

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 5

RIN 2900-AM05

Matters Affecting the Receipt of Benefits

AGENCY: Department of Veterans Affairs

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language regulations relating to determinations involving bars to benefits, forfeiture of benefits, and renouncement of benefits. These revisions are proposed as part of VA's rewrite and reorganization of all of its compensation and pension regulations in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants and VA personnel in locating and understanding these regulations.

DATES: Comments must be received by VA on or before July 31, 2006.

ADDRESSES: Written comments may be submitted by: mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; fax to (202) 273-9026; or e-mail through www.Regulations.gov. Comments should indicate that they are submitted in response to "RIN 2900-AM05." All 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) 273-9515 for an appointment.

FOR FURTHER INFORMATION CONTACT: Bob White, Acting Chief, Regulations Rewrite Project (00REG2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-9515.

SUPPLEMENTARY INFORMATION: The Secretary of Veterans Affairs has established an Office of Regulation Policy and Management to provide centralized management and coordination of VA's rulemaking process. One of the major functions of this office is to oversee a Regulations Rewrite Project (the Project) to improve the clarity and consistency of existing VA regulations. The Project responds to a recommendation made in the October 2001 "VA Claims Processing Task Force: Report to the Secretary of Veterans Affairs." The Task Force recommended that the compensation and pension regulations be rewritten

and reorganized in order to improve VA's claims adjudication process. Therefore, the Project began its efforts by reviewing, reorganizing and redrafting the content of the regulations in 38 CFR part 3 governing the compensation and pension program of the Veterans Benefits Administration. These regulations are among the most difficult VA regulations for readers to understand and apply.

Once rewritten, the proposed regulations will be published in several portions for public review and comment. This is one such portion. It includes proposed rules regarding line of duty and willful misconduct determinations, and the effects of alcohol and drug abuse and homicide on entitlement to certain VA benefits. This subpart also contains proposed rules concerning forfeiture of benefits and renouncement of benefits. After review and consideration of public comments, final versions of these proposed regulations will ultimately be published in a new part 5 in 38 CFR.

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Overview of New Part 5 Organization

We plan to organize the part 5 regulations so that most provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. We believe this organization will allow claimants,

beneficiaries, and their representatives, as well as VA personnel, to find information relating to a specific benefit more quickly than the organization provided in current part 3.

The first major subdivision would be "Subpart A—General Provisions." It would include information regarding the scope of the regulations in new part 5, delegations of authority, general definitions, and general policy provisions for this part. This subpart was published as proposed on March 31, 2006. *See* 71 FR 16464.

"Subpart B—Service Requirements for Veterans" would include information regarding a veteran's military service, including the minimum service requirement, types of service, periods of war, and service evidence requirements. This subpart was published as proposed on January 30, 2004. *See* 69 FR 4820.

"Subpart C—Adjudicative Process, General" would inform readers about claims and benefit application filing procedures, VA's duties, rights and responsibilities of claimants and beneficiaries, general evidence requirements, and general effective dates for new awards, as well as revision of decisions and protection of VA ratings. This subpart will be published as three separate Notices of Proposed Rulemaking (NPRMs) due to its size. The first, concerning the duties of VA and the rights and responsibilities of claimants and beneficiaries, was published on May 10, 2005. *See* 70 FR 24680.

"Subpart D—Dependents and Survivors" would inform readers how VA determines whether an individual is a dependent or a survivor for purposes of determining eligibility for VA benefits. It would also provide the evidence requirements for these determinations.

"Subpart E—Claims for Service Connection and Disability Compensation" would define service-connected disability compensation and service connection, including direct and secondary service connection. This subpart would inform readers how VA determines service connection and entitlement to disability compensation. The subpart would also contain those provisions governing presumptions related to service connection, rating principles, and effective dates, as well as several special ratings. This subpart will be published as three separate NPRMs due to its size. The first, concerning presumptions related to service connection, was published on July 27, 2004. *See* 69 FR 44614.

"Subpart F—Nonservice-Connected Disability Pensions and Death Pensions" would include information

regarding the three types of nonservice-connected pension: Improved Pension, Old-Law Pension, and Section 306 Pension. This subpart would also include those provisions that state how to establish entitlement to Improved Pension, and the effective dates governing each pension. This subpart will be published as two separate NPRMs due to its size. The portion concerning Old-Law Pension, Section 306 Pension, and elections of Improved Pension was published as proposed on December 27, 2004. See 69 FR 77578.

“Subpart G—Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary” would contain regulations governing claims for dependency and indemnity compensation (DIC); death compensation; accrued benefits; benefits awarded, but unpaid at death; and various special rules that apply to the disposition of VA benefits, or proceeds of VA benefits, when a beneficiary dies. This subpart would also include related definitions, effective-date rules, and rate-of-payment rules. This subpart will be published as two separate NPRMs due to its size. The portion concerning accrued benefits, death compensation, special rules applicable upon the death of a beneficiary, and several effective date rules, was published as proposed on October 1, 2004. See 69 FR 59072. The portion concerning DIC benefits and general provisions relating to proof of death and service-connected cause of death was published on October 21, 2005. See 70 FR 61326.

“Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors” would pertain to special and ancillary benefits available, including benefits for children with various birth defects.

“Subpart I—Benefits for Certain Filipino Veterans and Survivors” would pertain to the various benefits available to Filipino veterans and their survivors.

“Subpart J—Burial Benefits” would pertain to burial allowances.

“Subpart K—Matters Affecting the Receipt of Benefits” would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits. This subpart is the subject of this document.

“Subpart L—Payments and Adjustments to Payments” would include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules. Because of its size, proposed regulations in subpart L will be published in two separate NPRMs.

The final subpart, “Subpart M—Apportionments and Payments to Fiduciaries or Incarcerated Beneficiaries,” would include regulations governing apportionments, benefits for incarcerated beneficiaries, and guardianship.

Some of the regulations in this NPRM cross-reference other compensation and pension regulations. If those regulations have been published in this or earlier NPRMs for the Project, we cite the proposed part 5 section. We also include, in the relevant portion of the Supplementary Information, the **Federal Register** page where a proposed part 5 section published in an earlier NPRM may be found. However, where a regulation proposed in this NPRM would cross-reference a proposed part 5 regulation that has not yet been published, we cite to the current part 3 regulation that deals with the same subject matter. The current part 3 section we cite may differ from its eventual part 5 counterpart in some respects, but we believe this method will assist readers in understanding these proposed regulations where no part 5 counterpart has yet been published.

Because of its large size, proposed part 5 will be published in a number of NPRMs, such as this one. VA will not adopt any portion of part 5 as final until all of the NPRMs have been published for public comment.

In connection with this rulemaking, VA will accept comments relating to a prior rulemaking issued as a part of the Project, if the matter being commented on relates to both rulemakings.

Overview of Proposed Subpart K Organization

This NPRM pertains to those regulations governing matters affecting the receipt of benefits. These regulations would be contained in proposed Subpart K of new 38 CFR part 5. Although these regulations have been substantially restructured and rewritten for greater clarity and ease of use, most of the basic concepts contained in these proposed regulations are the same as in their existing counterparts in 38 CFR part 3. However, a few substantive differences are proposed, as are some regulations that do not have counterparts in 38 CFR part 3.

Table Comparing Current Part 3 Rules With Proposed Part 5 Rules

The following table shows the correspondence between the current regulations in part 3 and the proposed regulations contained in this NPRM:

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR section or paragraph (or “New”)
Bars to Benefits	
5.660(a)	3.301(a)
5.660(b)	3.1(m)—first sentence.
5.660(c)	3.1(m)(1)–(3)
5.660(d)	3.1(m)—second sentence.
5.661(a)(1)	3.1(n) first sentence of introduction and (n)(1) and (2).
5.661(a)(2) and (3) ...	New.
5.661(b)(1)	3.1(n)(3), 3.301(a)
5.661(b)(2)	3.301(b)
5.661(c)(1)	3.301(c)(2)
5.661(c)(2)	3.301(c)(3), 3.301(d)
5.661(d)	3.302
5.661(e)	3.301(c)(1)
5.661(f)	3.1(n)—second sentence of introduction.
5.662(a)	3.301(d)
5.662(b) through (d) ..	New.
5.663(a)(1)	3.11
5.663(a)(2) and (3) ...	New.
5.663(b)	3.11
5.663(c) through (f) ...	New.
Forfeiture and Renouncement of the Right to VA Benefits	
5.675(a)	3.900(a)
5.675(b)	3.900(c)
5.676(a)	3.901(a)
5.676(b)(1)	3.901(d)
5.676(b)(2)	3.901(b)
5.676(b)(3)(i)	3.901(d)—last sentence.
5.676(b)(3)(ii) and (iii), (b)(4).	New (cross-reference).
5.676(b)(5)	3.669(a) and (b)(1)
5.676(c)(1)	3.669(d)(1); 3.900(b)(2)—last sentence.
5.676(c)(2)(i)	3.901(c)
5.676(c)(2)(ii) and (c)(3).	New (cross-reference).
5.676(d)	3.904(a)
5.676(e)	New (cross-reference).
5.677(a)	3.902(a)
5.677(b)(1)	3.902(d)
5.677(b)(2)	3.902(b), 3.904(b)—last sentence.
5.677(b)(3)(i)	3.902(d)—last sentence.
5.677(b)(3)(ii)	3.904(b)—last sentence.
5.677(b)(4)	New (cross-reference).
5.677(b)(5)	3.669(a) and (b)(2)
5.677(c)(1)	3.669(d)(1); 3.900(b)(2)—last sentence.
5.677(c)(2)	3.902(c); 3.904(b)
5.677(d)	3.902(e)
5.677(e)	New (cross-reference).
5.678(a)(1)	3.903(a)(2)
5.678(a)(2)	3.903(a)(1)
5.678(a)(3)	New.

