**Submitted via www.regulations.gov**

September 3, 2025

Dr. Steven L. Lieberman
Acting Under Secretary for Health
Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420

**Re: Comment Regarding "Reproductive Health Services" proposed rule, Docket No. VA-2025-VHA-0073, 90 F.R. 36415 (August 4, 2025)**

Dear Acting Under Secretary Lieberman,

Governing for Impact ("GFI") submits this comment on the proposed rule, "Reproductive Health Services" ("the proposed rule"), issued by the Department of Veterans Affairs ("VA").[1] GFI is a regulatory policy organization dedicated to ensuring that the federal government operates more effectively for everyday working Americans.[2] We appreciate the opportunity to comment, and we write in opposition to the proposed rule, which would bar VA from providing abortion care and counseling to those it serves unless a physician certifies that the life of the woman would be endangered if the fetus were carried to term. The proposed rule, if finalized, would fail to satisfy the Administrative Procedure Act's ("APA") requirements for reasoned decisionmaking. VA should withdraw the proposed rule, as it relies on alleged legal uncertainty arising from faulty legal interpretations and fails to adequately explain VA's change in position. Finally, we request that VA disclose information related to any use of artificial intelligence as part of this rulemaking and, to the extent such use is significant, provide an additional opportunity for public comment, as required under the APA.

I. *Any final rule relying on the proposed rule's justification that VA is uncertain whether it has legal authority to provide abortion care and counseling, or that VA is heeding congressional policy concerning abortion, would be arbitrary and capricious because VA's legal analysis is erroneous.*

VA justifies the proposed rule in part by arguing that its prior interim final rule (the "2022 IFR") and final rule authorizing VA to provide abortion care and counseling, which remain in effect, were "legally questionable," claiming that VA's authority is "at least[] dubious and, at most, nonexistent."[3] VA also argues that the 2022 IFR "contradicted decades of Federal policy against forced taxpayer

[1] 90 FR 36415 (Aug. 4, 2025).
[2] Governing for Impact, https://governingforimpact.org/.
[3] 90 FR 36416.

funding for abortion" established in statutory provisions like the Hyde Amendment.[4] Any new final rule relying on these erroneous interpretations of the relevant statutes would be arbitrary and capricious under the APA because VA "misconceive[s] the law."[5]

VA, in its 2022 IFR and 2024 final rule, provided persuasive explanations why, under both VA's general treatment authority, 38 U.S.C. § 1710, and the Civilian Health and Medical Program of the Department of Veterans Affairs ("CHAMPVA"), 38 U.S.C. § 1781, VA is authorized to provide abortion care and counseling.[6] VA specifically addressed section 106 of the Veterans Health Care Act of 1992, Pub. L. No. 102-585, 106 Stat. 4943, concluding that it does not prohibit VA from providing such care under its general treatment authority.[7] VA's explanations were bolstered by a 2022 opinion from the Department of Justice's Office of Legal Counsel, which remains controlling.[8]

While VA now is of the view that section 106 calls into question the lawfulness of providing abortion care under its general treatment authority, VA does not meaningfully grapple with its 2022 IFR's, its 2024 final rule's, or OLC's contrary conclusion or the reasons underlying that conclusion. The agency cannot ignore these persuasive and controlling legal rationales just because it wants to change its policy. And in the proposed rule, VA makes no attempt whatsoever to question its legal authority (as opposed to its policy discretion) to provide abortion care and counseling under CHAMPVA. VA's assertion that the 2022 IFR was "legally questionable" is therefore both unexplained and inexplicable. Because the proposed rule advances an incorrect interpretation of VA's authorizing statute, it "cannot be sustained."[9]

The proposed rule's gestures toward the Hyde Amendment and similar statutory provisions that restrict when federal funds can be used for abortion fare no better for at least two reasons. VA states that "[f]or nearly fifty years, and across a slew of Federal programs, including Medicaid, the Child Health Insurance Program, TriCare, Federal Employee Health Benefits Program, and others, Congress has consistently drawn a bright line between elective abortion and health care services that taxpayers would support."[10] Just so—and for those same fifty years Congress has chosen *not* to apply the Hyde Amendment or "any similar statutory restriction" to VA, as VA recognized in the 2022

