

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 301**

[REG-124872-04]

RIN 1545-BD37

**Clarification of Definitions; Hearing Cancellation****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Cancellation of public hearing on proposed rulemaking by cross-reference to temporary regulations.**SUMMARY:** This document cancels a public hearing on a notice of proposed rulemaking by cross-reference to temporary regulations under section 7701 of the Internal Revenue Code that provide clarification of the definitions of a corporation and a domestic entity in circumstances where the business entity is considered to be created or organized in more than one jurisdiction.**DATES:** The public hearing originally scheduled for November 3, 2004, at 10 a.m., is cancelled.**FOR FURTHER INFORMATION CONTACT:** Sonya M. Cruse of the Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedures and Administration), (202) 622-4693 (not a toll-free number).**SUPPLEMENTARY INFORMATION:** A notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing that appeared in the *Federal Register* on Thursday, August 12, 2004 (69 FR 49840), announced that a public hearing was scheduled for November 3, 2004 at 10 a.m., in the auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW., Washington, DC. The subject of the public hearing is under section 7701 of the Internal Revenue Code.

The public comment period for these regulations expired on October 15, 2004. The notice of proposed rulemaking instructed those interested in testifying at the public hearing to submit a request to speak and an outline of the topics to be addressed. As of Wednesday, October 20, 2004, no one has requested to speak. Therefore, the public hearing scheduled for November 3, 2004, is cancelled.

**Cynthia E. Grigsby,***Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedures and Administration).*

[FR Doc. 04-23843 Filed 10-22-04; 8:45 am]

BILLING CODE 4830-01-P

**DEPARTMENT OF THE TREASURY****Fiscal Service****31 CFR Part 344**

[Department of the Treasury Circular, Public Debt Series No. 3-72]

**U.S. Treasury Securities—State and Local Government Series; Extension of Comment Period****AGENCY:** Bureau of the Public Debt, Fiscal Service, Treasury.**ACTION:** Notice of proposed rulemaking; extension of comment period.**SUMMARY:** The Department of the Treasury is extending the comment period for the notice of proposed rulemaking published September 30, 2004, proposing revisions of the regulations governing State and Local Government Series (SLGS) securities. SLGS securities are non-marketable Treasury securities that are only available for purchase by issuers of tax-exempt securities. The notice of proposed rulemaking provided for a comment period to end on November 1, 2004. Treasury is extending the comment period to November 16, 2004, in response to industry requests for more time to provide comments.**DATES:** Comments must be received no later than November 16, 2004.**ADDRESSES:** You may submit comments, identified by Docket Number BPD-02-04, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Agency Web Site: <http://www.publicdebt.treas.gov>. Follow the instructions for submitting comments via e-mail to [opda-sib@bpd.treas.gov](mailto:opda-sib@bpd.treas.gov).
- E-mail: [opda-sib@bpd.treas.gov](mailto:opda-sib@bpd.treas.gov). Include Docket Number BPD-02-04 in the subject line of the message.
- Fax: 304-480-5277.
- Mail: Keith Rake, Deputy Assistant Commissioner, Office of the Assistant Commissioner, Bureau of the Public Debt, Department of the Treasury, P.O. Box 396, Parkersburg, WV 26101-0396, or Edward Gronseth, Deputy Chief Counsel, Elizabeth Spears, Senior Attorney, or Brian Metz, Attorney-Adviser, Office of the Chief Counsel, Bureau of the Public Debt, Department of the Treasury, P.O. Box 1328, Parkersburg, WV 26106-1328.

- Hand Delivery/Courier: Keith Rake, Deputy Assistant Commissioner, Office of the Assistant Commissioner, Bureau of the Public Debt, Department of the Treasury, 200 3rd St., Parkersburg, WV 26101, or Edward Gronseth, Deputy Chief Counsel, Elizabeth Spears, Senior

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Attorney, or Brian Metz, Attorney-Adviser, Office of the Chief Counsel, Bureau of the Public Debt, Department of the Treasury, 200 3rd St., Parkersburg, WV 26101.

*Instructions:* All submissions received must be addressed to the Bureau of the Public Debt and include the Docket Number for this notice of proposed rulemaking, BPD-02-04. All comments received will be posted without change to <http://www.publicdebt.treas.gov>. The posting will include any personal information that you provide in the submission.**FOR FURTHER INFORMATION CONTACT:**Keith Rake, Deputy Assistant Commissioner, Office of the Assistant Commissioner, Bureau of the Public Debt, P.O. Box 396, Parkersburg, WV 26106-0396, (304) 480-5101, or by e-mail at [opda-sib@bpd.treas.gov](mailto:opda-sib@bpd.treas.gov) or Edward Gronseth, Deputy Chief Counsel, Elizabeth Spears, Senior Attorney, or Brian Metz, Attorney-Adviser, Office of the Chief Counsel, Bureau of the Public Debt, Department of the Treasury, P.O. Box 1328, Parkersburg, WV 26106-1328, (304) 480-8692, or by e-mail at [opda-sib@bpd.treas.gov](mailto:opda-sib@bpd.treas.gov).**SUPPLEMENTARY INFORMATION:** The notice of proposed rulemaking for which the comment period is being extended was published on September 30, 2004, at 69 FR 58756. In order to provide ample time for interested parties to review and comment on the notice of proposed rulemaking, the comment period is extended until November 16, 2004.

Dated: October 20, 2004.

**Donald V. Hammond,***Fiscal Assistant Secretary.*

[FR Doc. 04-23897 Filed 10-21-04; 10:19 am]

BILLING CODE 4810-39-P

**DEPARTMENT OF VETERANS AFFAIRS****38 CFR Parts 3 and 20**

RIN 2900-AL86

**Dependency and Indemnity Compensation: Surviving Spouse's Rate; Payments Based on Veteran's Entitlement to Compensation for Service-Connected Disability Rated Totally Disabling for Specified Periods Prior to Death****AGENCY:** Department of Veterans Affairs.**ACTION:** Proposed rule.**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its

adjudication regulations concerning payment of dependency and indemnity compensation (DIC) for certain non-service-connected deaths and the rate of DIC payable to a surviving spouse for either service-connected or non-service-connected deaths. The proposed rules would clarify VA's interpretation of similar statutes governing both matters, which provide for payments to the survivors of veterans who were, at the time of death, in receipt of or entitled to receive disability compensation for service-connected disability that was rated totally disabling for a specified period prior to death. The proposed rules would also reorganize and revise the regulations governing surviving spouses' DIC rate with the intent of making them easier to identify and understand. VA also proposes to reissue, with a minor nonsubstantive change, the Board of Veterans' Appeals rule concerning the effect of unfavorable decisions during a veteran's lifetime on claims for death benefits by the veteran's survivors. This reissuance is necessitated by a court decision vacating VA's prior action in revising that rule.

