[6] *Michigan*, 576 U.S. at 779 (regulation is irrational if it disregards the relationship between its costs and benefits); *Alltelcorp v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) ("a regulation perfectly reasonable and appropriate in the face of a given problem is highly capricious if that problem does not exist").
[7] 87 Fed. Reg. at 55288 (emphasis added).
[8] *Id*.
[9] *See generally* Rachel N. Morrison, *The Biden Administration's Post-Dobbs, Post-Roe Response*, FedSoc Blog (July 13, 2022), https://fedsoc.org/commentary/fedsoc-blog/the-biden-administration-s-post-dobbs-post-roe-response.
[10] *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2279 (2022).
[11] As we explain in our public comment, the VA failed to demonstrate "good cause" to issue an IFR. The APA permits an agency to forgo notice if the agency for "good cause" finds that compliance would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). The VA found that the normal rulemaking process would be "impracticable and contrary to the public interest." 87 Fed. Reg. at 55295. But, as we detail in pages 20-21 of our public comment, the VA's rationale falls far short of the good cause threshold to issue an IFR. EPPC, EPPC Scholars Comment Opposing Department of Veterans Affairs' "Reproductive Health Services" Interim Final Rule, RIN 2900–AR57 (Oct. 11, 2022) [hereinafter EPPC VA IFR Public Comment], https://eppc.org/wp-content/uploads/2022/10/VA-IFR-Ethics-and-Public-Policy-Center.pdf.
[12] *Id*. "CHAMPVA beneficiaries will face serious threats to their health."

2. The rule's RIA is flawed.

- *The baseline for analysis is wrong.* In the Regulatory Impact Analysis (RIA), the VA claimed that its rule was needed due to "urgent health risks" as a result of *Dobbs* and state laws.[13] The VA states:

> It is critical that this rule be published and be made effective immediately to ensure pregnant veterans and CHAMPVA beneficiaries have access to this important care. Indeed, delaying the issuance of this rule would increase the risk to their health and lives and put care out of reach for *some* pregnant veterans and CHAMPVA beneficiaries entirely. Time is also of the essence because, after the *Dobbs* decision, many State laws have prompted providers to cease offering abortion services altogether; thus, *many* veterans and CHAMPVA beneficiaries would face delays (including travel and wait times) if they were required to obtain, outside the VA, the treatment permitted under this rule.[14]

"Some" and "many" must be quantified. To determine the specific number of pregnant veterans and CHAMPVA beneficiaries that would benefit from this rule, the VA must determine how many are affected by lack of abortion access *due to state laws post*-Dobbs. To reach this number, the VA must:

a) Take the number of covered female veterans and beneficiaries of childbearing age.
b) Subtract the number of women in states that permit abortion.
c) Identify how many women would seek abortion based on life, health, rape, or incest.
d) For these women, subtract any abortions sought that were prohibited pre-*Dobbs* (such as when there is a fetal heartbeat or the fetus can feel pain).
e) Subtract any abortions sought that are permitted under state law (such as prior to detection of a fetal heartbeat or when the fetus can feel pain).
f) Subtract any abortions sought that are necessary to save a mother's life (since all states permit abortion in such circumstances).
g) Subtract any abortions sought in cases of rape or incest where such abortions are permitted in states otherwise prohibiting abortion.
h) Subtract any women left who are easily able to travel to a start where the abortion they seek is permitted.

This number is significantly smaller than the general unspecified broad claims of need and urgency made by the VA in its IFR. We urge OIRA to ensure that the VA accurately quantifies its baseline for analysis in any final rule.

- *The rule provides conflicting calculations.* The VA's estimates in its IFR do not add up, making them arbitrary and capricious.
    - For example, on September 21, 2022, VA Secretary McDonough, when speaking at the Senate Veterans' Affairs Committee, stated the VA "provide[s] healthcare to 300,000 women veterans of childbearing age."[15] The RIA assumed, based on data from the

[13] RIA at 6.
[14] 87 Fed. Reg. at 55296.
[15] U.S. Senate Committee on Veterans' Affairs, Ensuring Veterans' Timely Access to Care in VA and the Community, https://www.veterans.senate.gov/2022/9/ensuring-veterans-timely-access-to-care-in-va-and-the-community/63b521ff-d308-449a-b3a3-918f4badb805.