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[4] *Id.*
[5] *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *see* 5 U.S.C. § 706(2)(A).
[6] *See* 87 FR 55287, 55288-91 (Sept. 9, 2022); 89 FR 15451, 15452–61 (Mar. 4, 2024) (also addressing and rebutting, among other things, alleged conflicts between the 2022 IFR and state laws, *Dobbs*, the Tenth Amendment, Department of Defense authorities, the Antideficiency Act, the Hyde Amendment, the Assimilative Crimes Act, and the major questions doctrine).
[7] 87 FR 55289 (addressing section 106's text, which confirms that its limitation on abortion care does not apply VA's authority to provide such services under 38 U.S.C. 1710 or 38 U.S.C. 1712, and addressing a subsequent statutory enactment that effectively overtook section 106; and congressional ratification of VA's longstanding interpretation of section 106, among other things).
[8] Memorandum Opinion for the Acting General Counsel, Dep't of Veterans Affairs, Intergovernmental Immunity for the Department of Veterans Affairs and Its Employees When Providing Certain Abortion Services (Sept. 21, 2022) (*slip op.*), https://perma.cc/K2W4-NBFQ; *see* Memorandum from David J. Barron, Acting Assistant Att'y Gen. to the Off. of Legal Couns., Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010).
[9] *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985).
[10] 90 FR 36416.

IFR and 2024 final rule.[11] In addition, even if the Hyde Amendment applied to VA, the proposed rule could find little support in it, as the proposed rule would not permit abortion in cases of rape or incest, whereas the Hyde Amendment does.[12] The proposed rule's appeals to congressional policy ignore or misconstrue the laws that Congress has actually enacted. Any final rule repeating those errors "may not stand."[13]

## II. *The proposed rule, if finalized, would be arbitrary and capricious for failing to adequately explain VA's change in position.*

When an agency changes an existing policy, it must at minimum "display awareness that it *is* changing position" and "offer good reasons for the new policy."[14] And when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy[,] or when its prior policy has engendered serious reliance interests that must be taken into account," the agency must "provide a more detailed justification"—"a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[15] VA acknowledges that it is "un-do[ing]" its prior position,[16] so the "change-in-position doctrine" applies.[17] But VA fails the doctrine's requirements, rendering the rule arbitrary and capricious if finalized as proposed.

### A. VA misrepresents the status quo, and even the proposed rule itself, and thus fails to "display awareness" of how the proposed rule changes position.

If an agency does not accurately describe its prior position or its regulatory proposal, it cannot "display awareness" of the change that it is proposing, making it impossible to "reasonably . . . discern[]" "the agency's path" from the original to the changed policy.[18] The proposed rule mischaracterizes both the status quo and its own proposal.

First, as noted above, the proposed rule suggests that the 2022 IFR provided for "elective abortion."[19] It further asserts that the 2022 IFR "creat[ed] a purported Federal entitlement to abortion for veterans" and "claim[ed] . . . that abortions throughout pregnancy are needed to save the lives of pregnant women."[20] In reality, the 2022 IFR was much narrower, providing for abortion only "if determined needed by a health care professional[] 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

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[11] 87 FR 55290; *accord* 89 FR 15459.
[12] *See, e.g.*, Further Consolidated Appropriations Act, 2024, Pub. L. 118-42, Stat. 460, 703, Sec. 202 (Mar. 23, 2024).
[13] *Chenery*, 318 U.S. at 94; *see Sea-Land Serv., Inc.* v. *Dep't of Transportation*, 137 F.3d 640, 646 (D.C. Cir. 1998).
[14] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see FDA v. Wages & White Lion Invs., LLC*, 145 S. Ct. 898, 918 (2025).
[15] *Fox*, 556 U.S. at 515; *see Wages & White Lion*, 145 S. Ct. at 918.
[16] 90 FR 36417.
[17] *Wages & White Lion*, 145 S. Ct. at 918.
[18] *Fox*, 556 U.S. at 513–14 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U. S. 281, 286 (1974)).
[19] 90 FR 36416.
[20] *Id.*

result of an act of rape or incest."[21] This is not a sweeping "entitlement" to "elective abortion," as VA now seems to claim. VA's misdescription of the status quo is further rebutted by VA's own regulatory impact analysis ("RIA") accompanying the proposed rule, which recognizes that VA provided only about 140 abortions per year in 2023 and 2024, likely because "VA has strictly adhered" to the policy established in the 2022 IFR and 2024 final rule.[22]

