National Indian Health Board

February 13, 2023

Denis McDonough
Secretary
Department of Veterans Affairs
810 Vermont Ave N.W.
Washington, D.C. 20420

Submitted via regulations.gov

Re: Copayment Exemption for Indian Veterans (VA-2023-VHA-0005)

Dear Secretary McDonough:

On behalf of the National Indian Health Board and the 574+ federally recognized American Indian and Alaska Native (AI/AN) Tribes we serve, thank you for the opportunity to provide feedback and recommendations on the proposed rule on Copayment Exemption for Indian Veterans.

NIHB strongly supports the congressionally mandated exemption from VA imposed healthcare copayments for veterans meeting the definition of Indian, as those terms are defined in the *Indian Health Care Improvement Act (IHCIA)*. Exempting Indian veterans will help address inequities in health care access, create parity across federal sources of health care (i.e., Indian Health Service (IHS) and Veterans Health Administration), and live up to the federal trust responsibility. While this proposed rule brings us one step closer to these goals, it could be more effective if it is revised to expand the services covered by the exemption and to make it easier for Indian veterans to make use of this exemption. As such, NIHB makes the following specific comments, requests, and recommendations in response to January 12, 2023 request for comments on the proposed rule with further explanation and evidence below:

- NIHB requests that VA utilize self-attestation in determining eligibility for copayment exemptions and provide a six-month grace period for any required verification
- NIHB requests that VA exempt Indian veterans from all copayments, including urgent care visits needed by Indian veterans
- NIHB requests that VA make clear that the copay exemption exists because of the trust responsibility
- NIHB requests that VA host a Tribal consultation on the proposed rule

I. Indian Veterans and the Trust Responsibility

American Indians and Alaska Natives have served in the United States military in every major armed conflict in the Nation's history and have traditionally served at a higher rate than any other ethnic group in the United States.[1] This includes at least 9,000 Native American men who served the United States in World War One, before this country granted universal citizenship to American Indians and who suffered a casualty rate five times higher than the total force; 42,000 AI/ANs who served in the Vietnam War, representing twenty-five percent (25%) of the total AI/AN population at the time; and at least 33,538 AI/ANs who have served following September 11, 2001.[2] In return for their military service, the United States promised all veterans, including Native veterans, "exceptional health care that improves their health and well-being."[3]

[1] Proclamation on National Native American Heritage Month, 86 C.F.R. § 60545 (2021), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/29/a-proclamation-on-national-native-american-heritage-month-2021/.
[2] *See* U.S. Department of Veterans Affairs, American Indian and Alaska Native Veterans, 2017 27-28 (May 2020), https://www.va.gov/vetdata/docs/SpecialReports/AIAN.pdf ; Tanya Thatcher, James Ring Adams & Anne Bolen, Patriot Nations: Native Americans in Our Nation's Armed Forces, 17 American Indian Magazine 3 (2016), https://www.americanindianmagazine.org/story/patriot-nations-native-americans-our-nations-armed-forces.
[3] Veterans Health Administration, About VHA, https://www.va.gov/health/aboutVHA.asp.

The need for exceptional health care for Native veterans is especially important given that they are more likely to be uninsured and have a service-connected disability than other veterans.[4]

However, this nation's responsibility to provide exceptional health care to Native veterans extends beyond that owed to them in return for their military service. The United States also has a well-established trust responsibility to "maintain and improve the health of the Indians."[5] Unfortunately, VA copayments have historically represented a significant barrier to American Indian and Alaska Native veterans' ability to access the healthcare this Nation owes them through VA facilities.[6] Recognizing that VA copayments were a roadblock to fulfilling the United States' trust obligation, Congress passed the *Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020* specifically directing VA to exempt veterans meeting the definition of Indian and urban Indian, as defined by the IHCIA, from VA copayments.[7]

Unfortunately, it is now two years since the passage of the VA copayment exemption by Congress and VA has failed to implement this critical legislation. While this proposed rule is progress towards implementation, the strict requirements will further delay Indian veterans' ability to access the care that the United States owes to them.