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR section or paragraph (or "New")
5.678(a)(4)	3.903(a)(3)
5.678(a)(5)	3.903(a)(4)
5.678(b)(1)	3.903(b)(2)
5.678(b)(2)(i)	3.669(a)
5.678(b)(2)(ii)	3.669(c)—first sentence.
5.678(b)(3)(i) and (ii)	3.903(b)(1)
5.678(b)(3)(iii)	New (cross-reference).
5.678(b)(3)(iv)	3.903(b)(1), 3.904(c)—first sentence.
5.678(c)(1)	New (cross-reference).
5.678(c)(2) and (3)	3.904(c)—last sentence.
5.679(a)	3.905(a)
5.679(b)	3.905(b)
5.679(c)(1)	3.905(c)
5.679(c)(2)	3.905(c) and New.
5.679(d) and (e)	3.905(d)
5.680(a)	3.905(a)
5.680(b)	New.
5.680(c)(1) and (2)	3.901(e)
5.680(c)(3)	3.905(e)
5.681(a)(1)	3.669(a)
5.681(a)(2)	3.669(b)
5.681(b)(1)	3.500(k), 3.669(b)(1)—last sentence.
5.681(b)(2)	3.500(s)(1), 3.669(b)(2)—last sentence.
5.681(b)(3)	3.500(s)(2), 3.669(c)—last sentence.
5.682(a)	3.903(c) and New.
5.682(b) and (c)	3.669(d)(1)
5.682(d)	3.669(d)(2)
5.683(a) and 5.683(b)	3.106(a)
5.683(c)	3.106(a), 3.500(q)
5.683(d)(1)	3.106(d)
5.683(d)(2)	3.106(e)
5.683(e)(1)	3.106(b), 3.400(s)
5.683(e)(2)	3.106(c)

Readers who use this table to compare existing regulatory provisions with the proposed provisions, and who observe a substantive difference between them, should consult the text that appears later in this document for an explanation of significant changes in each regulation. Not every paragraph of every current part 3 section regarding the subject matter of this rulemaking is accounted for in the table. In some instances, other portions of the part 3 sections that are addressed in these proposed regulations will appear in subparts of part 5 that are being published separately for public comment. For example, a reader might find a reference to paragraph (a) of a part 3 section in the table, but no reference to paragraph (b) of that section because paragraph (b) will be addressed in a separate NPRM. The table also does not include provisions from part 3

regulations that will not be repeated in part 5. Such provisions are discussed specifically under the appropriate part 5 heading in this preamble. Readers are invited to comment on the proposed part 5 provisions and also on our proposals to omit those part 3 provisions from part 5.

Content of Proposed Regulations

Bars to Benefits

5.660 Line of duty.

Proposed § 5.660 is based on *line of duty* determination rules currently found in §§ 3.1(m) and 3.301(a). We propose to state in § 5.660(a) that the line-of-duty requirement does not apply to service connection under § 3.310. That section concerns service connection for disability proximately due to, or aggravated by, a service connected injury or disease. (The reference to § 3.310 will be updated in the final version of § 5.660 to reflect the part 5 equivalent to § 3.310.)

In proposed § 5.660(b), we replaced the term “active military, naval, or air service,” used in the § 3.1(m) definition of “line of duty,” with the shorter term “active military service.” This shorter term, “active military service,” will have the same meaning in part 5 as the term “active military, naval, or air service” does in part 3.

Current § 3.301(a) states, “Direct service connection may be granted only when a disability or cause of death was incurred or aggravated in line of duty.” All basic entitlement to service-connected compensation and related benefits for a disability that is either directly or presumptively service connected is authorized under 38 U.S.C. 1110, 1131. Both statutes require that the service-connected condition have been “contracted [or aggravated] * * * in line of duty in the active military * * * service.” The statutes establishing presumptions do not do away with the line of duty requirement. See 38 U.S.C. 1112(a), for example, which states that “for the purposes of section 1110” when “any veteran who served for ninety days or more during a period of war” suffers a listed condition, the condition “shall be considered to have been incurred in or aggravated by such service.” The service referred to there is the minimum 90-day period of service. Section 1112 does not state that such condition is considered incurred in line of duty for purposes of section 1110. In order to eliminate any potential for misinterpretation of the rule, we would not include the word “direct” in the proposed part 5 regulation.

5.661 Willful misconduct.

Proposed § 5.661 is based on current §§ 3.1(n), 3.301(a) through (d), and 3.302 pertaining to willful misconduct determinations.

Current § 3.1(n)(2) states “Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.” VA intends that all ordinances (e.g. police, city, or county) and police regulations be covered by this provision. We therefore propose to clarify this by inserting the word “other” in front of the word “ordinances”, in § 5.661(a)(1). In addition, we have replaced the phrase “per se” with “by itself”. It is a more easily understood phrase that has the same meaning. Black’s Law Dictionary 1162 (7th ed. 1999).

Willful misconduct involves the legal concept of “proximate cause.” Current 3.1(n)(3) states that “[w]illful misconduct will not be determinative unless it is the proximate cause of injury, disease, or death.” Proposed § 5.661(b) retains this concept, by stating that “[s]ervice connection may not be granted for an injury, disease, or death proximately caused by the veteran’s own willful misconduct” and that “[d]isability pension may not be granted for any condition proximately caused by the veteran’s own willful misconduct.” However, current regulations do not define “proximate cause.”

Two definitions of “proximate cause” appear in *Black’s Law Dictionary*. “1. A cause that is legally sufficient to result in liability. 2. A cause that directly produces an event and without which the event would not have occurred.” *Black’s Law Dictionary* 213 (7th ed. 1999). We believe that the second definition is most appropriate and clearest in the veterans-benefits context. Based on that definition, we propose to define “proximately caused” in § 5.661(a)(2) consistent with the definition of “proximate cause” in Black’s, and to make that definition applicable to all of proposed part 5.

In § 5.661(a)(3), we propose to define “drugs” as “prescription or non-prescription medications and other substances (e.g., glue or paint), whether obtained legally or illegally”. We are omitting the additional term “illicitly” that is included in current § 3.301(d) because it would be redundant if included in the revised definition. *Black’s Law Dictionary* defines “illicit” as “illegal or improper”. (*Black’s Law Dictionary* 750 (7th ed. 1999)). “Legally or illegally obtained” is sufficiently broad to cover all the means of obtaining the drugs or other substances.

We propose to include the parenthetical "(e.g., glue or paint)" after the word "substances." This addition is illustrative and not intended to be an exclusive list.

The first two sentences of current § 3.301(c)(2) state that "[t]he simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct." We have not repeated these two sentences in proposed § 5.661(c)(1) because we believe they could be confusing to some regulation users and their inclusion would not add substantively to proposed § 5.661(c)(1). Proposed paragraph (c)(1) clearly describes the situations in which the consumption of alcohol leading to injury, disease, or death will constitute willful misconduct, *i.e.*, that drinking "alcoholic beverages to the point of intoxication * * * [that] proximately causes injury, disease, or death" will be considered willful misconduct. Thus, the proposed regulation encompasses the concepts expressed in current § 3.301(c)(2).

Proposed § 5.661(d) states how VA will determine whether suicide, or attempted suicide, involves willful misconduct. The proposal is based on current § 3.302 which provides VA's longstanding policy on this issue in clear and easily understandable language. Since there is no need to rewrite the current rule, we have simply incorporated the regulatory text of current § 3.302 into proposed § 5.661(d) without substantive change.

Proposed § 5.661(e) is based on adjudication rules concerning venereal disease in current § 3.301(c)(1). We propose to omit the rules in § 3.301(c)(1) concerning whether the disease was incurred in or aggravated by service. The omitted rules are consistent with the rules VA generally uses to determine whether a disease was incurred in or aggravated by service. Those rules will be addressed in Subpart E of proposed part 5 and there is no need to repeat them here.