**DATES:** Comments must be received on or before December 27, 2004.

**ADDRESSES:** Mail or hand deliver written comments to: Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., Room 1068, NW., Washington, DC 20420; or fax comments to (202) 273-9026; or e-mail comments to [VAregulations@mail.va.gov](mailto:VAregulations@mail.va.gov); or, through [www.Regulations.gov](http://www.Regulations.gov). Comments should indicate that they are submitted in response to "RIN 2900-AL86." All comments received will be available for public inspection in the Office of Regulations Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273-9515 for an appointment.

**FOR FURTHER INFORMATION CONTACT:** David Barrans, Staff Attorney (022), Office of General Counsel, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-6332.

**SUPPLEMENTARY INFORMATION:** VA proposes to revise its regulations relating to DIC to clarify its interpretation of two statutory provisions and to reorganize and restate provisions in current VA regulations. Specifically, we propose to move the provisions of current 38 CFR 3.5(e) to a new regulation at 38 CFR 3.10, to revise those provisions, and to revise 38 CFR 3.22(b).

DIC is a benefit paid to survivors of veterans in cases of service-connected death or certain cases of non-service-connected death. Provisions governing entitlement to DIC for service-connected death are set forth in 38 CFR 3.5(b), while provisions governing entitlement to DIC in cases of certain non-service-connected deaths are set forth in 38 CFR 3.22. Provisions governing the rate of DIC payable to a surviving spouse in either circumstance are set forth in 38 CFR 3.5(e). Because those payment-rate provisions apply to DIC awarded under either § 3.5 or § 3.22, their placement in § 3.5 may cause unnecessary confusion. Accordingly, we propose to delete paragraph (e) from current § 3.5, and to establish a separate regulation in 38 CFR 3.10 to govern the rate of DIC payment to a surviving spouse. In new § 3.10, we propose to reorganize the existing provisions of § 3.5(e), to revise certain language for clarity, and to significantly elaborate upon the criteria governing one basis for entitlement to DIC payment at a level above the basic DIC rate, as explained below.

Current § 3.5(e)(1) states that, for deaths occurring on or after January 1, 1993, DIC will be paid at a flat rate specified in 38 U.S.C. 1311(a)(1). Section 3.5(e)(1) further states, however, that the basic rate may be increased by a specified amount in the case of the death of a veteran who at the time of death was in receipt of or "entitled to receive" compensation for a service-connected disability that was rated as totally disabling for a continuous period of at least eight years immediately preceding death. In a decision in *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 314 F.3d 1373 (Fed. Cir. 2003) ("NOVA"), the United States Court of Appeals for the Federal Circuit criticized VA for not elaborating upon the meaning of the phrase "entitled to receive" in this provision, as VA had done in § 3.22, where that phrase is also used. The Court ordered VA to revise its regulations for clarity and consistency. Although the court gave VA the option of amending either § 3.5(e) or 38 CFR 20.1106, VA has concluded that the meaning of the phrase "entitled to receive" logically should be explained in a revision to § 3.5(e), the regulation that uses that phrase and sets forth the substantive criteria governing DIC payment rates. Because we propose to move the relevant provisions of § 3.5(e) to 38 CFR 3.10, we will address the meaning of the phrase "entitled to receive" in § 3.10.

VA has concluded that the phrase "entitled to receive" should be given the same meaning for purposes of both

§ 3.22 and § 3.5(e) and the Federal Circuit upheld that conclusion in its January 2003 NOVA decision. Section 3.22 implements 38 U.S.C. 1318, which provides that basic entitlement to DIC may be established in certain cases of non-service-connected deaths, if the veteran, at the time of death, was in receipt of or "entitled to receive" compensation for a service-connected disability that was either continuously rated totally disabling for a period of ten or more years immediately preceding death, or was so rated continuously for a period of not less than five years from the date of separation from service to the date of death, or in the case of a former prisoner of war who died after September 30, 1999, was so rated for a period of not less than one year immediately preceding death. Section 3.5(e) implements 38 U.S.C. 1311(a)(2), which provides that a survivor having entitlement to DIC at the basic rate may receive an enhanced DIC payment in cases where the veteran was, at the time of death, in receipt of or "entitled to receive" compensation for a service-connected disability that was rated totally disabling for a continuous period of at least eight years immediately preceding death.

In the **Federal Register** of April 5, 2002, VA published a final rule amending 38 CFR 20.1106 to provide, in effect, that a survivor's claim under either section 1311 or 1318 must be decided with reference to decisions rendered during the veteran's lifetime. 67 FR 16309 (2002). That rule reflects our conclusion that a veteran could have been in receipt of or entitled to receive total disability compensation for a specified number of years prior to death only if VA had granted such benefits during the veteran's lifetime or had denied the benefits based on an error that could be corrected retroactively under the laws governing veterans' benefits. We have explained the basis for this conclusion in several prior notices in the **Federal Register**. See 67 FR 16309 (2002); 66 FR 65861 (2001); 65 FR 3388 (2000). In its January 2003 NOVA decision, however, the Federal Circuit stated that VA's regulations were disparate in that § 3.22 contained a detailed definition of the phrase "entitled to receive" for purposes of 38 U.S.C. 1318, but neither § 3.5(e) nor § 20.1106 contained a similarly detailed definition of that phrase for purposes of 38 U.S.C. 1311. To eliminate that disparity, we propose to include in new § 3.10 a definition of the phrase "entitled to receive" that will be nearly identical to the definition in § 3.22(b), with only minor differences

necessary to reference the different durational requirements of the two governing statutes. As explained below, we propose to revise the definitional provisions of current § 3.22(b) in two respects, and those revisions will be reflected in the definition of “entitled to receive” included in new § 3.10.

Section 3.22(b) currently defines the phrase “entitled to receive” to mean that, at the time of death, the veteran had service-connected disability that was rated totally disabling by VA but was not receiving compensation because: (1) VA was paying the compensation to the veteran’s dependents; (2) VA was withholding the compensation to offset an indebtedness of the veteran; (3) the veteran had applied for compensation but had not received total disability compensation for the required number of years prior to death due solely to a clear and unmistakable error in a VA decision; (4) the veteran had not waived retired or retirement pay; (5) VA was withholding payments under the provisions of 10 U.S.C. 1174(h)(2); (6) VA was withholding payments because the veteran’s whereabouts were unknown but the veteran was otherwise entitled to payment; or (7) VA was withholding payments under 38 U.S.C. 5308 but determines that benefits were payable under 38 U.S.C. 5309. We propose to adopt these criteria into new § 3.10 with certain changes discussed below, which will be made in both § 3.10 and § 3.22(b).