Second, the proposed rule's preamble misdescribes the proposed regulatory text, at least with respect to care under VA's general treatment authority. The preamble claims that the proposed rule "makes clear that the exclusion for abortion does not apply 'when a physician certifies that the life of the mother would be endangered if the fetus were carried to term.'"[23] But while this may accurately describe the effect of the proposed changes to the regulatory text with respect to CHAMPVA,[24] it is inaccurate with respect to the effect of the proposed changes concerning care under VA's general treatment authority: there, VA would simply reimpose a flat ban on coverage for all "[a]bortions and abortion counseling."[25] The preamble's claim that "VA has never understood" such a ban "to prohibit providing care to pregnant women in life-threatening circumstances,"[26] is of insufficient assurance, given that it is the text of a rule, not the preamble, that controls.[27]

Because the proposed rule mischaracterizes the status quo, and misdescribes itself even, it cannot adequately justify its proposed change.

B. VA does not "offer good reasons" for its proposed policy.

The proposed rule "disregard[s] [the] facts and circumstances that underlay" VA's 2022 IFR in failing to address its prior conclusions why abortion care is needed when the life or health of the pregnant veteran is at risk or in cases of rape and incest. The proposed rule asserts that the 2022 IFR's "stated basis for [its] determination that abortions were . . . a needed service was an anticipated rise in demand as a result of the *Dobbs* decision," and thus argues only that *Dobbs* did not render abortion services "needed" because demand was not as high as expected.[28] But the 2022 IFR and 2024 final rule were based on "[a]bundant evidence" regarding the health consequences of carrying certain

[21] 87 FR 55288.
[22] Regulatory Impact Analysis for RIN 2900-AS31(P), Reproductive Health Services 4 (July 30, 2025), https://downloads.regulations.gov/VA-2025-VHA-0073-0001/attachment_1.pdf (hereinafter "RIA").
[23] 90 FR 36416.
[24] 17 C.F.R. § 17.272(a)(58) (as proposed).
[25] *Id.* § 17.38(c)(1) (as proposed).
[26] 90 FR 36416
[27] *See, e.g.*, *Mejia-Velasquez v. Garland*, 26 F.4th 193, 202 (4th Cir. 2022); *Alpha Venture Cap. Partners LP v. Pourhassan*, 30 F.4th 920, 926 (9th Cir. 2022).
[28] 90 FR 36416.

pregnancies to term.[29] In the proposed rule, VA has not pointed to *any* evidence that undercuts the studies on which it relied, or the factual findings that it made, in 2022 and reaffirmed in 2024. If anything, VA's provision of abortion has likely only become more important since then as more states have banned or further restricted abortion,[30] even with respect to the categories authorized in the 2022 IFR.[31] Because the proposed rule disregards VA's previous factual findings, any final rule repeating that error will be arbitrary and capricious.

Relatedly, RIA fails to adequately "examine[] the relevant data" and "articulate[] a satisfactory explanation" as required by the APA.[32] For example, while the RIA attempts to estimate the increased costs of maternity care required for individuals who are no longer able to access abortion,[33] it does not address the various other social and economic costs associated with being denied abortion care—costs that VA itself documented in the 2022 IFR and 2024 final rule.[34] Furthermore, in its own estimation of what percentage of women would seek abortion elsewhere if VA does not cover abortion care, VA identifies 19 states with "high levels of abortion restrictions."[35] It is unclear what methodology VA used to identify these states, and other states with restrictive abortion bans—like Florida and Georgia, where one-eighth of the nation's female veterans live[36]—were inexplicably excluded from the RIA's estimates.[37] And although the RIA uses states with significant abortion restrictions as a proxy to estimate the number of veterans who would not seek abortions without VA support, as discussed below the cost of abortion care may also be prohibitive even for veterans in states without legal restrictions. Without accounting for the costs of being denied abortion care, VA has hardly met its burden to consider the relevant data.