5.662 Alcohol and drug abuse.

Proposed § 5.662 is based on rules in current § 3.301(d) and in related statutes, as interpreted by the United States Court of Appeals for the Federal Circuit (Federal Circuit). These rules are applied to determine whether VA may grant benefits for a disability or death related to the use of alcohol or drugs.

Proposed § 5.662(a) states the definitions applicable to the abuse of alcohol or drug rules. These definitions

are based on concepts in current § 3.301(d).

Paragraph (b) precludes a grant of service connection for alcohol or drug abuse and for injury or disease resulting from such abuse. Section 105 of title 38, United States Code, precludes a "line of duty" finding for an injury resulting from "the person's own * * * abuse of alcohol or drugs." Because such injury cannot be considered in line of duty, such injury cannot be service connected. In addition, 38 U.S.C. 1110 precludes payment of compensation for disability resulting from the veteran's abuse of alcohol or drugs. Moreover, current § 3.301(d) precludes a "line of duty" determination (and, by extension, an award of service connection) for an "injury or disease that was a result of the abuse of alcohol or drugs." Proposed paragraph (b) would carry this existing policy into part 5.

Proposed § 5.662(c) codifies the holding of the Federal Circuit in *Allen v. Principi*, 237 F.3d 1368, 1376 (Fed. Cir. 2001). In that case, the Court held that 38 U.S.C. 1110 "when read in light of its legislative history, does not preclude a veteran from receiving compensation for alcohol or drug-related disabilities arising secondarily from a service-connected disability, or from using alcohol or drug-related disabilities as evidence of the increased severity of a service-connected disability." *Allen*, 237 F.3d at 1370. Rather, 38 U.S.C. 1110 "precludes compensation only in two situations: (1) For primary alcohol abuse disabilities; and (2) for secondary disabilities (such as cirrhosis of the liver) that result from primary alcohol abuse." *Allen*, 237 F.3d at 1376.

Proposed § 5.662(d) codifies long-standing VA practice with respect to instances of accidental use of drugs. This proposed paragraph explains that VA will not consider the accidental use of a prescription or non-prescription drug or other substance as drug abuse. However, there is one exception. VA will consider accidental use as drug abuse if that accidental use is the result of impairment of judgment that is due to alcohol abuse, drug abuse, or the use of alcohol or drugs constituting willful misconduct under proposed § 5.661(c).

5.663 Homicide as a bar to VA benefits.

Proposed § 5.663 clarifies rules concerning VA benefit entitlement when a claimant or beneficiary kills the veteran or some other person upon whom their benefit entitlement depends. It is based on current § 3.11 and on long-standing VA practice.

Proposed § 5.663(a) contains applicable definitions, beginning with a definition of homicide. Current § 3.11, titled, "Homicide," bars "[a]ny person who has intentionally and wrongfully caused the death of another person" from receiving certain benefits. In applying this regulation, VA has traditionally understood a wrongful killing as being a killing without excuse or justification. Therefore, we propose to define homicide as "intentionally causing the death of a person without excuse or justification." We also propose to state in § 5.663(a)(1) that homicide "includes causing the death of the person directly or aiding or abetting someone else in causing the death." Individuals who assist in the killing of others should not profit from their wrongful acts. See *Lofton v. West*, 198 F.3d 846, 850 (Fed. Cir. 1999) (holding that current § 3.11 codifies the "slayer's rule," which is a common law principle that bars wrongdoers from obtaining benefits as a direct consequence of their wrongful acts).

Proposed §§ 5.663(a)(2) and (3) codify VA's current recognition, unstated in current regulations, that an "excuse" for killing means that the killing was accidental or that the person was insane at the time of the killing, and that "justification" means that there was a lawful reason for causing the death. The proposed definition of justification in § 5.663(a)(3) specifically references the well-recognized legal justification of a killing committed in self-defense or in defense of another person, which is further described in proposed paragraph (c).

In § 5.663(c), again based on long-standing VA practice, we propose to set out rules for what constitutes a killing committed in self-defense or in defense of another (*i.e.*, a homicide with "justification"). Essentially the requirements are that the killer had reason to believe that he or she, or someone else, was in immediate danger of death or serious bodily harm from the person slain; there was no apparent way for the endangered person to escape or retreat; and the act causing the death was necessary to avoid the danger of death or serious bodily harm, *i.e.*, the killer's response was in proportion to the threat posed by the deceased.

Proposed § 5.663(d), (e), and (f) are also codifications of long-standing VA practice.

Proposed § 5.663(d) addresses the effect of criminal judicial proceedings on VA claims involving homicide. Proposed § 5.663(d)(1) provides that VA will accept a criminal conviction of homicide as binding. We believe that this is appropriate, inasmuch as a

criminal conviction requires a finding of guilt beyond a reasonable doubt, a higher standard than is applicable in civil matters such as VA claims adjudication. By the same token, because of the higher standard of proof required for criminal conviction, acquittal does not mean that a person would not be guilty of homicide for VA purposes. Therefore we provide in proposed § 5.663(d)(2) that VA will develop the evidence to determine guilt for VA purposes if the person is acquitted, or if a conviction is reversed on appeal and the person is not retried.

Proposed § 5.663(e) explains that VA will accept a court finding that a person was insane at the time of a killing. We acknowledge that jurisdictions may differ on the standard of proof required to demonstrate insanity; however, we propose to accept such a finding in the interest of administrative economy, because it is rational to defer to a judicial proceeding that is directly relevant to the matter of sanity at the time of the killing. In other cases, VA would develop evidence to determine whether the person was sane at the time of the killing, if insanity is raised as a defense.

Proposed § 5.663(f) provides rules for determining how the death of the homicide victim affects VA benefits for potential beneficiaries other than the person who committed the homicide. The basic premise behind these rules is that a person who is guilty of homicide should not profit from his or her wrongdoing, nor should that person's wrongdoing interfere with the payment of benefits to other VA claimants or beneficiaries who were innocent of involvement in the homicide. Proposed § 5.663(f) provides a general rule that VA will make payments to eligible innocent claimants or beneficiaries as if the person who committed the homicide did not exist. It then addresses five common scenarios that show how this plays out.

The first specific rule, in § 5.663(f)(2), is illustrative. Some VA benefits are only payable to a veteran's children if there is no surviving spouse. For example, 38 U.S.C. 1313(a) provides for payment of dependency and indemnity compensation to a veteran's children if the veteran is not survived by a spouse. Proposed § 5.663(f)(2) provides that in the case of a homicide of a veteran by the veteran's spouse, VA will pay benefits to the veteran's eligible children as if there was no surviving spouse. Other proposed rules provide for cases in which there is a homicide of a veteran by the veteran's child, homicide of a veteran by the veteran's parent, homicide of one claimant or

beneficiary by another claimant or beneficiary, and rules for determining how homicide affects payment of accrued benefits and benefits awarded, but unpaid at death.

Forfeiture and Renouncement of the Right to VA Benefits

5.675 General forfeiture provisions.

Proposed § 5.675, based on portions of current § 3.900, contains generally applicable forfeiture-of-benefits rules.

We propose to not include current § 3.900(b)(1), which states that “[e]xcept as provided in paragraph (b)(2) of this section, any offense committed prior to January 1, 1959, may cause a forfeiture and any forfeiture in effect prior to January 1, 1959, will continue to be a bar on and after January 1, 1959.” Current § 3.900(b)(1) is based on section 3 of Public Law 85–857, 72 Stat. 1262. Public Law 85–857 established the forfeiture provisions applicable to veterans' benefits. Section 3 was a saving clause that continued forfeitures under laws predating Public Law 85–857 and permitted forfeitures for acts committed before the law became effective (on January 1, 1959). Stressing the provisions of the saving clause was important during the time of transition to the newly codified law; however, that is no longer necessary for the reasons stated in the following paragraph.

The rule in § 3.900(b)(1) that any offense committed prior to January 1, 1959, may cause a forfeiture is unnecessary because current statutes do not contain any time limitation on when acts leading to forfeiture were committed, whether prior to January 1, 1959, or otherwise. The rule in current § 3.900(b)(1) that any forfeiture in effect prior to January 1, 1959, will continue to be a bar on and after January 1, 1959, is also unnecessary, because it is subsumed in another rule. Current § 3.900(b)(2) provides that forfeitures found before September 2, 1959, will continue to be a bar on and after that date. We have retained that rule in proposed §§ 5.676(c)(1) and 5.677(c)(1) and 5.678(b)(3)(i). Forfeitures found before September 2, 1959, necessarily include those in effect prior to January 1, 1959.