#### Revision of § 3.22(b)

We propose to revise § 3.22(b) in two respects. First, we propose to reorganize and restate the provision concerning correction of clear and unmistakable error (CUE) to eliminate a potential ambiguity in the current regulation. Second, we propose to include one additional circumstance under which a veteran may be found to have been “entitled to receive” total disability compensation for the specified period prior to death.

We propose to revise for clarity the provisions of § 3.22(b) regarding correction of CUE as a basis for DIC entitlement. Current § 3.22(b) states that the phrase “entitled to receive” means that, at the time of death, the veteran had service-connected disability rated totally disabling by VA but was not receiving compensation for one of seven specified reasons, including the fact that the veteran was not receiving total disability compensation at the time of death due solely to CUE in a VA decision. This provision is potentially ambiguous as to whether DIC may be paid in circumstances where the CUE is

not corrected until after the veteran’s death. In cases involving CUE, the veteran’s disability may not actually have been rated totally disabling at the time of death. Once VA has issued a decision correcting CUE, the veteran would be deemed, as a matter of law, to have held a service-connected total disability rating at the time of death, because 38 U.S.C. 5109A(b) and 7111(b) mandate that a decision correcting CUE has the same effect as if it had been made at the time of the prior erroneous decision.

VA has consistently construed the statutes and regulations to permit DIC payment based on correction of CUE after a veteran’s death. We note, however, that the requirement in current § 3.22(b) that the veteran’s disability was rated totally disabling at the time of death, may not adequately convey this conclusion to readers. Accordingly, we propose to revise § 3.22(b) to contain a separate paragraph addressing DIC awards based on correction of CUE, which will not contain the requirement of a total disability rating existing at the time of the veteran’s death. We note that 38 U.S.C. 1311(a)(2) and 1318 both require that the veteran have been entitled to receive total disability benefits at the time of death for a service-connected disability that was rated totally disabling by VA for a specified period. We continue to believe that awards based on correction of CUE will satisfy this requirement, due to the retroactive effect of decisions correcting CUE. In order to avoid confusion, however, we believe it is clearer to state simply that the phrase “entitled to receive” includes circumstances where the veteran would have received total disability compensation at the time of death for a service-connected disability rated totally disabling for the specified period but for a CUE committed by VA in a decision on a claim filed during the veteran’s lifetime, without expressly requiring a finding that such entitlement existed at the time of death. We will retain the requirement of entitlement existing at the time of the veteran’s death with respect to the other six criteria in current § 3.22(b), because we do not believe there is similar potential for confusion with respect to those criteria.

We also propose to add a provision to § 3.22(b) explaining that the phrase “entitled to receive” includes circumstances where new and material evidence consisting solely of service department records provides a basis for reopening a claim finally decided during the veteran’s lifetime and for awarding a total service-connected

disability rating retroactively in accordance with 38 CFR 3.156(c) and 3.400(q)(2) for the relevant continuous period required by 38 CFR 3.22(a)(2). The reasons for this change are discussed below. In light of the Federal Circuit’s January 2003 decision in *NOVA*, however, it is also necessary to explain why VA does not propose to extend DIC entitlement to cases where a survivor submits new and material evidence consisting of items other than such contemporaneous service department records and alleges that such evidence establishes that the veteran was entitled to receive total disability compensation for a retroactive period of several years before the veteran’s death and before such evidence was submitted to VA.

In its January 2003 decision in *NOVA*, the Federal Circuit held that VA regulations implementing 38 U.S.C. 1311(a)(2) and 1318 are reasonable insofar as they reflect the conclusion that DIC cannot be paid under those statutes in cases where the veteran had never filed a claim for VA disability compensation during his or her lifetime. *NOVA*, 314 F.3d at 1378–80. The court concluded, however, that VA had not adequately addressed whether entitlement to DIC under those statutes may be established in cases where the veteran had filed a claim during his or her lifetime, but had not received a rating meeting the duration or degree-of-disability requirements of section 1311 or 1318, and the survivor seeks to reopen the claim based on new and material evidence submitted after the veteran’s death. *Id.* at 1380–81. The court directed VA to address the issue of whether reopening based on new and material evidence may provide a means of establishing entitlement to DIC under sections 1311 and 1318.

As a general matter, the submission of new and material evidence cannot establish any person’s entitlement to benefits for a past period. Congress has established a statutory scheme prescribing in detail the starting date and duration of any benefit award based on original claims or claims reopened by new and material evidence. As explained below, those statutes define VA’s authority to award—and thus, a veteran’s entitlement to receive—benefits for any specific period.

Pursuant to 38 U.S.C. 7104(b) and 7105(c), VA decisions are final once a final appellate decision has been made or the period for seeking appeal has expired. As these provisions state, VA decisions are “final,” and the finality serves as a bar to subsequent consideration of the claim as well as to a subsequent award of benefits based on

the claim. There are two statutory exceptions to this bar. One exception, permitting correction of CUE, operates retroactively, as explained above. See 38 U.S.C. 5109A(b) and 7111(b).

Accordingly, a claim of CUE that is brought after a veteran's death may nevertheless operate retroactively to establish that the veteran was entitled to total disability compensation for the required period prior to the veteran's death.

The other exception to the finality of VA decisions derives from 38 U.S.C. 5108, which permits a previously-disallowed claim to be reopened if new and material evidence is obtained. In contrast to the correction of CUE, however, a reopening based on new and material evidence generally does not have retroactive effect and cannot establish an individual's entitlement to benefits for past periods. The effective dates of benefit awards are governed by 38 U.S.C. 5110. Section 5110(a) states that, unless specifically provided otherwise by statute, the effective date of an award based on a claim reopened after final adjudication "shall not be earlier than the date of receipt of application therefor." VA has consistently interpreted this statute to provide that an award based on a reopened claim generally can be effective no earlier than the date the claim for reopening was filed, and the United States Court of Appeals for the Federal Circuit has upheld that interpretation. See *Sears v. Principi*, 349 F.3d 1326 (Fed. Cir. 2003), *cert. denied*, 124 S. Ct. 1723 (2004). The CAVC has further explained that a reopening under 38 U.S.C. 5108 "is not a reactivation of the previous claim, based upon the original application for benefits," and that "even upon a reopening, the prior claim is still 'final' in a sense" because any award based on the reopening can be effective no earlier than the date of the application to reopen. *Spencer v. Brown*, 4 Vet. App. 283, 293 (1993), *aff'd*, 17 F.3d 368 (Fed. Cir. 1994).