C. VA fails to account for "serious reliance interests" in its existing policy.

The change-in-position doctrine requires an agency to assess whether there are reliance interests in its existing policy, determine whether they are significant, and "weigh any such interests against

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[29] *See* 87 FR 55291–92 (presenting evidence regarding the consequences of lack of access to abortion with respect to maternal mortality; loss of future fertility; exacerbation of underlying or preexisting conditions; development of new conditions such as severe preeclampsia, newly diagnosed cancer requiring prompt treatment, and intrauterine infections; and mental health, including serious traumatic stress, anxiety, or depression when the pregnancy results from rape or incest); 89 FR 15467 ("Without access to comprehensive reproductive health care, including abortion, . . . individuals may experience conditions resulting from their pregnancy that can leave them at risk for loss of future fertility, significant morbidity, or death.").

[30] *See* Nancy F. Berglas *et al.*, *Changes in Abortion Access, Travel, and Costs Since the Implementation of State Abortion Bans, 2022–2024*, 115 Am. J. Pub. Health (forthcoming).

[31] *See* Kaiser Family Found., *Policy Tracker: Exceptions to State Abortion Bans and Early Gestational Limits* (last updated Jan. 6, 2025), https://www.kff.org/womens-health-policy/exceptions-in-state-abortion-bans-and-early-gestational-limits/.

[32] *Wages & White Lion*, 145 S. Ct. at 917 (quotation omitted).

[33] RIA at 5–6.

[34] *See, e.g.*, Berglas, *supra* note 30.

[35] RIA at 5.

[36] *Veteran Population*, Nat'l Ctr. for Veterans Analysis and Stat. (last updated Mar. 26, 2025), https://www.va.gov/vetdata/veteran_population.asp (Age/Sex table under The States).

[37] *Id.*; *see* Kaiser Family Found., *Abortion in the United States Dashboard* (June 2, 2025), https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/.

competing policy concerns."[38] In the proposed rule, VA did not take even the first step to identify the existence of reliance interests, let alone conduct the significance and balancing inquiries the doctrine requires.

Veterans rely on VA's abortion coverage to pay for medically necessary services. Abortion care is expensive: the median out-of-pocket cost for an abortion in the first trimester was $563 in 2023 (and $1,000 in the second trimester).[39] Yet over a third of Americans say they would go into debt or sell their belongings to pay an emergency expense of just $400.[40] And as VA itself previously found, the inability to access abortion care is associated with numerous health consequences.[41] This may be particularly true for veterans, who "may be at heightened risk for . . . pregnancy complications," as the 2022 IFR recognized[42] and which the RIA itself admits.[43]

VA's proposed rule is entirely silent with respect to reliance interests. It does not acknowledge that the approximately 140 abortions VA provided each year from 2023–2024 demonstrate that veterans have come to rely on the care and counseling that the 2022 IFR authorized, it does not question whether that reliance is significant, and it does not weigh that reliance against competing factors. The proposed rule would be arbitrary and capricious if finalized as drafted.

### *III. Any use of artificial intelligence in this rulemaking must be disclosed.*

Finally, VA must disclose information related to any use of artificial intelligence as part of this rulemaking and, to the extent such use is significant, provide an additional opportunity for public comment.[44] Under the APA's reasoned decisionmaking requirement, "[w]hen an agency uses a computer model, it must explain the assumptions and methodology used in preparing the model."[45] Moreover, the public must have notice of, and an opportunity to comment on, agencies' uses of models and data, AI-enhanced and otherwise, to regulate.[46] Such disclosures are "[t]he safety valves in the use of . . . sophisticated methodology."[47]