We also propose to not include § 3.900(d), which reads: “When the person primarily entitled has forfeited his or her rights by reason of fraud or a treasonable act determination as to the rights of any dependents of record to benefits under § 3.901(c) or § 3.902(c) may be made upon receipt of an application.” These two provisions concern apportionment of benefits which were forfeited based on fraud or

treason, respectively. Submitting such an application would now have little usefulness. As §§ 3.901(c) and 3.902(c) show, no forfeited benefits are apportionable unless the forfeiture was found before September 2, 1959, and the apportionment was authorized (granted) by VA before September 2, 1959. Since VA no longer has authority to grant such apportionments, the provision in § 3.900(d) is obsolete and no longer relevant.

5.676 Forfeiture for fraud.

Proposed § 5.676 consolidates rules for forfeiture of VA benefits for fraud currently found in §§ 3.669(a) and (b)(1), 3.900(b)(2), 3.901 and 3.904(a).

Proposed § 5.676(b)(2) would clarify that forfeiture applies to both current and future VA benefits. This is consistent with 38 U.S.C. 6103(a), which provides that forfeiture for fraud extends to “all rights, claims, and benefits under all laws administered by the Secretary.”

Proposed § 5.676(b)(5) states the procedures for suspension of benefits for fraud and the restoration of benefits if VA ultimately decides that forfeiture is not appropriate.

In proposed § 5.676(c)(1), we have added references to the exception to the general rule that any forfeiture in effect prior to September 2, 1959, continues to be a bar to benefits on and after September 2, 1959. The exception is where there is a Presidential pardon for committing the act(s) that led to the forfeiture or where VA remits the forfeiture. This is not a substantive change.

5.677 Forfeiture for treasonable acts.

Proposed § 5.677 restates in one regulation rules for forfeiture of VA benefits for treasonable acts currently found in §§ 3.669(a) and (b)(2), 3.900(b)(2), 3.902 and 3.904(b).

Proposed § 5.677(b)(5) states the procedures for suspension of benefits for treasonable acts and the restoration of benefits if VA ultimately decides that forfeiture is not appropriate.

In proposed § 5.677(c)(1), we have added references to the exceptions to the general rule that any forfeiture in effect prior to September 2, 1959, continues to be a bar to benefits on and after September 2, 1959. The exceptions are where there is a Presidential pardon for committing the act(s) that led to the forfeiture and where VA remits the forfeiture. This is not a substantive change. *See* current § 3.100(b) (delegating authority to certain VA officials to, among other things, remit a forfeiture of benefits under 38 U.S.C. 6104, “Forfeiture for treason”) and

§ 3.669(d) (providing for the resumption of awards after the payee's offense has been pardoned by the President).

5.678 Forfeiture for subversive activity.

Proposed § 5.678 consolidates rules for forfeiture of VA benefits for subversive activity currently found in §§ 3.669(a) and (c), 3.903, and 3.904(c).

Current § 3.903(a) defines subversive activity by referring to numerous sections of titles 10, 18, 42, and 50 of the United States Code. The proposed definition in new § 5.678(a) adds the United States Code title names and the names of the specific code sections to provide regulation users with information about the subjects of the cited sections.

Section 705 of the Veterans Benefits Act of 2003 ("the Act") added several offenses to the list of offenses considered subversive activity. Sec. 705, Public Law 108-183, 117 Stat. 2672. The section 705 amendments apply to claims filed after the enactment of the Act (Dec. 16, 2003). *Id.* These additional offenses, and the relevant effective date information, are in proposed § 5.678(a)(3).

Under current § 3.903(b)(2) the Secretary of the Treasury notifies VA when members of the Coast Guard are convicted of subversive activity under various provisions of the Uniform Code of Military Justice. The Coast Guard is now under the jurisdiction of the Department of Homeland Security. Proposed § 5.678(b)(1) reflects this change. *See* sec. 888(b), Public Law 107-296, 116 Stat. 2249.

Proposed § 5.678(b)(2)(ii) adds "or otherwise not convicted" after the word "acquitted." Conviction and acquittal are not the only potential outcomes of an indictment. For example, the charges might be dismissed, or a conviction reversed on appeal and the person not retried.

5.679 Forfeiture decision procedures.

Proposed § 5.679, based on current § 3.905, provides procedures VA uses when rendering a decision on forfeiture. Section 3.905 and other related regulations use the term "declaration of forfeiture". Throughout these forfeiture regulations in part 5, we propose to simply use the term "forfeiture decision", which is less technical and more easily understood.

Pursuant to 38 U.S.C. 6105(a), VA makes a decision that VA benefits provided under this part have been forfeited without further adjudication upon being notified that a beneficiary has been convicted of engaging in subversive activity. However, 38 U.S.C.

6103, which governs forfeiture for fraud, and 38 U.S.C. 6104, which governs forfeiture for treason, do not provide for forfeiture without VA first adjudicating whether a beneficiary is guilty of fraud or treason for the limited purpose of determining whether this beneficiary has forfeited the right to VA benefits.

Neither 38 U.S.C. 6103 nor 6104 provide a standard of proof to apply in these forfeiture adjudications. As noted by the Court of Appeals for Veterans Claims (CAVC) in *Trilles v. West*, 13 Vet. App. 314, 318 (2000), the standard VA has historically applied is proof "beyond a reasonable doubt," but that standard does not appear in current VA forfeiture regulations. We propose to codify the "beyond a reasonable doubt" standard in § 5.679(c)(2).

5.680 Remission of forfeiture.

Proposed § 5.680, based in part on current § 3.905, provides procedures applicable to remittance of a forfeiture.

Proposed § 5.680(b) states the two bases for remission of a forfeiture: Showing that the forfeiture decision involved clear and unmistakable error (CUE), and submission of new and material evidence establishing that the forfeiture should not be continued. As the CAVC pointed out in *Trilles*, although current VA regulations "do not expressly state the method of review of final forfeiture decisions," they cumulatively "authorize revoking a forfeiture declaration because of CUE in that earlier decision declaring forfeiture or on the basis of new and material evidence." *Trilles*, 13 Vet. App. at 323.

We propose to require in § 5.680(b)(2) that "[i]n accordance with the requirements noted in § 3.156(a) of this chapter, the new and material evidence must directly relate to the basis for forfeiture." This language is based on *Reyes v. Brown*, 7 Vet. App. 113, 115 (1994), where the court held that in seeking to reopen a Board of Veterans' Appeals' decision in a forfeiture case, "the appellant would have had to produce new and material evidence bearing directly on whether she had acted in a false or fraudulent manner in her efforts to restore her DIC benefits." The proposed language, like the *Reyes* opinion, does not represent a gloss or change to the current requirements of § 3.156; rather, it clarifies what issue in particular is subject to a reopening based on new and material evidence.

Proposed § 5.680(c) includes rules from current § 3.901(e) concerning a special remission procedure applicable where a forfeiture for fraud was imposed before September 2, 1959.

5.681 Effective dates—forfeiture.

Proposed § 5.681 is based on current §§ 3.500(k) and (s) and 3.669(a) through (c). It provides the effective dates for the various actions associated with forfeiture. We have intentionally omitted an effective date rule found at current § 3.400(m), which reads as follows: "(m) *Forfeiture* (§§ 3.901, 3.902). Day following date of last payment on award to payee who forfeited." Section 3.400(m) provides the effective dates for awards of apportioned benefits to the dependents of a beneficiary after the beneficiary forfeits his or her benefits due to fraud or treasonable acts. As noted in the discussion of proposed §§ 5.675 and 5.676, payments to dependents of benefits forfeited for fraud or treasonable acts can be made only under an apportionment decision that predates September 2, 1959. Inasmuch as there has been no authority to make a new apportionment award of benefits forfeited for fraud or treasonable acts since 1959, § 3.400(m) no longer serves a useful purpose.

5.682 Presidential pardon for offenses causing forfeiture.

Proposed § 5.682 is based on current §§ 3.669(d) and 3.903(c). It provides the effective date rules related to the restoration of forfeited benefits after a Presidential pardon of the offenses leading to forfeiture.

Current § 3.903(c) states that "[w]here any person whose right to benefits has been [forfeited for subversive activities] is granted a pardon of the offense by the President of the United States, the right to such benefits shall be restored as of the date of such pardon, if otherwise eligible." Current § 3.903(c) is based on similar language concerning forfeiture for subversive activities in 38 U.S.C. 6105(a). However, the stated rule is equally applicable to forfeitures for fraud or treason. This is implicit in current § 3.669(d)(1) which, subject to certain conditions, provides for the resumption of an award of forfeited VA benefits effective the date of a Presidential pardon. Therefore proposed § 5.682(a) states as a general rule that if the President of the United States pardons the offenses that were the basis of a forfeiture of rights to VA benefits, VA will restore rights to all forfeited VA benefits effective the date of the pardon, if otherwise in order.

Current § 3.669(d)(1) speaks of "resuming an award" after a Presidential pardon. We propose to instead speak of resuming payment in § 5.682(b). We believe this terminology will be clearer to many regulation users.