VA has concluded that the different temporal effects of these two finality exceptions, as prescribed by statute, are significant in the context of 38 U.S.C. 1311 and 1318. By statute, when VA corrects CUE, it is required to give retroactive effect to its decision and to grant entitlement retroactive to the date of a previously denied claim. Accordingly, correction of CUE even after a veteran's death clearly may result in a conclusion that the veteran was entitled to receive total disability compensation for a number of years prior to death. In contrast, when VA awards benefits in a reopened claim, it

is prohibited by statute from giving retroactive effect to its decision or from awarding benefit entitlement for any period prior to the date of the application for reopening. Thus, the reopening of a claim after a veteran's death ordinarily could not establish that the veteran was entitled to total disability compensation for any period prior to death.

We believe it is logical to conclude that, when Congress conditioned a survivor's DIC eligibility on the extent and duration of a veteran's entitlement to benefits, it intended that VA would apply the existing statutory provisions governing the extent and duration of the veteran's entitlement, including those prohibiting VA from according retroactive effect to decisions based on new and material evidence.

We also conclude that adherence to the provisions regarding the nonretroactivity of decisions based on new and material evidence is consistent with the purpose of the DIC statutes as indicated by their legislative history. In providing for payment of DIC based on the veteran's entitlement to total disability compensation during his or her lifetime, Congress explained that its purpose was to replace the source of income the veteran's family would otherwise lose when the veteran died and his or her compensation payments ceased. The Senate Committee on Veterans' Affairs explained this purpose by stating:

The appropriate Federal obligation to these survivors should, in the Committee's view, be the replacement of the support lost when the veteran dies. For example, assume that a veteran who is totally blind from service-connected causes dies at the age of 55 from a heart attack, having been so disabled from the age of 22—a period of 33 years. During that period, his wife and he depended upon his disability compensation for income support, but, because his death is not service connected, she would not receive DIC.

S. Rep. No. 1054, 95th Cong., 2nd Sess. 28 (1978), *reprinted in*, 1978 U.S.C.C.A.N. 3465, 3486. Permitting survivors to rely on new and material evidence to establish a veteran's entitlement to benefits that were not actually awarded during the veteran's lifetime—and could not have been awarded to the veteran retroactively if he or she had survived—would be contrary to the stated purpose to replace income that veterans and their families had come to depend on by virtue of having received total disability payments for a prolonged period prior to death.

In 1982, Congress expanded DIC eligibility under what is now 38 U.S.C. 1318, by authorizing DIC in cases where

the veteran would have received total disability compensation for the specified period prior to death but for CUE committed by VA in a decision on a claim submitted during the veteran's lifetime. The stated purpose of that change was "to provide that the existence of a clear and unmistakable error should not defeat entitlement to the survivors' benefits." S. Rep. No. 550, 97th Cong., 2nd Sess. 35 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2877, 2898. The legislative history further explained that, "[u]nder the amendment, a veteran would not need actually to have been 'in receipt' of total disability benefits for the requisite period of time in order to provide eligibility to the survivors if a clear and unmistakable error had been made that resulted in a shorter period of receipt than should have been provided." *Id.*

Permitting survivors to rely on new and material evidence to establish a veteran's entitlement to benefits that were not actually awarded during the veteran's lifetime would go well beyond the stated purpose to provide DIC in cases where CUE resulted in a shorter period of entitlement than should have been provided. As noted above, new and material evidence does not have retroactive effect and could not establish a longer period of compensation entitlement for any veteran, as correction of CUE may do. The legislative history of the 1982 statute reasonably reflects the principle that veterans and their families should not be penalized in cases where the veteran did everything necessary to establish entitlement to a total disability rating for the required period, but VA's error prevented the timely assignment of such rating. The purpose of that amendment was clearly remedial, in the same way that the general authority to correct CUE retroactively is remedial. In contrast, the authority to reopen and grant claims upon receipt of new and material evidence is not remedial, in the sense that it does not correct any past error, but merely permits a new adjudication informed by new evidence.

In view of the stated congressional purpose, we believe it is appropriate to recognize the distinction between statutory procedures that may result in the retroactive assignment of a total disability rating for periods prior to death (i.e., correction of CUE) and those that may not (i.e., reopening based on new and material evidence). It is, further, appropriate to recognize a distinction between procedures designed to remedy VA error (i.e., correction of CUE) and those that are not (i.e., reopening based on new and material evidence). In view of

Congress's stated purpose to allow DIC where VA's error was the only obstacle to the veteran's receipt of benefits, we find no basis for extending DIC to circumstances where there was no VA error and, moreover, where VA would have no statutory authority to award retroactive entitlement to the veteran, if the veteran were still alive.

Finally, VA notes that interpreting 38 U.S.C. 1311 and 1318 to permit reopening based on new and material evidence concerning past disability would have significant practical effects on VA claims processing. In VA's view, those statutes require determinations based on an existing record of evidence and adjudications made during the veteran's lifetime. Either VA had awarded a total disability rating during the veteran's lifetime or the evidentiary record established during the veteran's lifetime demonstrates that VA committed CUE in failing to award such a rating. Moreover, the duration of the veteran's entitlement could be readily established by reference to existing ratings or to the effective-date provisions of 38 U.S.C. 5110. In contrast, if new and material evidence were a basis for establishing DIC entitlement under 38 U.S.C. 1311 and 1318, VA potentially would be required to conduct significant new evidentiary development, including requesting medical opinions as necessary to resolve issues concerning the extent and duration of past disability. In addition, if VA were required to ignore the provisions of 38 U.S.C. 5110 prohibiting retroactive awards based on new and material evidence, determinations concerning the duration of the veteran's "entitlement" would be a matter of significant uncertainty and dispute. Inasmuch as Congress's stated purpose is limited to cases involving existing ratings and correction of CUE in an existing record, we cannot conclude that Congress intended to impose the burdens of the much more complex, uncertain, and hypothetical adjudicative actions that would be necessary in determinations based on new and material evidence.

For the foregoing reasons, VA has concluded that new and material evidence submitted after a veteran's death generally may not provide a basis for establishing that the veteran was "entitled to receive" benefits not awarded during the veteran's lifetime and thus may not provide a basis for establishing entitlement to DIC under 38 U.S.C. 1318.

As noted above, however, there is one circumstance in which additional evidence submitted after a veteran's death may result in retroactive benefit

awards, potentially for several years prior to the date of reopening—where the additional evidence consists of service department records that existed at the time of a final decision by VA during the veteran's lifetime but for some reason were not previously considered by VA.