Department of Defense, that "0.005 percent of active-duty servicemembers of reproductive age" will seek abortion when the pregnancy is the result of rape or incest. The analysis goes on to assume "that VA will provide or cover 1000 abortions annually" for both veterans and CHAMPVA beneficiaries for life, health, rape, and incest reasons. But 0.005 percent of 300,000 veterans (not including any CHAMPVA beneficiaries) is 1,500, not 1,000—significantly more than the VA's estimates. This number does not include any abortion for "health" reasons, which can be broadly defined to mean abortion on demand until birth for any reason.[16] The VA's calculation error has major implications for the projected costs of the rule and the capacity of the VA to provide such services.

- According to the National Partnership for Women & Families, it is estimated that up to 53 percent of veterans of reproductive age may be living in States that have already banned or are likely to soon ban abortion following the *Dobbs* decision.[17] The VA estimates that over 155,000 veterans ages 18 through 49 are potentially capable of pregnancy, enrolled in VA health care, and live in States that have enacted abortion bans or restrictions.[18] But these numbers do not add up; 53 percent of 300,000 is 159,000, not 155,000. Further, even though a veteran is in a state that "bans" abortion, the calculation cannot stop there. As discussed above, state abortion laws ban abortion at different points in pregnancy and allow varying exceptions, all of which must be accounted for by the VA.

3. The VA's rule is contrary to law.

- *The VA's authority*. To support its removal of the existing regulations' exclusions for abortion counseling and abortion services in the IFR, the VA pointed to the VA Secretary's general treatment authority to furnish "needed" hospital care or medical services under 38 U.S.C. § 1710 and 38 CFR 17.38. Notably, the term "abortion" does not appear once in 38 U.S.C. § 1710, and despite the statute's enactment in 1996, the VA has never before relied on § 1710 to permit or require coverage of abortion or abortion counseling. Indeed, prior to the IFR, VA regulations provided that "the 'medical benefits package' does not include ... abortions and abortion counseling."[19]

- *Section 106 prohibits abortion.* Despite the general authorities cited in the IFR, the Veterans Health Care Act of 1992, Public Law 102-585, 106 Stat. 4943 ("Section 106") provides an unequivocal and explicit abortion exclusion. Section 106 states:

  > In furnishing hospital care and medical services under chapter 17 of title 38, United States Code, the Secretary of Veterans Affairs may provide women the following health care services: ...
  >
  > (3) General reproductive health care, including the management of menopause, but not including under this section ... abortions ... except for such care relating to a pregnancy

[16] In *Doe v. Bolton* (the companion case to the now overturned *Roe v. Wade*), the Supreme Court defined health as including "all factors—physical, emotional, psychological, familial, and the woman's age-relevant to the wellbeing of the patient." 410 U.S. 192 (1972), *abrogated on other grounds*, *Dobbs*, 142 S. Ct. 2228. In our public comment, we discuss how the VA's abortion benefits for undefined "health" reasons functionally allows abortion on demand until birth, not in "limited circumstance" as the IFR claims. EPPC VA IFR Public Comment, *supra* note 11, at 5-6. This is yet another way the VA's rule is arbitrary and capricious.
[17] 87 Fed. Reg. at 55295.
[18] *Id.*
[19] 38 CFR § 17.38(c)(1).

that is complicated or in which the risks of complication are increased by a service-connected condition...

- *The VA wrongly claims Section 106 does not apply.* The VA stated in the IFR that Section 106's abortion exclusion does not apply, claiming (i) it is limited only to services provided under Section 106 and (ii) it was "effectively overt[aken]" by the later enacted Veterans' Health Care Eligibility Reform Act (VHCERA), which includes 38 U.S.C. § 1710.[20] The VA is wrong on both points.