VA intends no substantive change by the substitution of terms.

5.683 Renouncement of benefits.

Proposed § 5.683 is based on current §§ 3.106, 3.400(s), and 3.500(q). It sets out rules concerning a VA beneficiary's renouncement of VA pension, compensation, or dependency and indemnity compensation.

One change is in proposed § 5.683(c), which states that "VA will discontinue payment of renounced benefits effective the last day of the month in which VA received the renouncement. If payments had been suspended, VA will discontinue payment of renounced benefits effective the first day of the month that follows the month for which VA last paid benefits". The first sentence of this rule is consistent with provisions of current §§ 3.106(a) and 3.500(q). The second sentence of this rule is new.

If a beneficiary has an award that has been suspended, he or she may not have received any benefit payments for some length of time. Under normal circumstances if VA resumes a beneficiary's suspended award, those payments that are due but not yet paid would be released to the beneficiary. In the case of renouncement, however, releasing those payments to a beneficiary would be inconsistent with the expressed desire of the beneficiary to stop receiving benefits. The proposed wording for § 5.683(c) would ensure that beneficiaries who renounce their rights to receive VA benefits are not sent any additional benefit payments.

Endnote Regarding Amendatory Language

We intend to ultimately remove part 3 entirely, but we are not including amendatory language to accomplish that at this time. VA will provide public notice before removing part 3.

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 proposed 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, 5 U.S.C. 601–612. This proposed amendment would not affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility

analysis requirements of sections 603 and 604.

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 Order classifies a rule as a significant regulatory action requiring review by the Office of Management and Budget if it meets any one of a number of specified conditions, including: having an annual effect on the economy of \$100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. VA has examined the economic, legal, and policy implications of this proposed rule and has concluded that it is a significant regulatory action because it may raise novel legal or policy issues.

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, or 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, or tribal governments, or the private sector.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 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; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; and 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida.

List of Subjects in 38 CFR Part 5

Administrative practice and procedure, Claims, Disability benefits, Pensions, Veterans.

Approved: February 17, 2006.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

For the reasons set forth in the preamble, VA proposes to amend 38 CFR part 5 as proposed to be added at 69 FR 4832, January 30, 2004 by adding subpart K to read as follows

PART 5—COMPENSATION, PENSION, BURIAL, AND RELATED BENEFITS

Subpart K—Matters Affecting the Receipt of Benefits

Bars to Benefits

Sec.

- 5.660 Line of duty.
- 5.661 Willful misconduct.
- 5.662 Alcohol and drug abuse.
- 5.663 Homicide as a bar to VA benefits.
- 5.664–5.674 [Reserved]

Forfeiture and Renouncement of the Right to VA Benefits

- 5.675 General forfeiture provisions.
- 5.676 Forfeiture for fraud.
- 5.677 Forfeiture for treasonable acts.
- 5.678 Forfeiture for subversive activity.
- 5.679 Forfeiture decision procedures.
- 5.680 Remission of forfeiture.
- 5.681 Effective dates—forfeiture.
- 5.682 Presidential pardon for offenses causing forfeiture.
- 5.683 Renouncement of benefits.
- 5.684–5.689 [Reserved]

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

Subpart K—Matters Affecting the Receipt of Benefits

Bars to Benefits

§ 5.660 Line of duty.

(a) *Effect of line of duty findings on claims adjudication.* Except as provided in § 3.310 of this chapter, VA may grant service connection only for an injury, disease, or cause of death that was incurred or aggravated in line of duty.

(b) *Definition of "in line of duty."* Except as provided in paragraph (c) of this section, an injury, disease, or cause of death was incurred or aggravated *in line of duty* when that injury, disease, or cause of death was incurred or aggravated during a period of active military service and was not the result of either of the following:

- (1) The veteran's own willful misconduct; or
- (2) The veteran's abuse of alcohol or drugs. See §§ 5.661, "Willful misconduct," and 5.662, "Alcohol and drug abuse."

(c) *Exceptions.* Line of duty requirements are not met as to an injury, disease, or cause of death incurred or aggravated at a time that the veteran was:

- (1) Avoiding duty by desertion;

(2) Absent without leave, which materially interfered with the performance of military duty;

(3) Confined under a sentence of court-martial involving an unremitted dishonorable discharge; or

(4) Confined under sentence of a civil court for a felony as determined under the laws of the jurisdiction where the veteran was convicted by such court.

(d) *Weight given service department findings.* A service department finding that injury, disease, or death occurred in line of duty will be binding on VA unless the finding is patently (clearly) inconsistent with the laws administered by VA.

(Authority: 38 U.S.C. 101(16), 105, 1110, 1131)

Cross Reference: See also § 3.1(y)(4) of this section (concerning whether the detention or internment of a former prisoner of war was in line of duty).

§ 5.661 Willful misconduct.

(a) *Definitions.*—(1) *Willful misconduct*, for the purposes of this part, means an act involving deliberate or intentional wrongdoing with knowledge of, or wanton and reckless disregard of, its probable consequences. A mere technical violation of police regulations or other ordinances will not by itself constitute willful misconduct.

(2) *Proximately caused*, for the purposes of this part, means that the event resulted directly from the cause and would not have occurred without that cause. For example, injury, disease, or death is proximately caused by willful misconduct if the act of willful misconduct results directly in injury, disease, or death that would not have occurred without the willful misconduct.

(3) *Drugs*, for the purposes of this part, means prescription or non-prescription medications and other substances (e.g., glue or paint), whether obtained legally or illegally.

(b) *Effect of willful misconduct findings on claims adjudication.*—(1) Service connection may not be granted for a disability or death resulting from injury or disease proximately caused by the veteran's own willful misconduct and compensation may not be paid for disability due to such injury, disease, or death. This paragraph applies to service connection established under any provision of this chapter, including § 3.310 of this chapter and compensation awarded under §§ 3.358 and 3.361 of this chapter.

(2) Disability or death pension may not be granted for any condition proximately caused by the veteran's own willful misconduct.

(c) *Use of alcohol or drugs constituting willful misconduct.*—(1)

Alcohol. (i) If a person consumes alcoholic beverages to the point of intoxication and that intoxication proximately causes injury, disease, or death, VA will consider the injury, disease, or death to have been proximately caused by willful misconduct.

(ii) Organic diseases and injuries that are proximately caused by the chronic use of alcohol as a beverage will not be considered of willful misconduct origin. However, VA may be precluded by § 5.662(b) from awarding service connection for such diseases or injuries.

(2) *Drugs.* (i) The isolated and infrequent use of drugs by itself will not be considered willful misconduct.

However, the progressive and frequent use of drugs in a manner not legally prescribed and to the point of addiction will be considered willful misconduct.

(ii) If a person uses drugs in a manner not legally prescribed to the point of intoxication and that intoxication proximately causes injury, disease, or death, VA will consider the injury, disease, or death to have been proximately caused by willful misconduct.

(iii) Organic diseases that are proximately caused by the chronic use of drugs and infections coinciding with the injection of drugs will not be considered of willful misconduct origin. However, VA may be precluded by § 5.662(b) from awarding service connection for such diseases.

(iv) The use of drugs for therapeutic purposes as directed is not willful misconduct.

(v) The use of drugs or addiction to drugs proximately caused by a service-connected disability is not willful misconduct.

(d) *Suicide constituting willful misconduct.*—(1) *General.* (i) In order for suicide to constitute willful misconduct, the act of self-destruction must be intentional.

(ii) A person of unsound mind is incapable of forming an intent (*mens rea*, or guilty mind, which is an essential element of crime or willful misconduct).

(iii) It is a constant requirement for favorable action that the precipitating mental unsoundness be service connected.

(2) *Evidence of mental condition.* (i) Whether a person, at the time of suicide, was so unsound mentally that he or she did not realize the consequences of such an act, or was unable to resist such impulse is a question to be determined in each individual case, based on all available lay and medical evidence

pertaining to his or her mental condition at the time of suicide.

(ii) The act of suicide or a bona fide attempt is considered to be evidence of mental unsoundness. Therefore, where no reasonable, adequate motive for suicide is shown by the evidence, the act will be considered to have resulted from mental unsoundness.

(iii) A reasonable, adequate motive for suicide may be established by affirmative evidence showing circumstances which could lead a rational person to self-destruction.

(3) *Evaluation of evidence.* (i) Affirmative evidence is necessary to justify reversal of service department findings of mental unsoundness where VA's criteria do not otherwise warrant contrary findings.

(ii) In all instances any reasonable doubt should be resolved favorably to support a finding of service connection (see § 3.102).

(e) *Venereal disease.* VA will not consider the residuals of venereal disease to be the result of willful misconduct. Whether the veteran complied with service regulations and directives for reporting the disease and undergoing treatment is immaterial after November 14, 1972, and the service department characterization of acquisition of the disease as willful misconduct or as not in line of duty will not govern.