Arguably, VA regulation 38 CFR 3.156(c) indicates that retroactive entitlement is potentially possible for several years prior to the date of reopening of a previously denied claim based upon the submission of new evidence consisting of either previously-existing service department records that VA presumes to have been lost or mislaid at the time of a prior decision or supplemental service department reports correcting a prior service department record. However, as discussed below, regulatory provisions governing the assignment of effective dates for awards clearly establish that retroactive entitlement for several years prior to the date of a reopening of a previously denied claim is potentially possible only when a claim has been reopened and granted based upon the submission of new evidence in the form of service department records that existed when the prior decision was made and which VA presumes to have been previously lost or mislaid. 38 CFR 3.400(q)(2). When a claim has been reopened and granted based upon the submission of new and material evidence in the form of corrected service department records, entitlement to such awards is limited to the date of filing the application for change, correction, or modification with the service department; the date VA received a prior claim if it disallowed the claim; or the date one year prior to the date of reopening of the disallowed claim, whichever is later. 38 CFR 3.400(g).

A VA regulation, 38 CFR 3.400(q)(2), states that when a claim is reopened and granted based on new and material evidence in the form of records from a service department (i.e., the Army, Navy, or Air Force) that VA considers to have been lost or mislaid, benefits may be awarded retroactive to the date of the previously denied claim. Under the plain language of this section, new and material evidence in the form of presumably lost or mislaid official service department records submitted after a veteran's death potentially may establish that the veteran was entitled to total disability benefits for retroactive periods during his or her lifetime. This regulation reflects a longstanding VA policy of treating service department records that were presumably lost or mislaid as providing a basis for an

award of benefits based on the veteran's original claim. Moreover, this regulation is clearly intended to remedy error (the loss or misplacement of service department records or failure to associate pertinent service department records with the file) affecting the prior final decision.

VA regulation 38 CFR 3.400(g) prohibits the awarding of retroactive entitlement for several years prior to the date of reopening of a previously denied claim when a claim has been reopened and granted based on the submission of new and material evidence in the form of corrected military records. This implementing regulation mirrors its authorizing statutory provision, 38 U.S.C. 5110(i). Section 5110(i) provides that, "[w]henever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence resulting from the correction of the military records of the proper service department under section 1552 of title 10, or the change, correction, or modification of a discharge or dismissal under section 1553 of title 10, or from other corrective action by competent authority, the effective date of commencement of the benefits so awarded shall be the date on which the application was filed for the correction of the military record or for the change, modification, or correction of a discharge or dismissal, as the case may be, or the date the disallowed claim was filed, whichever date is later, *but in no event shall such award of benefits be retroactive for more than one year from the date of reopening of such disallowed claim.*" 38 U.S.C. 5110(i) (emphasis added). Accordingly, a reopening based on new and material evidence in the form of corrected service department records could establish a veteran's entitlement to benefits for no more than one year prior to the date of reopening, and could not satisfy the periods of entitlement necessary to support a survivor's DIC award under 38 U.S.C. 1311 and 1318. Reopenings based on corrected military records are therefore excluded from this regulation.

As noted above, we believe 38 U.S.C. 1311 and 1318 are most reasonably construed as requiring VA to apply its existing statutes and regulations in determining the extent and duration of a veteran's entitlement to benefits. Further, those statutes reflect an intent that a survivor's DIC entitlement should not be defeated solely by VA error. Although the misplacement of service department records may have been due to error by the service department, rather than VA, we believe it would be consistent with the language and purpose of 38 U.S.C. 1311 and 1318 to

permit DIC in cases where new and material evidence solely in the form of presumably lost or misplaced service department records results in assignment of a total disability rating with a retroactive effective date sufficient to satisfy the requirements of those statutes. Accordingly, we propose to add provisions to 38 CFR 3.10 and 3.22(b) to reflect this determination.

Although VA regulation 38 CFR 3.400(q)(2) refers to records that VA considers to have been lost or mislaid, we do not believe it requires a factual determination that the records were actually lost or mislaid. The reference to records "considered" to have been lost or mislaid serves to draw a distinction between service department records that existed at the time of the prior VA decision and therefore presumably could or should have been available for VA's consideration when the veteran's original claim was filed, and the type of post-service corrections of service department records that are separately addressed in 38 CFR 3.400(g). If a service department record existed at the time of VA's prior decision, but for some reason was not provided to and considered by VA at the time of its decision on the veteran's original claim, VA will presume that the record was lost or mislaid. In order to clarify the distinction between this type of service department record covered by 38 CFR 3.400(q)(2) and the type of post-service corrections covered by 38 CFR 3.400(g), we propose to state that DIC entitlement under 38 U.S.C. 1311 and 1318 may be established where additional evidence consisting solely of service department records that existed at the time of VA's prior decision but were not previously considered by VA provide a basis for reopening a claim finally decided during the veteran's lifetime and for awarding a total service-connected disability rating in accordance with § 3.156(c) and § 3.400(q)(2) for the retroactive period specified in 38 U.S.C. 1311 or 1318.

#### Provisions in New 38 CFR 3.10

As explained above, we propose to move provisions currently in 38 CFR 3.5(e) to a new provision codified at 38 CFR 3.10. We further propose to reorganize those provisions for clarity, and to add provisions mirroring those in 38 CFR 3.22(b), as modified by these proposed rules.

Proposed § 3.10 will state rules governing the DIC rate payable to the surviving spouse of a deceased veteran. Paragraph (a) of § 3.10 will state that the rate of DIC payable to a surviving spouse will be the total of a basic monthly rate and any applicable

increases. This provision would merely provide a general summary of the existing provisions in § 3.5(e), and would not effect any change in existing requirements.

Paragraph (b) of proposed § 3.10 is a restatement of the first sentence of current § 3.5(e)(1), which states the basic monthly rate of DIC. Current § 3.5(e)(1) states that this rate is payable for deaths occurring on or after January 1, 1993. Under 38 U.S.C. 1311(a)(3) and current 38 CFR 3.5(e)(2), however, this rate may also be paid for deaths occurring prior to that date, if it would be greater than the alternative rate payable for such deaths, which is discussed below. To avoid confusion regarding this point, we propose to delete the reference to deaths occurring on or after January 1, 1993, in this provision. As explained below, we propose a separate paragraph explaining the alternative rate that may be payable for deaths occurring before January 1, 1993. No substantive change is intended by this revision.

