

**DEPARTMENT OF VETERANS AFFAIRS****38 CFR Part 3**

RIN 2900-AN33

**Claim-Related Documents or Supporting Evidence Not of Record****AGENCY:** Department of Veterans Affairs.**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to add a new section to its adjudication regulations to establish temporary VA procedures for when claimants allege the submission of claim-related documents or evidence in support of a claim during the time period of April 14, 2007, through October 14, 2008, and such documents or evidence are not of record in the official VA file.

**DATES:** Comments must be received by VA on or before January 11, 2010.

**ADDRESSES:** Written comments may be submitted through "<http://www.Regulations.gov>;" by mail or hand-delivery to Director, Regulation Policy and Management (O2REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20042; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AN33—Claim-Related Documents or Supporting Evidence Not of Record." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4923 for an appointment (this is not a toll-free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at "<http://www.Regulations.gov>."

**FOR FURTHER INFORMATION CONTACT:**

Thomas J. Kniffen, Chief, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (202) 461-9725 (This is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** On August 20, 2008, VA's Office of Inspector General (OIG) initiated an audit of select Veterans Benefits Administration (VBA) regional office (RO) mail processing procedures. VBA receives and processes approximately 25 million documents each year. The OIG audit team examined mail-handling activities and the activity that places claims under

electronic control in four ROs. The audit team found 36 pieces of active mail and 93 original support documents improperly designated for destruction by shredding. Documents identified as designated for destruction included, among other things, the following: VA Form 21-526, Veteran's Application for Compensation and/or Pension; VA Form 21-686c, Declaration of Status of Dependents; VA Form 21-674, Request for Approval of School Attendance; and documents constituting informal claims.

VA recognizes that the OIG's findings may have been indicative of a document-handling or shredding problem affecting numerous ROs at the time of the OIG audit and that this problem may have adversely impacted some veterans. In response to these findings, the Secretary suspended all document-shredding activities and provided new guidance and training to all RO personnel regarding the handling and shredding of claim-related documents and evidence in support of a claim. The Secretary also decided to establish temporary claims-handling procedures for veterans who allege that they submitted claim-related documents or evidence in support of a claim during the time period of April 14, 2007, through October 14, 2008, that are not of record in official VA files. This rule would codify the temporary claims-handling procedures, which include a relaxed evidentiary standard for the adjudication of claims involving alleged submissions of documents or evidence during this 18-month time period. These temporary procedures would reflect VA's pro-veteran response to the OIG's findings of improper document handling and control at the ROs.

October 14, 2008, is the date on which the Secretary suspended all document-shredding activities following the OIG audit. To ensure that claimants who may have been affected by the former document shredding activities have an opportunity to make assertions regarding missing documents, we propose to establish an 18-month time period from April 14, 2007, through October 14, 2008, during which affected claimants may receive the benefit of certain liberalized procedures. As we describe in greater detail below, the proposed 18-month period is based upon VA's claims adjudication experience. With regard to lost claims or applications for benefits, based on our experience, VA takes on average 6 months to process a claim. VA added an additional 12 months to reflect a reasonable amount of time for a claimant to learn that a submitted claim-related document may have been lost or mishandled by the RO.

With regard to lost evidence in support of a claim, the RO most likely would have issued a decision or a supplemental statement of the case within 18 months from the date of the alleged submission of evidence. Because the RO is required to summarize the evidence that it considered in denying a claim for benefits (38 U.S.C. 5104(b)(2)), a decision would have revealed that the RO had not considered the alleged submitted evidence. Also, the RO is required to address in a supplemental statement of the case new evidence submitted subsequent to the filing of a statement of the case (38 CFR 19.31(b)).

With regard to lost notices of disagreement, the RO is required to issue a statement of the case (38 U.S.C. 7105(d)) and usually does so within a year after receiving a notice of disagreement. With regard to lost substantive appeals, the Board, as a matter of practice soon after the processing of a formal appeal, will notify a claimant that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board (38 CFR 20.1304(a)).

Thus, we believe that, if a veteran contends that he or she submitted a claim-related document or evidence in support of a claim before April 14, 2007, the veteran reasonably would have inquired about the document submission or would have been informed of its misplacement or destruction within 18 months from the asserted date of submission, or prior to October 14, 2008.

We are particularly interested in comments regarding the proposed establishment of the 18-month period of April 14, 2007, through October 14, 2008, for an alleged submission of a claim-related document or evidence that is missing from official VA files for which VA will consider the asserted date of submission as the actual date of submission.