(f) *Weight to be given to service department findings.* A service department finding that injury, disease, or death was not proximately caused by willful misconduct will be binding on VA unless it is patently (clearly) inconsistent with the facts and the laws administered by VA.

(Authority: 38 U.S.C. 105, 501, 1110, 1131, 1151, 1521)

§ 5.662 Alcohol and drug abuse.

(a) *Definitions.*—(1) *Alcohol abuse* means the consumption of alcoholic beverages over time, or excessive use at any one time, sufficient to proximately cause injury, disease, or death to the person consuming such beverages.

(2) *Drug abuse* means the intentional use of drugs for a purpose other than their medically intended use or in a manner not prescribed or directed.

(b) *Service connection for alcohol or drug abuse.* Except as provided in paragraph (c) of this section, an injury or disease incurred during active military service shall not be deemed to have been incurred in line of duty if such injury or disease was proximately caused by the abuse of alcohol or drugs.

(c) *Alcohol or drug abuse related to, or a part of, a service-connected injury or disease.*—(1) VA may grant service

connection for a disability or death proximately caused by the abuse of alcohol or drugs that is secondary to a service-connected injury or disease.

(2) VA will consider the effect of the abuse of alcohol or drugs in evaluating the severity of a service-connected disability under part 4 of this chapter if competent evidence shows that the abuse of alcohol or drugs was proximately caused by that service-connected disability.

(d) *Accidental use.* The accidental use of prescription or non-prescription drugs or other substances is not drug abuse unless the accident was due to impaired judgment caused by one or more of the following:

(1) Alcohol abuse.

(2) Drug abuse.

(3) The use of alcohol or drugs constituting willful misconduct under § 5.661(c).

(Authority: 38 U.S.C. 105(a), 501(a), 1110, 1131)

§ 5.663 Homicide as a bar to VA benefits.

(a) *Definitions.* The following definitions apply to this section:

(1) *Homicide* means intentionally causing the death of a person without excuse or justification. Homicide includes causing the death of the person directly or aiding or abetting someone else in causing the death.

(2) *Excuse* means that the death was caused by a person who was insane at the time of the act causing the death.

(3) *Justification* means that there was a lawful reason for causing the death, including acting in self-defense or in defense of another person, as provided in paragraph (c) of this section.

(b) *Homicide as a bar to VA benefits.* The general rule is that VA will not award pension, compensation, or dependency and indemnity compensation (including benefits under 38 U.S.C. 1318), or any increase in those benefits, to which the person responsible for the homicide would otherwise be entitled because of the death of the person slain.

(c) *Self defense, or defense of another.* A killing is justified as having been committed in self-defense or defense of another if the evidence establishes that the killer reasonably believed that:

(1) She or he, or another person, was in immediate danger of death or serious bodily harm from the deceased;

(2) There was no way to escape or retreat in order to avoid the danger of death or serious bodily harm; and

(3) The action causing the death was necessary to avoid the danger of death or serious bodily harm.

(d) *Effect of court of law proceeding on VA finding of homicide.*—(1)

Conviction. VA will accept a court of law conviction of homicide as binding.

(2) In all other situations, including those in which the person was acquitted of criminal charges or in which the conviction was reversed on appeal and the person is not retried, VA will develop the necessary evidence and determine whether the person was guilty of homicide, as defined in paragraph (a)(1) of this section.

(e) *Effect of court of law proceeding on VA finding of insanity at time of killing.* VA will accept as binding a court's determination that a person was insane at the time of the killing. In other cases, if insanity is alleged, VA will develop the necessary evidence and determine whether the person was insane.

(f) *Effect of homicide on eligibility for death benefits.*—(1) *General rule.* The general rule is that VA will make payments to eligible innocent beneficiaries as if the person who committed the homicide did not exist.

(2) *Homicide of a veteran by the veteran's spouse.* In the case of a homicide of a veteran by the veteran's spouse, VA will pay benefits to the veteran's eligible children as if there were no surviving spouse.

(3) *Homicide of veteran by the veteran's child.* The following rules apply in the case of a homicide of a veteran by the veteran's child:

(i) VA will pay to the veteran's surviving spouse any additional benefits to which the spouse is entitled on account of that child, if the surviving spouse has actual or constructive custody of the child.

(ii) If the surviving spouse does not have actual or constructive custody of the child, VA will pay death benefits to the eligible surviving spouse as if the child did not exist.

(iii) VA will pay death benefits to any other child of the veteran (including apportionments of benefits based on the veteran's death) as if the child who committed the homicide did not exist.

(4) *Homicide of a veteran by the veteran's parent.* In the case of a homicide of a veteran by the veteran's parent, VA will pay benefits to which the veteran's other parent is entitled as if the parent who committed the homicide did not exist.

(5) *Homicide of one claimant or beneficiary by another claimant or beneficiary.* In the case of homicide of a VA claimant or beneficiary by another VA claimant or beneficiary, the person who committed the homicide cannot receive any increase in benefits based on the death of the victim. For example, if both beneficiaries are children of a deceased veteran, the child who

committed the homicide is not entitled to any increase in benefits based on the death of the deceased child. If one of the veteran's parents is responsible for the homicide of the other parent, the parent who committed the homicide is not entitled to receive benefits, or an increase in benefits, based on being a sole surviving parent.

(6) *Homicide and accrued benefits or benefits awarded, but unpaid at death.* Accrued benefits and benefits awarded, but unpaid at death, are paid to various classes of claimants, each of which takes precedence over lower classes of beneficiaries. See § 5.551, "Persons entitled to accrued benefits or benefits awarded, but unpaid at death." The homicide of a person who is a member of a higher priority class by a person in a lower priority class will not entitle the wrongdoer to such benefits. The homicide of one member of a class by a person in the same class will not entitle the wrongdoer to an increased share of the benefits payable to the members of that class because of the death of the person slain.

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

§§ 5.664—5.674 [Reserved]

Forfeiture and Renouncement of the Right to VA Benefits

§ 5.675 General forfeiture provisions.

(a) *Forfeiture does not bar benefits based on later periods of service.* Forfeiture of benefits based on one period of service does not affect entitlement to benefits based on a later period of service that begins after the commission of the offense(s) that caused the forfeiture.

(b) *Violation of hospital rules not grounds for forfeiture.* Pension or compensation benefits are not subject to forfeiture because of violation of hospital rules.

(Authority: 38 U.S.C. 501(a), 6103, 6104, 6105)

§ 5.676 Forfeiture for fraud.

(a) *Definition of fraud.* For purposes of this section, the definition of fraud in § 3.901(a) applies.

(b) *Forfeiture for fraud after September 1, 1959.*—(1) *Persons subject to forfeiture.* After September 1, 1959, forfeiture for fraud will be found only if:

(i) The person committing the fraud was not residing or domiciled in a State at the time of the commission of the fraud; or

(ii) The person committing the fraud ceased to be a resident of or domiciled in a State before expiration of the period during which criminal prosecution could be instituted; or

(iii) The fraud was committed in the Philippine Islands.

(2) *Effect of forfeiture for fraud.* Any person for whom forfeiture for fraud is found forfeits all rights to VA benefits provided under this part. The forfeiture applies to both current and future VA benefit entitlement.

(3) *Effect on dependents of forfeiture for fraud.*—(i) *Apportionment.* After September 1, 1959, VA may not apportion benefits forfeited for fraud.

(ii) *Death benefits.* See paragraph (d) of this section.

(iii) *Burial benefits.* See [regulation that will be published in a future Notice of Proposed Rulemaking] (concerning the effect of forfeiture on burial benefits).

(4) *Effective date of forfeiture.* See § 5.681 (concerning the effective date of forfeitures for fraud).

(5) *Suspension for fraud.* When a case is recommended for forfeiture for fraud in accordance with § 5.679, VA will suspend payment of benefits provided under this part. If VA ultimately decides that forfeiture for fraud is not appropriate, VA will restore payments effective the first day of the month that follows the month for which VA last paid benefits, if otherwise in order.

(c) *Forfeiture before September 2, 1959.*—(1) *Forfeitures continue to bar benefits.* Any forfeiture in effect before September 2, 1959, continues to bar benefits on and after September 2, 1959, except where there is a Presidential pardon for commission of the offense(s) leading to the forfeiture, or where VA remits the forfeiture under the provisions of § 5.680, “Remission of forfeiture.”

(2) *Effect on dependents of forfeiture for fraud.*—(i) *Apportionment of disability compensation.* (A) *When payable.* Disability compensation a veteran forfeited for fraud may be paid to the veteran’s spouse, child, or parent if the forfeiture was found before September 2, 1959, and if VA authorized the apportionment before September 2, 1959.