II. The Copayment Exemption Should Cover all Urgent Care Visits for Indian Veterans

NIHB strongly urges VA to revise its proposed amendments to 38 CFR § 17.4600 to permit veterans meeting the definition of Indian or urban Indian to be exempt from copayments for more than the first three urgent care visits in a calendar year. Charging a copayment for urgent care visits is directly contrary to the United States' trust responsibility to "maintain and improve the health of the Indians."[8] Congress has clearly stated that in fulfilling the trust responsibility, it is the policy of the United States "to ensure the highest possible health status for Indians and urban Indians and **to provide all resources necessary** to effect that policy."[9] As was previously discussed, Congress' intent in passing the copayment exemption was to further the United States' efforts to meet its trust responsibility. While VA argues that the limitation to three exempted urgent care visits is consistent with policies for other copay-exempted veterans, the trust responsibility is uniquely owed to Indian veterans, and so the limitation should not apply.

Additionally, VA argues that limiting copay exemptions for urgent care will "encourage appropriate use of the benefit," so that urgent care does not replace primary care. However, for many Tribal citizens, urgent care is accessible and primary care is not. Rather than encouraging the use of primary care, the higher cost of urgent care may instead encourage Indian veterans to delay or forgo needed care, leading to greater inequities in health outcomes.

There is no requirement in law or regulation that VA charge Native veterans a copayment for urgent care visits. Congress has left this decision squarely within VA's administrative authority.[10] VA must use that

[4] Department of Veterans Affairs, American Indian and Alaska Native Veterans: 2017 14-19 (2020), https://www.va.gov/vetdata/docs/SpecialReports/AIAN.pdf.
[5] 25 U.S.C. § 1601(1).
[6] U.S. Government and Accountability Office, *VA and Indian Health Service Actions Needed to Strengthen Oversight and Coordination of Health Care for American Indian and Alaska Native Veterans*, GAO-19-921, Mar. 2019, *available at* https://www.gao.gov/assets/gao-19-291.pdf (stating that officials at IHS and Tribal healthcare facilities, "as well as IHS headquarters officials and representatives of two national tribal organizations said that the copayments that VA charges veterans represented a barrier to AI/AN veterans receiving care.").
[7] Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, Pub. L. No. 116-315, 134 Stat. 4931 (Jan 5. 2021), *available at* https://www.govinfo.gov/content/pkg/PLAW-116publ315/pdf/PLAW-116publ315.pdf; U.S. Senate Committee on Veterans Affairs, Chairman Moran, Ranking Member Tester Introduce Bipartisan Bill to Increase Native American Veterans' Access to VA Health Care, Eliminate Copays, Nov. 19, 2020, https://www.veterans.senate.gov/2020/11/chairman-moran-ranking-member-tester-introduce-bipartisan-bill-to-increase-native-american-veterans-access-to-va-health-care-eliminate-copays.
[8] 25 U.S.C. § 1601(1).
[9] 25 U.S.C. § 1602(1).
[10] 38 U.S.C. § 1725f(1)(A)(B).

authority to fulfill the trust obligation as Congress intended and exempt Native veterans from all copayment requirements for urgent care visits.

III. Verification of Eligibility

NIHB urges VA to revise its proposed changes to 38 C.F.R. § 17.108(d)(14), and other relevant portions of the Code of Federal Regulations, to permit a veteran meeting the definition of Indian or urban Indian, as defined in IHCIA, to self-attest as to whether they meet these definitions. VA's proposed regulatory amendments place VA in the untenable position of evaluating and determining the veracity of Tribal identification or other documentation showing eligibility for the copayment exemption. Further, the proposed identification requirements present an unreasonable risk that VA will not provide the copayment exemption to veterans who meet the legal definition of Indian or urban Indian because they place a significant administrative burden on vulnerable Native veterans who meet the eligibility requirements but may not be able to produce documentation because of financial hardship or housing insecurity. In addition, VA has not provided any evidence to support its conclusion that "all veterans who are Indian and urban Indian pursuant to the definitions in 25 U.S.C. 1603(13) and (28) would be able to obtain and submit to VA the documents listed above that are applicable to their status in order to establish their status as Indian or urban Indian"[11] or its assertion that "self-attestation presents an unreasonable risk that VA would provide the copayment exemption to veterans who do not meet the legal definition of Indian or urban Indian."