This rule would require a claimant to notify the RO within one year of the effective date of the final rule implementing the temporary claims handling procedures of an alleged submission during the 18-month period of April 14, 2007, through October 14, 2008. The one-year deadline reasonably gives claimants time to inform ROs of alleged submissions during the 18-month period and would be consistent with the 12-month time period given to claimants to file a Notice of Disagreement. After the expiration of this one-year period, VA would amend its regulations to remove the obsolete provisions in proposed § 3.218.

For claims allegedly submitted between April 14, 2007, and October 14, 2008, the effective date would be established in accordance with the date asserted by the claimant as the date on which the Secretary received the claim.

In general practice, when a claimant asserts the submission of a claim-related document or evidence in support of a claim that was not of record in the official VA file, VA requests the claimant to submit any available secondary evidence that would support the alleged previous submission. For example, VA would ask a claimant to submit a copy of the claim-related document or evidence date stamped by VA or the claimant's representative, or a dated transmittal or cover sheet from the claimant or claimant's representative relating to the pertinent document, together with copies of any documents that were included with the alleged previous submission. Accordingly, if a claimant asserts that a document was originally filed before April 14, 2007, or after October 14, 2008 (or if a claimant asserts after the one-year period following the effective date of the final rule that a document was originally filed during the time period of April 14, 2007, through October 14, 2008) and such document is not of record in official VA files, VA would ask the claimant to submit similar secondary evidence to support the alleged previous submission, consistent with VA's general practice. If entitlement to benefits is established under this scenario, VA would assign an effective date in accordance with the facts found based on credible corroborating evidence submitted by the claimant and applicable laws and regulations.

#### 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 an 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 given year. This rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### Executive Order 12866

Executive Order 12866 directs agencies to assess all 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). The Executive Order classifies a "significant regulatory action" requiring review by the Office of Management and Budget, 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 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 entitlement recipients; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

VA has examined the economic, interagency, budgetary, legal, and policy implications of this proposed rule and has concluded that it is a significant regulatory action under Executive Order 12866 because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

#### Paperwork Reduction Act

This document contains no provisions constituting a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

#### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would 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. The rule could affect only VA beneficiaries and would not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rule would be exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

#### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are as follows: 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans, Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity

Compensation for Service-Connected Death.

#### List of Subjects in 38 CFR part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: August 11, 2009.

**John R. Gingrich,**

*Chief of Staff, Department of Veterans Affairs.*

For the reasons set forth in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 3 as follows:

### PART 3—ADJUDICATION

#### Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

**Authority:** 38 U.S.C. 501(a), unless otherwise noted.

2. Add § 3.218 to read as follows:

#### § 3.218 Claim-Related Documents or Supporting Evidence Not of Record.

(a) *Submissions during the time period of April 14, 2007, through October 14, 2008.* If a claimant or claimant's representative asserts that a claim-related document or evidence in support of a claim was originally filed with VA during the time period of April 14, 2007, through October 14, 2008, and such document or evidence is missing from official VA files, VA will consider the asserted date of submission as the actual date of submission. VA will apply procedures under this section only for assertions made before the end of the 1-year period following [EFFECTIVE DATE OF FINAL RULE].

(b) *Additional requirements and procedures for alleged submissions under paragraph (a).* (1) If the claimant's assertion refers to an original claim, a claim for increased benefits, or a claim for reopening, the claimant must submit either a copy of the previously submitted claim form or a new claim form. VA will provide the claimant with assistance and notification of the required evidence and information upon receipt of a substantially complete application, as necessary under § 3.159 of this part, and will develop the claim pursuant to existing procedures.

(2) If the claimant's assertion refers to evidence in support of a claim, the claimant must identify the claim to which the evidence pertains and submit a copy of the evidence, or, if the evidence is no longer available, a description of such evidence or a completed VA Form 21–4142.

(3) If the claimant's assertion refers to a document relating to the appeal of an administrative decision, such as a notice of disagreement or substantive appeal, VA will follow proper appeal procedures based on date of receipt of the document, as determined under this section.

(4) If the only issue raised by the claimant's assertion concerns the effective date of an award for benefits for a claim already decided, VA will establish the proper effective date without additional development.

(c) *Effective dates.* For claims allegedly submitted between April 14, 2007, and October 14, 2008, the effective date will be established in accordance with the date asserted by the claimant as the date on which the Secretary received the claim.