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[38] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,* 591 U.S. 1, 33 (2020).
[39] Rosalyn Schroeder *et al.*, Advancing New Standards in Reprod. Health, Univ. of Cal., S.F., Trends in Abortion Services in the United States, 2017–2023, at 16 (2024).
[40] *See* Bd. of Governors of the Fed. Rsrv. Sys., Economic Well-Being of U.S. Households in 2024, at 41 (May 2025); *see also* Samuel L. Dickman, Viewpoint, *Affordability and Access to Abortion Care in the United States*, 181 JAMA Internal Med. 1157 (2021).
[41] *See supra* note 29.
[42] 87 FR 55291.
[43] RIA at 6.
[44] We adopt the definition of artificial intelligence at Pub. L. 115-232 § 238(g), 132 Stat. 1697–98.
[45] *Owner-Operator Ind. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 204 (D.C. Cir. 2007) (quotation omitted).
[46] *See Am. Radio Relay League v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008); *Air Transp. Ass'n v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999).
[47] *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981).

Beyond being legally required, disclosure of AI usage is prudent policy. Administrative agencies should uphold the values of transparency and public participation.[48] In particular, the Administrative Conference of the United States has recognized that "[a]gencies' efforts to ensure transparency in connection with their AI systems can serve many valuable goals," and it therefore recommends that "agencies might prioritize transparency in the service of legitimizing its AI systems, facilitating internal or external review of its AI-based decision making, or coordinating its AI-based activities."[49] Among other things, disclosure of AI usage allows the public to confirm that agencies are adhering to relevant laws, apply technical expertise to improve agencies' use of technology, assess the risk that federal policies might be influenced by biased or otherwise faulty methods or products, and learn about an emerging and important field of technology. Indeed, the Office of Management and Budget recently recognized that the government, in using AI, must "provide improved services to the public, while maintaining strong safeguards for civil rights, civil liberties, and privacy."[50]

Consistent with these requirements and principles, VA must disclose, first, whether it has used or plans to use AI as part of this rulemaking, including to develop substantive policy, produce supporting analysis, or respond to public comments. If so, VA must disclose the particular AI product it has used and why it was selected, how that product was procured, whether the product was fine tuned, what prompts or inputs the agency used to elicit responses from the product, and the responses the product produced. VA must also disclose how agency staff used AI-produced information, including any quality control, peer review, or other validation performed. And VA must disclose what measures it took to ensure that its use of AI complied with applicable data security and privacy requirements. To that end, it must disclose whether and to what extent any persons and entities not employed by the agency developed, modified, provided access to, or used AI in the course of the agency's decisionmaking process. To the extent the disclosed use of AI is significant, VA must provide an additional opportunity for public comment.

## *IV. Conclusion.*

The proposed rule violates the APA because it does not demonstrate reasoned decisionmaking. Its primary justification—that the 2022 IFR is legally "dubious"—is belied by VA's persuasive analyses from 2022 and 2024 and OLC's controlling 2022 opinion, none of which the proposed rule addresses. And the proposed rule fails to provide the justification that the Supreme Court has said is required when an agency changes course—namely, an understanding that the agency is changing course (requiring a correct understanding of both the status quo and the proposed rule itself), the agency's good reasons for the new policy (responsive to factual findings the agency previously made), and consideration of relevant reliance interests. Because the reasoning in the proposed rule is

[48] *See* Attorney General's Manual on the Administrative Procedure Act 9 (1947) (describing the APA's purposes to include "requir[ing] agencies to keep the public currently informed of their organization, procedures, and rules" and "provid[ing] for public participation in the rule making process").
[49] Admin. Conf. of the U.S., Statement #20, Agency Use of Artificial Intelligence, 86 FR 6612, 6616 (Jan. 22, 2021).
[50] Memorandum for the Heads of Executive Departments and Agencies from Russell T. Vought, Director, Office of Management & Budget 1, M-25-21 (Apr. 3, 2025), *available at* https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-21-Accelerating-Federal-Use-of-AI-through-Innovation-Governance-and-Public-Trust.pdf.

both faulty and insufficient, and particularly if VA used AI in preparing it, VA should withdraw the proposed rule.

Sincerely,

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