Paragraph (c) of proposed § 3.10 is a restatement of the second sentence of current § 3.5(e)(1). It would explain that the basic monthly rate may be increased in cases where the veteran, at the time of death, was receiving, or was entitled to receive, compensation for service-connected disability that was rated by VA as totally disabling for a continuous period of at least eight years immediately preceding death. We propose to refer to this increase as the "veteran's compensation increase" in the caption of paragraph (c) and in subsequent references in other paragraphs of proposed § 3.10. We further propose to state that determinations of entitlement to that increase will be made in accordance with provisions in paragraph (f) of § 3.10.

Paragraph (d) of proposed § 3.10 is a restatement of the first two sentences of current § 3.5(e)(2). This provision states that, in the case of death occurring before January 1, 1993, the basic monthly rate of DIC is a rate specified in 38 U.S.C. 1311(a)(3), based on the veteran's pay grade, but only if such rate would be greater than the total of the basic monthly rate under paragraph (b) of proposed § 3.10 and the veteran's compensation increase, if applicable, payable under paragraph (c) of proposed § 3.10.

Paragraph (e) of proposed § 3.10 addresses three additional increases that may augment the monthly DIC rate. Paragraph (e)(1) restates, without substantive change, the provisions of current § 3.5(e)(3), governing additional amounts for children. Paragraph (e)(2)

restates, without substantive change, the first sentence of current § 3.5(e)(4), governing additional amounts based on the surviving spouse's need for regular aid and attendance. Paragraph (e)(3) restates, without substantive change, the second sentence of current § 3.5(e)(4), governing additional amounts based on the surviving spouse's housebound status.

Paragraph (f) of the proposed rule states criteria governing entitlement to the veteran's compensation increase under paragraph (c) of the proposed rule. We propose to place those criteria in a separate paragraph at the end of the regulation, rather than including them in paragraph (c), due to their length. We believe proposed § 3.10 will be easier to follow if it provides a succinct statement of the DIC rates and allowances payable to a surviving spouse in paragraphs (b) through (e), and the lengthy explanation necessary to fully explain the veteran's compensation increase is reserved for the end.

Proposed paragraph (f)(1) states that the surviving spouse must have been married to the veteran for the entire eight-year period referenced in paragraph (c) in order to qualify for the veteran's compensation increase. This is a restatement of the third sentence of current § 3.5(e)(1), which says that, in determining the eight-year period, only periods during which the veteran was married to the surviving spouse shall be considered. We believe it is clearer to state simply that the surviving spouse must have been married to the veteran for the entire period required by paragraph (c). No substantive change is intended by this different wording.

Proposed paragraph (f)(2) states that the phrase "rated by VA as totally disabling," as used in paragraph (c), includes total disability ratings based on unemployability. This paragraph would contain a reference to 38 CFR 4.16, which provides that, even though a veteran's service-connected disability does not qualify for a 100% rating under VA's disability rating schedule, VA may assign a total disability rating if the veteran's service-connected disability prevents him or her from pursuing substantially gainful employment. Current § 3.5(e) does not contain this provision. However, proposed paragraph (f)(2) would mirror the provision in current 38 CFR 3.22(c) defining the phrase "rated by VA as totally disabling" for purposes of 38 U.S.C. 1318. We propose to add a similar statement in § 3.10(f)(2) based on our conclusion that the language of 38 U.S.C. 1311(a)(2) and 38 U.S.C. 1318, must be interpreted in the same manner.

Proposed paragraph (f)(3) would define the phrase “entitled to receive” as used in proposed paragraph (c). Paragraph (f)(3) is based on the provisions of 38 CFR 3.22(b), which define the phrase “entitled to receive” for purposes of 38 U.S.C. 1318. We have previously explained the basis for our interpretation of the phrase “entitled to receive” in 38 U.S.C. 1318 and our reasons for concluding the phrase must be interpreted in the same manner for purposes of 38 U.S.C. 1311(a)(2). See 67 FR 16309 (2002); 66 FR 65861 (2001); 65 FR 3388 (2000). The Federal Circuit upheld that determination in its January 2003 *NOVA* decision. Accordingly, we propose to include in paragraph (f)(3) of § 3.10 a provision mirroring the provisions of 38 CFR 3.22(b), as proposed to be amended by this document.

#### Reissuance of 38 CFR 20.1106

In the **Federal Register** of April 5, 2002 (67 FR 16309), VA published a final rule amending 38 CFR 20.1106, the Board of Veterans’ Appeals regulation governing the effect of adverse decisions during a veteran’s lifetime on a survivor’s claim for death benefits. As amended, the final rule stated that, except with respect to benefits under 38 U.S.C. 1311 and 1318 and certain cases involving veterans whose benefits have been forfeited for treason or subversive activities under 38 U.S.C. 6104 and 6105, issues involved in a survivor’s claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran’s lifetime. That rule reflects VA’s longstanding practice of adjudicating *de novo* the issue of service connection for the cause of a veteran’s death even if VA had denied the veteran’s claim during his or her lifetime for compensation for the disease or injury that later caused death. The April 2002 final-rule notice explained that claims under 38 U.S.C. 1311 and 1318 were excepted from that principle because VA construed those statutes to require that determinations regarding the veteran’s entitlement to receive total disability compensation for a specified number of years prior to death must be made with reference to decisions rendered during the veteran’s lifetime.

The final rule was issued pursuant to the Federal Circuit’s August 2001 order in *National Organization of Veterans’ Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365 (2001). In its January 2003 order in *NOVA*, the Federal Circuit concluded that the final rule did not fully comply with the court’s prior order. Specifically, the Federal Circuit stated that VA had not

amended either 38 CFR 3.5 or 20.1106 to state criteria similar to those in 38 CFR 3.22 and that the final rule did not explain the scope of the rule concerning prior adjudications. The court stated that it could not sustain the final rule, but instead “vacate[d] and remand[ed] for a further rulemaking proceeding.”

In response to the court’s order, we are proposing to revise the provisions currently in 38 CFR 3.5(e) to explain the criteria governing entitlement to benefits under 38 U.S.C. 1311. The proposed revision will make clear that the veteran must have filed a claim for disability compensation during his or her lifetime in order for the survivors to be eligible for DIC under section 1311, and will explain the circumstances under which DIC may be paid based on correction of CUE or submission of new and material evidence.

We have concluded that these provisions are more appropriately included in proposed § 3.10 than in 38 CFR 20.1106. Section 3.10 will be the VA regulation specifically implementing 38 U.S.C. 1311 and will be codified in part 3 of title 38, Code of Federal Regulations, the part containing the regulations governing awards of compensation, pension, and DIC. Section 20.1106, in contrast, implements 38 U.S.C. 7104(b), governing the finality of Board decisions, rather than 38 U.S.C. 1311 or 1318, and the regulation is codified in the portion of title 38, Code of Federal Regulations, setting forth the rules of the Board of Veterans’ Appeals. Section 20.1106 states a general rule of finality applicable to a broad range of statutory provisions and is not limited to 38 U.S.C. 1311. We believe the revision to 38 CFR 3.5(e) proposed in this notice will satisfy the requirements of the Federal Circuit’s remand order.