(B) *Amount that may be apportioned.* The total apportioned amount is the lesser of the service-connected death benefit that would be payable if the veteran were dead or the amount of disability compensation that would have been paid to the veteran but for the forfeiture.

(C) *Participation in the fraud bars apportionment.* VA may not apportion benefits forfeited for fraud to any dependent who participated in the fraud that caused the forfeiture.

(ii) *Death benefits.* See paragraph (d) of this section.

(3) *Remission.* See § 5.680(c), “Special rules for remission of a forfeiture for fraud imposed before September 2, 1959.”

(d) *Death benefits.*—(1) *Veteran’s fraud does not bar dependents’ death benefits.* A veteran’s forfeiture of benefits for fraud does not bar the award of death pension, death compensation, or dependency and indemnity compensation to eligible dependents.

(2) *Dependent’s participation in fraud bars death benefits.* VA may not pay death benefits to any surviving dependent who participated in the fraud that caused the forfeiture of the veteran’s benefits.

(e) *Presidential pardons.* See § 5.682, “Presidential pardon for offenses causing forfeiture.”

(Authority: 38 U.S.C. 501(a), 6103)

Cross Reference: For decision procedures, see § 5.679, “Forfeiture decision procedures.”

§ 5.677 Forfeiture for treasonable acts.

(a) *Definition of treasonable acts.* For purposes of this section, *treasonable acts* are acts of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies.

(b) *Forfeiture for treasonable acts after September 1, 1959.*—(1) *Persons subject to forfeiture.* After September 1, 1959, forfeiture for treasonable acts will be found only where:

(i) The person committing the treasonable act was not residing or domiciled in a State at the time of the commission of the treasonable act;

(ii) The person committing the treasonable act ceased to be a resident of or domiciled in a State before expiration of the period during which criminal prosecution could be instituted; or

(iii) The treasonable act was committed in the Philippine Islands.

(2) *Effect of a forfeiture for treasonable acts.* Any person for whom forfeiture for treasonable acts is found after September 1, 1959, forfeits all rights to VA benefits provided under this part. The forfeiture applies to both current and future VA benefit entitlement.

(3) *Effect on dependents of a forfeiture for treasonable acts.* After September 1, 1959, VA has no authority to make either of the following awards to dependents of a veteran who forfeited VA benefits for treasonable acts:

(i) An apportionment award of the forfeited benefits.

(ii) An award of VA benefits provided under this part to the veteran’s dependents based on a period of the veteran’s active military service that

began before the date of commission of the treasonable acts.

(4) *Effective date of forfeiture.* See § 5.681 (concerning the effective date of forfeitures for treasonable acts).

(5) *Suspension for treasonable acts.* When a case is recommended for consideration of forfeiture for treasonable acts in accordance with § 5.679, VA will suspend payment of VA benefits provided under this part. If VA ultimately decides that forfeiture for treasonable acts is not appropriate, VA will restore payments effective the first day of the month that follows the month for which VA last paid benefits, if otherwise in order.

(c) *Forfeiture before September 2, 1959.*—(1) *Forfeitures continue to bar benefits.* Any forfeiture in effect before September 2, 1959, continues to bar benefits on and after September 2, 1959, except where there is a Presidential pardon for commission of the offense(s) leading to the forfeiture, or where VA remits the forfeiture under the provisions of § 5.680, “Remission of forfeiture.”

(2) *Effect on dependents of a forfeiture for treasonable acts.*—(i) *Apportionment of forfeited benefits.*—

(A) *When payable.* If forfeiture for treasonable acts was found before September 2, 1959, and if VA authorized the apportionment before September 2, 1959, VA may pay any part of the forfeited benefits to the dependents of the person who forfeited benefits, as follows:

(B) *Amount of compensation that may be apportioned.* If the forfeited benefit is disability compensation, the total amount payable to the veteran’s spouse, children and parents is the lesser of the service-connected death benefit that would be payable if the veteran were dead or the amount of disability compensation that would have been paid to the veteran but for the forfeiture.

(C) *Amount of pension that may be apportioned.* If the forfeited benefit is pension, the total amount payable to the veteran’s spouse and children is the lesser of the nonservice-connected death benefit that would be payable if the veteran were dead or the amount of pension being paid to the veteran at the time of the forfeiture.

(D) *Participation in the treasonable acts bars apportionment.* VA may not apportion benefits forfeited for treasonable acts to any dependent of a beneficiary who participated in the treasonable acts that caused the forfeiture.

(ii) *Death benefits.* VA may pay death pension, death compensation, or dependency and indemnity compensation to the eligible surviving

dependents of a veteran who forfeited VA benefits for a treasonable act if all of the following are true:

(A) The forfeiture was found before September 2, 1959;

(B) The specified death benefits were authorized before September 2, 1959; and

(C) The payee of the specified death benefits did not participate in the treasonable acts that caused the forfeiture.

(d) *Effect of a child's treasonable act on the benefits of a surviving spouse.* Treasonable acts committed by a child in the surviving spouse's custody do not affect the spouse's award of additional death benefits for that child.

(e) *Presidential pardons.* See § 5.682, "Presidential pardon for offenses causing forfeiture."

(Authority: 38 U.S.C. 501(a), 6103(d)(1), 6104)

Cross Reference: For forfeiture procedures, see § 5.679, "Forfeiture decision procedures."

§ 5.678 Forfeiture for subversive activity.

(a) *Definition of subversive activity.*

Subversive activity is any of the following offenses in the United States Code for which punishment is prescribed:

(1) *Title 10, "Armed Forces" (Uniform Code of Military Justice).*

(i) Section 894—(Art. 94, "Mutiny or sedition").

(ii) Section 904—(Art. 104, "Aiding the enemy").

(iii) Section 906—(Art. 106, "Spies").

(2) *Title 18, "Crimes and Criminal Procedure."*

(i) Section 792, "Harboring or concealing persons."

(ii) Section 793, "Gathering, transmitting, or losing defense information."

(iii) Section 794, "Gathering or delivering defense information to aid foreign government."

(iv) Section 798, "Disclosure of classified information."

(v) Section 2381, "Treason."

(vi) Section 2382, "Misprision of treason."

(vii) Section 2383, "Rebellion or insurrection."

(viii) Section 2384, "Seditious conspiracy."

(ix) Section 2385, "Advocating overthrow of Government."

(x) Section 2387, "Activities affecting armed forces generally."

(xi) Section 2388, "Activities affecting armed forces during war."

(xii) Section 2389, "Recruiting for service against United States."

(xiii) Section 2390, "Enlistment to serve against United States."

(xiv) Chapter 105, "Sabotage."

(3) *Title 18, "Crimes and Criminal Procedure"—claims filed on and after December 16, 2003.* With respect to the forfeiture of benefits awarded on the basis of claims filed on and after December 16, 2003, the following offenses in Title 18 are also subversive activities:

(i) Section 175, "Prohibitions with respect to biological weapons."

(ii) Section 229, "Prohibited activities."

(iii) Section 831, "Prohibited transactions involving nuclear materials."

(iv) Section 1091, "Genocide."

(v) Section 2332a, "Use of certain weapons of mass destruction."

(vi) Section 2332b, "Acts of terrorism transcending national boundaries."

(4) *Title 42, The Public Health and Welfare.*

(i) Section 2272, "Violation of specific sections."

(ii) Section 2273, "Violation of sections."

(iii) Section 2274, "Communication of Restricted Data."

(iv) Section 2275, "Receipt of Restricted Data."

(v) Section 2276, "Tampering with Restricted Data."

(5) *Title 50, War and National Defense.* Section 783, "Offenses."

(b) *Indictment or conviction for subversive activity.*—(1) *Sources of notification.* The Secretary of Defense or the Secretary of Homeland Security, as applicable, notifies VA in each case in which an individual is convicted of an offense listed in paragraph (a)(1) of this section. The Attorney General notifies VA in each case in which an individual is indicted or convicted of an offense listed in paragraphs (a)(2) through (5) of this section.

(2) *Indictment*—(i) *VA action on notice of indictment.* Upon receipt of notice of the return of an indictment for subversive activity, VA will suspend payment of VA benefits provided under this part to the individual indicted pending disposition of the criminal proceedings. Payments will be suspended effective the first day of the month that follows the month for which VA last paid benefits.

(ii) *VA action on notice of acquittal.* If the person indicted for subversive activity is acquitted or otherwise not convicted, VA will restore payments effective the first day of the month that follows the month for which VA last paid benefits, if otherwise in order.

(3) *Conviction*—(i) *VA action on notice of conviction.* Upon receipt of notice that a VA beneficiary was convicted after September 1, 1959, of

subversive activity, VA will make a decision on forfeiture as provided in § 5.679(c)(1).

(ii) *Benefits forfeited.* Any person convicted of subversive activity forfeits all rights to VA benefits provided under this part. The forfeiture applies to both current and future benefits.