    - First, the VA wrongly concluded that "Section 106 did not limit VA's authority to provide care under any other provision of law," including 38 U.S.C. §§ 1710 and § 1781.[21] The IFR pointed to the phrase "but not including under this section" proceeding Section 106's abortion exclusion.[22] But preceding that phrase in the same section is the phrase (conveniently omitted in the IFR): "In furnishing hospital care and medical services under chapter 17 of title 38." Thus, Section 106's abortion exclusion applies to that section which covers all hospital care and medical services provided to women under Chapter 17 of Title 38, which includes 38 U.S.C. § 1710 (veterans) and 38 U.S.C. § 1781 (CHAMPVA beneficiaries)—the Department purported authority for the IFR. The VA's deliberate omission of the phrase referencing chapter 17 and its obfuscation of the scope of Section 106 makes the IFR and this final rule arbitrary and capricious, as well as contrary to law.

    - Second, while the VA acknowledged Section 106, it stated multiple times that the VHCERA "effectively overtook" Section 106.[23] But "effectively overt[aking]" or no longer having a "need to rely on section 106" is not a legal standard; the VA's claims fall short of Congressional action or judicial direction. If Congress intended to repeal Section 106 or exempt §§ 1710 or 1781 from its application, it could say so explicitly. The VA's reliance or lack thereof on Section 106 is inapposite to the proper statutory interpretation of the VA's authority granted by Congress. As the Supreme Court has repeatedly reiterated as a "cardinal rule," "repeals by implication are not favored."[24] The VA's claim that Section 106 is "effectively overt[aken]" is contrary to law.

    - The IFR stated that the VA "for decades … has offered general pregnancy care and certain infertility services under 38 U.S.C. 1710" and that the VA "no longer relies on section 106 … to provide such services or any other services."[25] But to the extent that coverage of general pregnancy care and certain infertility services are included in VA medical benefits packages contrary to Section 106, those services (a) should not be provided contrary to law and (b) do not justify the VA further exceeding its statutory authority and violating Section 106 in another way.

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[20] 87 Fed. Reg. at 55289.
[21] *Id*.
[22] *Id*.
[23] *See id.* ("The Veterans' Health Care Eligibility Reform Act effectively overtook section 106 of the VHCA."); *id*. at 55289 n.6 ("The subsequent 1996 amendments to 38 U.S.C. 1710 and the 1999 rulemaking establishing the medical benefits package overtook VA's need to rely on section 106 to provide certain women's health care to women veterans.")
[24] *Posadas v. National City Bank*, 296 U.S. 497 (1936) ("Were there are two acts upon the same subject, effect should be given to both, if possible."). The fact the IFR (and DOJ's OLC opinion) uses the phrase "overtook" and does not claim that Section 106 was repealed explicitly is telling.
[25] 87 Fed. Reg. at 55289.

- *The VA's position is undercut by Congressional action.*

    - In debates during 1993-1994, Congress considered legislation to repeal the VA's abortion ban explicitly shortly after the 1992 law's (Veterans Health Care Act of 1992, Public Law 102-585, 106 Stat. 4943 ("Section 106")) enactment.[26] Congress did not repeal it.

    - In 2019, the VA acknowledged that Congress had not given the agency authority to provide abortion. The VA stated Congress never gave it a "legal mandate" to provide abortion, and the "VA believes that Congress, as the representatives of the will of the American people, must take the lead on this sensitive and divisive issue."[27]

    - In 2021, 130 Members of Congress wrote to the VA to confirm Section 106 and the abortion exclusion is still in effect.[28]

    - As we explain in our public comment, Section 106's abortion exclusion is consistent with Congress' repeated decision to remain neutral on abortion and prohibit taxpayer dollars from funding abortion or abortion counseling (in most circumstances).[29]

    - In short, despite what the VA or others may want to provide, Congress explicitly excluded abortion benefits in Section 106.

- *The rule violates other federal laws.*

    - **Antideficiency Act**. The rule violates the Antideficiency Act, which bars federal agencies from making expenditures for which there is no authorizing congressional appropriation.[30] Indeed, the VA estimates that the rule will incur expenses in excess of $25 million over the next decade to pay for more than 10,000 abortions![31] Because Congress explicitly prohibited the VA from providing health benefits for abortion services or counseling, the VA and any VA employee providing or counseling for abortion is acting outside authorized Congressional appropriations and subject to administrative and criminal penalties.