We further conclude that the provisions of 38 CFR 20.1106 issued in our April 2002 **Federal Register** notice properly reflect VA’s interpretation of 38 U.S.C. 1311 and 1318 and are consistent with the VA regulations implementing those statutes. As revised in April 2002, section 20.1106 provides in effect that claims under 38 U.S.C. 1311 and 1318 will be decided with regard to decisions during the veteran’s lifetime. This comports with our conclusion, stated above and in our April 2002 final-rule notice, that DIC entitlement under those statutes may exist when ratings during the veteran’s lifetime granted total disability compensation, or would have granted such compensation but for CUE, or where new and material evidence in the form of presumably lost or mislaid service department records warrants a

retroactive award of total disability compensation.

Where a DIC claim is based on the allegation of CUE in a decision made during the veteran’s lifetime, the DIC claim must be made with regard to the prior decision, in order to determine whether there was error in that decision. Similarly, where a DIC claim is based on new and material evidence in the form of presumably lost or mislaid service department records, the claim must be made with regard to the prior decision on the veteran’s claim. As the CAVC stated in *Spencer v. Brown*, 4 Vet. App. at 293, “where the claim is reopened on the basis of new and material evidence from service department reports, the VA has consistently treated it as a true ‘reopening’ of the *original claim* and a review of the *former disposition* in light of the service department reports which were considered to have been lost or mislaid.” (Emphasis in original).

For the foregoing reasons, we conclude that the final rule issued in April 2002 revising 38 CFR 20.1106 is valid and reasonable. However, because the status of that rule is uncertain in light of the Federal Circuit’s January 2003 order “vacat[ing]” the matter before it, we propose to reissue the provisions of the April 2002 rule, with one minor, nonsubstantive change discussed below.

Although the caption of current § 20.1106 refers to “unfavorable” decisions during made a veteran’s lifetime, the term “unfavorable” does not appear in the text of the regulation, which states that, with certain exceptions, issues involved in a survivor’s claim for death benefits will be decided without regard to “any prior disposition” of those issues during the veteran’s lifetime. We propose to add the word “unfavorable” before “disposition” in the text of the regulation, to clarify that VA generally will disregard only unfavorable decisions made during the veteran’s lifetime. This change will resolve any ambiguity that could result from the different terminology used in the caption and text of the current regulation.

The added language does not alter the meaning of the regulation, but merely clarifies VA’s existing interpretation of the regulation as requiring VA to disregard only unfavorable decisions. As noted above, the caption of the current regulation indicates that it is intended to apply only to prior unfavorable decisions. Further, the statutory authority cited for the current regulation, 38 U.S.C. 7104(b), addresses the finality of Board decisions that have “disallowed” a claim. Section 20.1106

implements that statute by prescribing rules to govern the finality of prior unfavorable decisions, and the proposed amendment would merely clarify that purpose.

#### *Unfunded Mandates*

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any given year. This proposed amendment would have no such effect on State, local, or tribal governments, or the private sector.

#### *Executive Order 12866*

The Office of management and Budget has reviewed this document under Executive Order 12866.

#### *Paperwork Reduction Act*

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

#### *Regulatory Flexibility Act*

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. The reason for this certification is that these amendments would not directly affect any small entities. Only VA beneficiaries and their survivors could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### *Catalog of Federal Domestic Assistance*

The Catalog of Federal Domestic Assistance program numbers are 64.109, and 64.110.

#### **List of Subjects**

##### *38 CFR Part 3*

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

##### *38 CFR Part 20*

Administrative practice and procedure, Claims, Veterans.

Approved: July 13, 2004.

#### **Anthony J. Principi,**

*Secretary of Veterans Affairs.*

For the reasons set forth in the preamble, 38 CFR parts 3 and 20 are proposed to be amended 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.

#### **§ 3.5 [Amended]**

2. Section 3.5 is amended by removing paragraph (e).

3. Section 3.10 is added to read as follows:

#### **§ 3.10 Dependency and indemnity compensation rate for a surviving spouse.**

(a) *General determination of rate.*

When VA grants a surviving spouse entitlement to DIC, VA will determine the rate of the benefit it will award. The rate of the benefit will be the total of the basic monthly rate specified in paragraph (b) or (d) of this section and any applicable increases specified in paragraph (c) or (e) of this section.

(b) *Basic monthly rate.* Except as provided in paragraph (d) of this section, the basic monthly rate of DIC for a surviving spouse will be the amount set forth in 38 U.S.C. 1311(a)(1).

(c) *Veteran's compensation increase.* The basic monthly rate under paragraph (b) of this section shall be increased by the amount specified in 38 U.S.C. 1311(a)(2) if the veteran, at the time of death, was receiving, or was entitled to receive, compensation for service-connected disability that was rated by VA as totally disabling for a continuous period of at least eight years immediately preceding death.

Determinations of entitlement to this increase shall be made in accordance with paragraph (f) of this section.

(d) *Alternative basic monthly rate for death occurring prior to January 1, 1993.* The basic monthly rate of DIC for a surviving spouse when the death of the veteran occurred prior to January 1, 1993, will be the amount specified in 38 U.S.C. 1311(a)(3) corresponding to the veteran's pay grade in service, but only if such rate is greater than the total of the basic monthly rate and veteran's compensation increase (if applicable) the surviving spouse is entitled to receive under paragraphs (b) and (c) of this section. The Secretary of the concerned service department will certify the veteran's pay grade and the certification will be binding on VA. DIC paid pursuant to this paragraph may not be increased by the veteran's compensation increase under paragraph (c) of this section.

(e) *Additional increases.* One or more of the following increases may be paid

in addition to the basic monthly rate and veteran's compensation increase.

(1) *Increase for children.* If the surviving spouse has one or more children under the age of 18 of the deceased veteran (including a child not in the surviving spouse's actual or constructive custody, or a child who is in active military service), the monthly DIC rate will be increased by the amount set forth in 38 U.S.C. 1311(b) for each child.

(2) *Increase for regular aid and attendance.* If the surviving spouse is determined to be in need of regular aid and attendance under the criteria in § 3.352 or is a patient in a nursing home, the monthly DIC rate will be increased by the amount set forth in 38 U.S.C. 1311(c).

