DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AN10

Post-9/11 GI Bill

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is issuing this final rule to establish regulations regarding a new educational assistance program for individuals who serve on active duty after September 10, 2001. The new program, known as the Post-9/11 GI Bill, was authorized by title V of the Supplemental Appropriations Act, 2008 (Post-9/11 Veterans Educational Assistance Act of 2008). This final regulation includes the rules necessary to implement the provisions of the Post-9/11 Veterans Educational Assistance Act of 2008 that govern the Post-9/11 GI Bill.

DATES: *Effective Date:* This final rule will become effective on August 1, 2009.

FOR FURTHER INFORMATION CONTACT: Brandye R. Terrell, Regulation Development Team Leader, Education Service, Department of Veterans Affairs (225C), 810 Vermont Avenue, NW., Washington, DC 20420. Telephone: (202) 461–9822. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on December 23, 2008 (73 FR 78876), VA published a proposal to establish VA regulations to implement the provisions of the Post-9/11 Veterans Educational Assistance Act of 2008 that govern the Post-9/11 GI Bill. Interested persons were invited to submit written comments on or before January 22, 2009. We received comments from 38 organizations and 8 individuals. We have made several changes based on these comments.

Eligibility

One commenter stated that the period of eligibility for retirees is not specifically addressed and noted that there is no definition of ''retiree'' in title 38, CFR. We did not define the term ''retiree'' or address retirees as a separate category in the regulation because an individual's period of eligibility is based on factors unrelated to the individual's status as a retiree. The period of eligibility for all individuals entitled to Post-9/11 GI Bill benefits is provided in § 21.9530. If the individual meets the eligibility requirements, the 15-year period of eligibility begins on the last date of discharge, without regard to the reason for separation, even if the individual was discharged prior to August 1, 2009, the effective date of the program.

We received three comments on the eligibility of members of the National Guard or Active Guard Reserve (AGR) serving on active duty under title 32, U.S.C. One commenter requested that these members be allowed to transfer Post-9/11 GI Bill benefits to their dependents. One commenter also suggested that any service under orders lasting 30 days or more that cite use of Operation Iraqi Freedom, Operation Enduring Freedom, or Operation Noble Eagle funds should be considered active duty for the purpose of the Post-9/11 GI Bill. Section 3301 of title 38, U.S.C., defines ''active duty'' as having the same meaning given such term in 38 U.S.C. 101(21)(A) for members of the regular components of the Armed Forces. This paragraph states that active duty means full-time duty in the Armed Forces, other than active duty for training. Active Duty is further defined in 38 U.S.C. 3301(1) to include a call or order to active duty under specific title 10 sections of the U.S. Code for members of the reserve components of the Armed Forces. Neither of the statutory definitions for active duty under section 3301(1) includes members of the National Guard or Active Guard Reserve serving under title 32, U.S.C.; therefore, we are unable to authorize eligibility for these individuals.

One commenter requested clarification on why commissioned officers of the Public Health Service (PHS) are excluded from eligibility for Post-9/11 GI Bill benefits. Another commenter requested a review of 42 U.S.C. 213(d) to determine if PHS officers qualify for the new benefit and suggested National Oceanic and Atmospheric Administration (NOAA) officers also be included as eligible. We agree that commissioned officers of PHS and NOAA are eligible for benefits under the Post-9/11 GI Bill. In a digested opinion from 1985, our General Counsel read the provisions of 42 U.S.C. 213 regarding PHS and 33 U.S.C. 857–1 and 857–3 (now in 33 U.S.C. 3002 and 3072, respectively) regarding NOAA as expanding the definition of ''Armed Forces'' in 38 U.S.C. 101(10) to also include PHS and NOAA for purposes of benefits administered by VA. *See* VADIGOP, 6–26–85 (8–28 Reentry in Active Service). Therefore, service as a commissioned officer of PHS or NOAA meets the ''active duty in the Armed Forces'' service requirement in section 3311 of title 38, U.S.C.

Transfer of Entitlement

Two commenters requested that retirees be allowed to transfer benefits to dependents. Two additional commenters wanted individuals to be allowed to transfer benefits to dependents even if they were unable to reenlist, or without their having to reenlist, if they met the minimum service requirements. While VA is responsible for administering payment of transferred benefits, the Department of Defense (DoD) is responsible for determining eligibility for transfer of entitlement to dependents. Specifically, the statute provides that the Secretary of Defense may authorize the Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, and the Secretary of Homeland Security (with respect to the Coast Guard when it is not operating as a service in the Navy) to determine if individuals serving in the Armed Forces in their respective departments are eligible to transfer entitlement to dependents. As VA has no authority to determine eligibility for transfer of entitlement of educational assistance under the Post-9/11 GI Bill, individuals inquiring about eligibility for transfer of entitlement should contact DoD for information.

One commenter requested that VA clarify what happens to entitlement that was transferred under the Montgomery GI Bill (MGIB) if the transferor does not revoke the transferred entitlement before electing to receive benefits under the Post-9/11 GI Bill. Entitlement that was transferred under MGIB and not revoked prior to the transferor's election of Post-9/11 GI Bill benefits will remain available to the dependent to whom it was transferred. Dependents will remain eligible for transferred benefits under the provisions of the chapter from which benefits were transferred.

One commenter disagreed with the exclusion of transferred benefits as marital property. We made no change to this rule in the final regulation because 38 U.S.C. 3319(f)(3) prohibits the treatment of transferred entitlement as marital property.

We received one comment suggesting we specify the time limit for which dependents eligible for transferred entitlement may use their benefit. We make no change based on this comment as the period of eligibility for use of transferred benefits is listed in 38 CFR 21.9530, in paragraph (d) for spouses and in paragraph (e) for children.

One commenter recommended removing the kicker exclusion from the rate of payment for transferred benefits because there is no statutory provision limiting its payment to the dependent.