    - **Comstock Act.** To the extent that the VA is providing drugs for chemical abortion, VA employees must comply, under threat of criminal penalties, with federal law that prohibits interstate carriage and mailing of abortion drugs and other equipment, devices, and other commodities for producing abortions.[32] Further, 18 U.S.C. § 552 states that for "an officer, agent, or employee of the United States"—which includes the VA—to

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[26] Proposed Veterans Health Legislation, Hearing Before the Subcommittee on Hospitals and Health Care of the Committee on Veterans' Affairs, House of Representatives, 103rd Cong. (Sept. 22, 1993).
[27] Department of Veterans Affairs, Meeting of the Advisory Committee on Women Veterans (2019), available at https://www.va.gov/ADVISORY/MINUTES/Minutes-WomVetAug2019.pdf.
[28] Letter from Members of Congress to Secretary McDonough (June 15, 2021), *available at* https://republicansveterans.house.gov/uploadedfiles/2021_6_15_pro-life_letter_to_va_secretary.pdf; *see also* Letter from Sen. Lankford to Secretary McDonough (Aug. 26, 2022), *available at* https://www.lankford.senate.gov/imo/media/doc/2022-08-26%20Letter%20to%20McDonough%20IFR.pdf.
[29] EPPC VA IFR Public Comment, *supra* note 11, at 10-11.
[30] 31 U.S.C. § 1341.
[31] RIA at 3.
[32] 18 U.S.C. §§ 1461, 1462.

"knowingly aid[] or abet[] any person engaged in any violation of" these laws is also a crime.[33]

- **Assimilative Crimes Act.** One of the stated purposes of the IFR is to "ensure" that veterans can obtain abortions "irrespective of what laws or policies States may impose."[34] This is contrary to federal law, making the rule contrary to law. Pursuant to the Assimilative Crimes Act, abortion is a crime on federal property if it is a crime in the state where the property is located. The only exception is when there is a federal statute that already makes the conduct a crime.[35] Apart from the Partial Birth Abortion Ban, federal law does not criminalize abortion. Neither the IFR nor the DOJ OLC opinion on the VA IFR mentions the Assimilative Crimes Act. However, a prior OLC opinion on the application of the Assimilative Crimes Act on federal enclaves, which "may include" VA hospitals, explains that application of the act on a particular location "requires a case-by-case analysis."[36] Even if the OLC opinions are correct, abortion is excluded from VA medical benefits under *federal law*, specifically Section 106. Further, current VA regulations governing its facilities across the U.S. provide that "State or local laws and regulations [are] applicable to the area in which the [VA] property is situated."[37] The VA's failure to address this Act is arbitrary and capricious.

4. The rule raises federalism concerns.

- The IFR stated: "Under VA's regulations, State and local laws, rules, regulations, or other requirements are preempted only to the extent they unduly interfere with the ability of VA employees to furnish reproductive health care while acting within the scope of their VA authority and employment."[38] The rule does not impose any limits on the types of abortion procedures permitted. It is unclear what abortion regulations (outside a prohibition) would purportedly "unduly interfere." Additionally, the VA failed to state which state health and safety abortion regulations will be recognized and which will be preempted. Common state abortion regulations include informed consent, parental notification, reflection periods, ultrasounds, in-person evaluations, and medical training, qualifications, and certification for a medical professional to perform an abortion. In any final rule, the VA must address the scope of its purported preemption of state abortion laws, which raises federalism concerns.

5. The rule raises serious concerns under the major questions doctrine.

- Without clear direction from Congress, the VA's rule imposes the administration's policy preference for taxpayer-funded abortion benefits. Taxpayer-funded abortion, the purported preemption of state abortion laws, and the rule's novel (and unlawful) interpretation of its authority under §§ 1710 and 1781 and the inapplicability of Section 106's abortion exclusion

[33] *Cf. Texas v. Becerra*, 5:22-CV-185-H, 54 n.21 (N.D. Tex. Aug. 23, 2022) (The federal government's reading of EMTALA "may conflict with the federal law barring the importation or delivery of any device or medicine designed to produce an abortion. How the defendants' view of EMTALA and that criminal statute would interact is not before the Court, but their fraught coexistence further counsels against the defendants' interpretation, especially in light of the strong presumption against implied repeal of another statute." (citing 18 U.S.C. § 1461)).
[34] 87 Fed. Reg. at 55288.
[35] 18 U.S.C. § 13.
[36] *Application of the Assimilative Crimes Act to Conduct of Federal Employees Authorized by Federal Law*, Dep't of Justice, Office of Legal Counsel 46 Op. O.L.C ___, slip op. 1 (Aug. 12, 2022).
[37] 38 C.F.R. § 1.218(c)(3).
[38] 87 Fed. Reg. at 55294.