(3) *Increase for housebound status.* If the surviving spouse does not qualify for the regular aid and attendance allowance but is housebound under the criteria in § 3.351(f), the monthly DIC rate will be increased by the amount set forth in 38 U.S.C. 1311(d).

(f) *Criteria governing veteran's compensation increase.* In determining whether a surviving spouse qualifies for the veteran's compensation increase under paragraph (c) of this section, the following standards shall apply.

(1) *Marriage requirement.* The surviving spouse must have been married to the veteran for the entire eight-year period referenced in paragraph (c) of this section in order to qualify for the veteran's compensation increase.

(2) *Determination of total disability.* As used in paragraph (c) of this section, the phrase "rated by VA as totally disabling" includes total disability ratings based on unemployability (§ 4.16 of this chapter).

(3) *Definition of "entitled to receive".* As used in paragraph (c) of this section, the phrase "entitled to receive" means that the veteran filed a claim for disability compensation during his or her lifetime and one of the following circumstances is satisfied:

(i) The veteran would have received total disability compensation for the period specified in paragraph (c) of this section but for clear and unmistakable error committed by VA in a decision on a claim filed during the veteran's lifetime; or

(ii) Additional evidence submitted to VA before or after the veteran's death, consisting solely of service department records that existed at the time of a prior VA decision but were not previously considered by VA, provides a basis for reopening a claim finally decided during the veteran's lifetime and for awarding a total service-connected

disability rating retroactively in accordance with §§ 3.156(c) and 3.400(q)(2) of this part for the period specified in paragraph (c) of this section; or

(iii) At the time of death, the veteran had a service-connected disability that was continuously rated totally disabling by VA for the period specified in paragraph (c) of this section, but was not receiving compensation because:

(A) VA was paying the compensation to the veteran's dependents;

(B) VA was withholding the compensation under the authority of 38 U.S.C. 5314 to offset an indebtedness of the veteran;

(C) The veteran had not waived retired or retirement pay in order to receive compensation;

(D) VA was withholding payments under the provisions of 10 U.S.C. 1174(h)(2);

(E) VA was withholding payments because the veteran's whereabouts were unknown, but the veteran was otherwise entitled to continued payments based on a total service-connected disability rating; or

(F) VA was withholding payments under 38 U.S.C. 5308 but determines that benefits were payable under 38 U.S.C. 5309.

(Authority: 38 U.S.C. 501(a), 1311, 1314, and 1321).

4. Section 3.22 is amended by revising paragraph (b) to read as follows:

**§ 3.22 DIC benefits for survivors of certain veterans rated totally disabled at time of death.**

\* \* \* \* \*

(b) For purposes of this section, "entitled to receive" means that the veteran filed a claim for disability compensation during his or her lifetime and one of the following circumstances is satisfied:

(1) The veteran would have received total disability compensation at the time of death for a service-connected disability rated totally disabling for the period specified in paragraph (a)(2) of this section but for clear and unmistakable error committed by VA in a decision on a claim filed during the veteran's lifetime; or

(2) Additional evidence submitted to VA before or after the veteran's death, consisting solely of service department records that existed at the time of a prior VA decision but were not previously considered by VA, provides a basis for reopening a claim finally decided during the veteran's lifetime and for awarding a total service-connected disability rating retroactively in accordance with §§ 3.156(c) and

3.400(q)(2) of this part for the relevant period specified in paragraph (a)(2) of this section; or

(3) At the time of death, the veteran had a service-connected disability that was continuously rated totally disabling by VA for the period specified in paragraph (a)(2), but was not receiving compensation because:

(i) VA was paying the compensation to the veteran's dependents;

(ii) VA was withholding the compensation under authority of 38 U.S.C. 5314 to offset an indebtedness of the veteran;

(iii) The veteran had not waived retired or retirement pay in order to receive compensation;

(iv) VA was withholding payments under the provisions of 10 U.S.C. 1174(h)(2);

(v) VA was withholding payments because the veteran's whereabouts were unknown, but the veteran was otherwise entitled to continued payments based on a total service-connected disability rating; or

(vi) VA was withholding payments under 38 U.S.C. 5308 but determines that benefits were payable under 38 U.S.C. 5309.

\* \* \* \* \*

**PART 20—BOARD OF VETERANS' APPEALS: RULES OF PRACTICE**

5. The authority citation for part 20 continues to read as follows:

**Authority:** 38 U.S.C. 501(a) and as noted in specific sections.

**Subpart L—Finality**

6. Section 20.1106 is revised to read as follows:

**§ 20.1106 Rule 1106. Claim for death benefits by survivor—prior unfavorable decisions during veteran's lifetime.**

Except with respect to benefits under the provisions of 38 U.S.C. 1311(a)(2), 1318, and certain cases involving individuals whose Department of Veterans Affairs benefits have been forfeited for treason or for subversive activities under the provisions of 38 U.S.C. 6104 and 6105, issues involved in a survivor's claim for death benefits will be decided without regard to any prior unfavorable disposition of those issues during the veteran's lifetime.

(Authority: 38 U.S.C. 7104(b))

[FR Doc. 04-23488 Filed 10-22-04; 8:45 am]

**BILLING CODE 8320-01-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 262**

[OA-2004-0004; FRL-7829-9]

**RIN 2090-AA13**

**National Environmental Performance Track Program, Parallel Proposal To Direct Final Rule for RCRA Corrections**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed Rule.

**SUMMARY:** This proposed rulemaking is a parallel proposal to the direct final rulemaking EPA is also publishing today. EPA is taking direct final action on the National Environmental Performance Track Program, Direct Final Rule for RCRA Corrections. The revisions concern the proposed rule published on August 13, 2002 (67 FR 52674), and the subsequent final rule published on April 22, 2004 (69 FR 21737). Both the 2002 proposal and the 2004 final rule contained an inconsistency between the preamble language and regulatory language. The final rule also inadvertently omitted three references to applicable regulatory provisions that were properly referenced in the proposed rule. We are proposing today's revisions to address the inconsistency between the preamble and regulatory language, and to correct the inadvertently omitted applicable regulatory provisions.

In the "Rules and Regulations" section of today's **Federal Register**, we are approving these revisions and corrections in a direct final rulemaking because we view this as a noncontroversial amendment and anticipate no adverse comment. We have explained our reasons for this approval in the preamble to the direct final rule. If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the direct final rule and it will not take effect, and we will address all public comments in a subsequent final rule based on this proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

**DATES:** Written comments must be received by November 24, 2004.

**ADDRESSES:** Submit your comments, identified by Docket ID No. OA-2004-0004, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.