(Authority: 38 U.S.C. 501(a)(1))

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 0907301206-91208-01]

RIN 0648-AY13

#### Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Specifications and Management Measures

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes 2010 specifications and management measures for Atlantic mackerel, squid, and butterfish (MSB). This action proposes to maintain quotas for Atlantic mackerel (mackerel), *Illex* squid (*Illex*), *Loligo* squid (*Loligo*), and butterfish at the same levels as 2009. This action also proposes to modify accounting procedures for underages of Trimester 1 quotas in the *Loligo* fishery so that Trimester 1 quota underages that are greater than 25% of the Trimester 1 quota would be allocated equally to Trimesters 2 and 3, and underages that are less than 25% of the Trimester 1 quota would be allocated to Trimester 3. Additionally, this action proposes to increase the minimum mesh size requirement for codend covers in the

*Loligo* fishery from 4.5 inches to 5 inches. These proposed specifications and management measures promote the utilization and conservation of the MSB resource.

**DATES:** Public comments must be received no later than 5 p.m., eastern standard time, on December 14, 2009.

**ADDRESSES:** Copies of supporting documents used by the Mid-Atlantic Fishery Management Council (Council), including the Environmental Assessment (EA) and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), are available from: Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19904-6790. The EA/RIR/IRFA is accessible via the Internet at <http://www.nero.noaa.gov>.

You may submit comments, identified by 0648-AY13, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking portal <http://www.regulations.gov>;
- Fax: (978) 281-9135, Attn: Carrie Nordeen;
- Mail to NMFS, Northeast Regional Office, 55 Great Republic Dr, Gloucester, MA 01930. Mark the outside of the envelope "Comments on 2010 MSB Specifications."

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF formats only.

**FOR FURTHER INFORMATION CONTACT:** Carrie Nordeen, Fishery Policy Analyst, 978-281-9272, fax 978-281-9135.

#### SUPPLEMENTARY INFORMATION:

##### Background

Regulations implementing the Fishery Management Plan for the Atlantic Mackerel, Squid, and Butterfish Fisheries (FMP) appear at 50 CFR part 648, subpart B. Regulations governing foreign fishing appear at 50 CFR part 600, subpart F. These regulations at § 648.21 and 600.516(c), require that NMFS, based on the maximum optimum yield (Max OY) of each fishery as established by the regulations,

annually publish a proposed rule specifying the amounts of the initial optimum yield (IOY), allowable biological catch (ABC), domestic annual harvest (DAH), and domestic annual processing (DAP), as well as, where applicable, the amounts for total allowable level of foreign fishing (TALFF) and joint venture processing (JVP) for the affected species managed under the FMP. In addition, these regulations allow specifications to be specified for up to 3 years, subject to annual review. The regulations found in § 648.21 also specify that IOY for squid is equal to the combination of research quota (RQ) and DAH, with no TALFF specified for squid. For butterfish, the regulations specify that a butterfish bycatch TALFF will be specified only if TALFF is specified for mackerel.

At its June 9-11, 2009, meeting in New York, NY, the Mid-Atlantic Fishery Management Council (Council) recommended 2010 MSB specifications. The recommended specifications for mackerel, *Illex*, *Loligo*, and butterfish are the same as those implemented in 2009. For *Loligo*, the Council recommended a modification in accounting Trimester 1 quota underages. The Council also recommended increasing the minimum mesh size requirement for codend covers in the *Loligo* fishery. The Council submitted these recommendations, along with the required analyses, for agency review on August 10, 2009.

##### Research Quota

Framework Adjustment 1 to the FMP established the Mid-Atlantic Research Set-Aside (RSA) Program, which allows research projects to be funded through the sale of fish that has been set aside from the total annual quota. The RQ may vary between 0 and 3 percent of the overall quota for each species. The Council has recommended that 3 percent of the 2010 *Loligo*, *Illex*, butterfish, and mackerel quotas be set aside to fund projects selected under the 2010 Mid-Atlantic RSA Program.

NMFS solicited research proposals under the 2010 Mid-Atlantic RSA Program through the **Federal Register** (74 FR 75, January 2, 2009). The deadline for submission was March 3, 2009. The project selection and award process for the 2010 Mid-Atlantic RSA Program has not concluded and therefore, the research quota awards are not known at this time. When the selection process has concluded, projects requesting RQ will be forwarded to the NOAA Grants Office for award. If any portion of the RQ is not awarded, NMFS will return any un-awarded RQ to the commercial fishery