raise serious questions under the major questions doctrine.[39] We address the major questions doctrine as it applies to abortion accommodations at length in our public comment on the EEOC's Pregnant Workers Fairness Act regulations[40]; a similar analysis would apply here for taxpayer funded abortion benefits. Especially in the wake of *Dobbs* and the Court's decision to return the issue of abortion "to the people and their elected representatives,"[41] and in light of vastly different state pro-life laws, abortion is certainly a major question of vast political and economic significance and one that Congress must explicitly speak to.

6. The VA failed to justify the rule's benefits and consider its costs.

- *Wrongly claimed benefits.* The VA wrongly claims benefits the rule does not provide because the rule's baseline for analysis is wrong, as discussed. Specifically, the VA cannot claim as a benefit of its rule any abortion to save a mother's life or any abortions otherwise permitted under state law.

- *Harms to the unborn child.* Conspicuously missing from the IFR and the RIA is any discussion of the unborn child or the irreparable harm of the loss of life for those children as a result of abortion authorized and funded by the VA. The VA must account for these costs in the RIA. To justify its rule, the VA points to "maternal morbidities and mortality" and "the human costs involved."[42] Yet the VA fails to acknowledge, much less consider, the morbidity and mortality of innocent unborn human beings and the human costs involved with abortion for those children. This one-sided calculus makes the VA's analysis arbitrary and capricious.

- *Harms of abortion*. As detailed in our comment, the VA fails to address the harms of abortion on the mother, including any negative mental health effects.[43]

- *Harm to children conceived in rape or incest.* The IFR stated that abortions are "needed" and "medically necessary and appropriate" when the pregnancy is the result of an act of rape or incest.[44] Put another way, the VA stated that it is "needed" and "medically necessary and appropriate" to abort children conceived through rape or incest. This is highly offensive. Killing these children is not "needed" or "medically necessary and appropriate." Their lives have value regardless of how they were conceived. The VA must account for the harm its rule will have to these children by establishing in federal regulations that it was necessary and appropriate to abort such children.

- *Harms as a result of not fully recognizing conscience rights.* The VA rolled out the IFR without adequate consideration of religious and conscience rights of its employees who object to performing, providing, participating in, assisting with, counseling on, promoting, or referring for abortions or abortion counseling based on religious beliefs or moral conviction. This oversight resulted in litigation.[45] The VA's final rule must comply constitutional and statutory religious and

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[39] *See West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022).
[40] EEOC Scholars' Public Comment on EEOC Regulations to Implement Pregnant Workers Fairness Act Proposed Rule, RIN 2046–AB30, Docket ID EEOC-2023-0004, at 12-17 (Oct. 10, 2023), https://eppc.org/wp-content/uploads/2023/10/EPPC-Scholar-Comment-EEOC-Regulations-to-Implement-the-Pregnant-Workers-Fairness-Act.pdf.
[41] *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2279 (2022).
[42] RIA at 2-3.
[43] *See* EPPC VA IFR Public Comment, *supra* note 11, at 12-13.
[44] 87 Fed. Reg. at 55292.
[45] *See Carter v. McDonough,* 46 F.4th 1356 (Fed. Cir. 2022).

conscience protections, such as the First Amendment, the Religious Freedom Restoration Act, Title VII, and the Coats-Snowe Amendment,[46] and should include an explanation how VA employees will be able to avail themselves of their federal conscience and religious freedom rights. Without such guarantees in its final rule, the VA will likely lose qualified health care staff, which could lead to gaps in healthcare, increased healthcare costs, and worse health outcomes for veterans—costs the VA would need to account for in its regulatory impact analysis.

Conclusion

We urge OIRA to ensure that there is sufficient need for the VA's rulemaking, that any final rule complies with the VA's obligations under federal law, and its regulatory analysis is sound.

[46] We detail these protections under federal law in our public comment. *See* EPPC VA IFR Public Comment, *supra* note 11, at 22-23.