VA must make self-attestation the primary mechanism for identification. Self-attestation still allows VA to implement a policy where it may later verify or review if questions arise, but self-attestation will ensure that Indian veterans receive their exemptions immediately. If VA does require some form of documentation to verify eligibility, there should be a six-month grace period to allow the veteran to supply the necessary documentation of their status as "Indian." VA must make every effort to ensure that the process for verifying eligibility as an Indian veteran does not constitute a barrier to care for Indian veterans with limited financial means. To that end, we offer the following recommendations:

- Enough information should be provided in the enrollment and intake process to ensure that individuals are able to determine whether they are entitled to this special copay exemption.
- The exemption from copays should begin as soon as a veteran attests that they are "Indian or urban Indian." VA should then allow a minimum of six months for the veteran to supply the necessary documentation of their status as "Indian or urban Indian."
- Allow patient records from IHS, Tribal, and Urban Indian Organization (ITU) health care providers to count as allowable documentation of status as "Indian or urban Indian."
- Wherever possible, reduce the burden on individual veterans by improving the coordination and interoperability of systems. For example, if an Indian veteran has ever visited an IHS facility, when that veteran's health records are shared with VA, the veteran's status as "Indian or urban Indian" should be automatically established without additional documentation required.
- If VA seeks additional documentation from a veteran, the exemption should remain in place until the veteran's appeal has been completed.
- Place the decision-making authority for eligibility determinations within the purview of staffers with specialized training and the requisite subject matter expertise to accurately recognize and interpret documentation that will be presented to them (rather than with frontline staff). The process of verifying whether someone is an "Indian" for the purposes of this exemption can be complex and requires a level of expertise that VA intake staff may not have. For example, staff would have to interpret documentation that verifies descendancy or membership in a state or federally recognized Tribe.

[11] Copayment Exemption for Indian Veterans, 88 Fed. Reg. 2038, 2040 (Jan. 12, 2023), https://www.federalregister.gov/documents/2023/01/12/2023-00364/copayment-exemption-for-indian-veterans.

NIHB supports the proposed option for retroactive reimbursement and urges VA to ensure this is implemented smoothly so that veterans automatically receive their reimbursements without any extra administrative burden.

IV. Additional Recommendations to Maximize Effectiveness of Copay Exemption

NIHB also offers additional recommendations to maximize the effectiveness of the copay exemption. First, when implemented, the verification process should be streamlined across all VA health care facilities and all relevant staff should be provided adequate training to ensure eligible veterans do not miss out on this exemption. Additionally, the rule and implementation should include specific steps to ensure awareness. For example, a significant amount of outreach to VA clinics, community providers, and Native veterans is necessary, and VA should include notifying Native active duty servicemembers of this benefit during the process of the Disability Evaluation System prior to leaving the service.

Second, VA should share data with Indian Country on the utilization of this exemption to improve accountability. This data should be shared on a yearly basis and broken down by region. This data will be essential for ensuring that Indian Country has the information it needs to certify that Native veterans are benefiting from this program and to conduct outreach efforts to increase participation. It also will help Indian Country hold VA accountable for ensuring that Native veterans are receiving this benefit.

V. VA Must Make Clear that the Covered Services Copay Exemption Exists Because of the Trust Responsibility

NIHB recommends that VA include a section in the proposed rule that acknowledges the United States' trust responsibility to provide the services and resources needed to "maintain and improve the health of the Indians."[12] NIHB reminds VA that Native veterans are entitled to the copayment exemption because of the trust responsibility. The federal government's responsibility to provide health care free-of-cost to AI/AN people does not end simply because a Indian veteran receives care at VA as opposed to an ITU facility.

To ensure that this final rule is not misused by those who intentionally misunderstand and attack the United States' relationship with AI/ANs, we recommend adding additional language in the final rule under the "Covered Services" section that explicitly recognizes the federal government's ability to provide and support services for Native veterans in fulfillment of the trust responsibility for health care provisions for all AI/ANs.

VI. Conclusion

This exemption's effective implementation is important because copays' cost can prevent Indian veterans from accessing needed health care. This rule will determine the extent to which the intended copay exemption effectively reduces this barrier to care. We urge VA to reduce the burden of documentation for Indian veterans and to ensure all urgent care visits are copay-exempt. NIHB further recommends VA host Tribal consultation with Tribal leaders to gain a better understanding of the impact this will have on the veteran communities it serves. We look forward to continued partnership to improve access to care for Native veterans and to advance health equity.

Sincerely,

William Smith, *Valdez Native Tribe*
Chairman
National Indian Health Board

[12] 25 U.S.C. § 1601(1).