(iii) *Effective date of forfeiture upon conviction.* See § 5.681(b)(3), "Effective dates—forfeiture for subversive activity."

(iv) *Effect on dependents.* VA may not award benefits provided under this part to the dependents of a veteran who was convicted of subversive activity after September 1, 1959, if the award would be based on a period of the veteran's active military service that began before the date of commission of the subversive activity.

(c) *Presidential pardons.*—(1) *Restoration of forfeited benefits.* See § 5.682, "Presidential pardon for offenses causing forfeiture."

(2) *Restoration of benefits for surviving dependents.* Upon application following Presidential pardon for the offenses leading to forfeiture for subversive activity, a veteran's dependents may be paid death pension, death compensation, or dependency and indemnity compensation, if otherwise eligible for that benefit.

(Authority: 38 U.S.C. 501(a), 6105)

§ 5.679 Forfeiture decision procedures.

(a) *Officials authorized to make a forfeiture decision; recommend forfeiture; or refer forfeiture cases.*—(1) *Forfeiture decisions.* An official authorized under § 3.100(b) of this chapter (the Director of the C&P Service or his or her designee) shall have the authority to make a forfeiture decision.

(2) *Recommendation of forfeiture.* A Regional Counsel or, in the Manila Veterans Service Center (VSC), the Veterans Service Center Manager (VSCM) shall have authority to recommend forfeiture and submit the case to such an official.

(3) *Referral of forfeiture cases.* The following individuals may refer cases to the Regional Counsel or VSCM in Manila, as appropriate, for consideration whether to recommend the case for forfeiture: the director of a Veterans Benefits Administration service, the Chairman, Board of Veterans' Appeals, or the General Counsel.

(b) *VA obligations prior to recommending forfeiture based on fraud or treasonable acts.* Before recommending forfeiture for fraud or treasonable acts under paragraph (a) of this section, the Regional Counsel or, in Manila, Philippines, the VSCM must

provide the beneficiary or claimant with written notice that VA is proposing to make a forfeiture decision and of the right to present a defense. The notice will be sent to the person's latest address of record and will include the following information:

(1) The specific charges against the person;

(2) A detailed statement of the evidence supporting the charges (subject to regulatory limitations on disclosure of information);

(3) A citation and discussion of the applicable statute;

(4) The right to submit a statement or evidence within 60 days after the date of the notice, either to rebut the charges or explain the person's position;

(5) The right to a hearing within 60 days after the date of the notice, with representation by counsel of the person's own choosing; and

(6) Information about that fees for representation are limited in accordance with 38 U.S.C. 5904, "Recognition of agents and attorneys generally," and that VA will not pay expenses incurred by a claimant, his or her counsel, or witnesses.

(c) *Standards for forfeiture.*—(1) *Forfeiture upon conviction of engaging in subversive activity.* An official authorized under § 3.100(b) of this chapter will make a decision to forfeit benefits when notified that a VA beneficiary has been convicted of an offense involving subversive activity.

(2) *Forfeiture for engaging in fraud or treasonable acts.* An official authorized under § 3.100(b) of this chapter will make a forfeiture decision when the official determines that the evidence shows beyond a reasonable doubt that a VA claimant or beneficiary has engaged in fraud as defined in § 5.576(a), or one or more treasonable acts as defined in § 5.677(a).

(d) *Administrative appeal.* An authorized VA official may file an administrative appeal of a forfeiture decision under the provisions in § 19.51 of this chapter, "Officials authorized to file administrative appeals and time limits for filing."

(e) *Finality of forfeiture decisions.* Forfeiture decisions are final and binding under the provisions in § 3.104(a) of this chapter (concerning the binding effect of a decision by an agency of original jurisdiction on all VA field offices); § 20.1103 of this chapter, "Finality of determinations of the agency of original jurisdiction where appeal is not perfected;" or § 20.1104 of this chapter, "Finality of determinations of the agency of original jurisdiction affirmed on appeal;" as applicable.

(Authority: 38 U.S.C. 501(a), 512(a), 6103, 6104)

§ 5.680 Remission of forfeiture.

(a) *Authority to make remission decisions.* See § 3.100(b) of this chapter (concerning the delegation of authority to make forfeiture decisions).

(b) *Standards.*—(1) *Clear and unmistakable error.* VA will remit a forfeiture upon a showing that the forfeiture decision involved clear and unmistakable error. See § 3.105(a) of this chapter (concerning reversal or amendment of prior decisions based on clear and unmistakable error).

(2) *New and material evidence.* VA will remit a forfeiture upon the submission of new and material evidence establishing that forfeiture should not be continued, see § 3.156 of this chapter, "New and material evidence." In accordance with the requirements noted in § 3.156(a) of this chapter, the new and material evidence must directly relate to the basis for forfeiture.

(c) *Special rules for remission of a forfeiture for fraud imposed before September 2, 1959.*—(1) *Basis for remission.* If a forfeiture for fraud was imposed before September 2, 1959, and that forfeiture would not be imposed under the statutes and regulations in effect on and after September 2, 1959, the forfeiture will be remitted.

(2) *Effective dates.*—(i) *Effective date of remission.* Remission of a forfeiture under paragraph (c)(1) of this section is effective June 30, 1972.

(ii) *Effective date of payments.* Upon receipt of an application, VA will award benefits under paragraph (c)(1) of this section effective as of the date provided by § 3.114 of this chapter, "Change of law or Department of Veterans Affairs issue."

(3) *Deduction of apportionment payments.* (i) *Applicability.* This paragraph applies when all of the following are true:

(A) VA remitted a forfeiture under paragraph (c)(1) of this section.

(B) During the period of time that the forfeiture was in effect, VA apportioned some or all of the forfeited benefits to the beneficiary's dependents as provided in § 5.676(c)(2).

(C) The remission results in payments being due to the beneficiary for periods during which the apportionment was being paid to the beneficiary's dependents.

(ii) *Deduction.* The payments to the beneficiary will be reduced by the amount of apportioned benefits paid to the beneficiary's dependents during the time stated in paragraph (c)(3)(i)(C).

(Authority: 38 U.S.C. 501(a), 6103(d)(2))

§ 5.681 Effective dates—forfeiture.

(a) *Suspension upon recommendation of forfeiture for fraud or treasonable acts.*—(1) *Suspension on recommendation for forfeiture.* VA will suspend payment, effective the first day of the month after the most recent month for which VA has paid benefits, upon receipt of notice from a VA Regional Counsel, or from the Veterans Service Center Manager in Manila, Philippines, when such an official recommends forfeiture for fraud or treasonable acts pursuant to § 5.679.

(2) *Restoration of payments where forfeiture for fraud or treasonable acts is not warranted.* VA will restore payments effective the first day of the month after the most recent month for which VA paid benefits, if otherwise in order, if VA decides that forfeiture is not appropriate.

(b) *Effective dates of forfeiture.*—(1) *Forfeiture for fraud.* A forfeiture of VA benefits for fraud is effective the later of the starting date of the award of the forfeited benefits or the day before the commission of the act resulting in forfeiture.

(2) *Forfeiture for treasonable acts.* A forfeiture of VA benefits for treasonable acts is effective the earlier of the date of the forfeiture decision or the first day of the month following the month for which VA last paid benefits.

(3) *Forfeiture for subversive activity.* A forfeiture of VA benefits for conviction for subversive activity is effective the later of the starting date of the award of the forfeited benefits or the day before the commission of the subversive activity for which the beneficiary was convicted.

(Authority: 38 U.S.C. 5112(a), (b)(9); 6105)

§ 5.682 Presidential pardon for offenses causing forfeiture.

(a) *Restoration of rights to VA benefits.* If the President of the United States pardons the offenses that were the basis of a forfeiture decision, VA will restore rights to all forfeited VA benefits effective the date of the pardon, if otherwise in order.

(b) *Effective date of resumption of payment of monetary benefits.* Once rights have been restored under paragraph (a) of this section, VA will resume payment of forfeited VA monetary benefits, if otherwise in order, as follows:

(1) If an application is filed within one year after the date of the pardon, VA will restore payments effective the date of the pardon.

(2) If an application is filed more than one year after the date of the pardon, VA will restore payments effective the date of receipt of the application.

(c) *Payment subject to recovery of overpayments.* Payment of VA monetary benefits following Presidential pardon of the offenses that were the basis of a forfeiture decision is subject to recovery of any existing overpayments.

(d) *Discontinuance of apportionments.* VA will discontinue any benefits apportioned to a dependent under §§ 5.676(c)(2)(i) or 5.677(c)(2)(i) effective the day before the date of the pardon.

(Authority: 38 U.S.C. 501(a), 6105(a))

§ 5.683 Renunciation of benefits.

(a) *Who may renounce a benefit.* A person entitled to receive compensation, pension, or dependency and indemnity compensation (DIC) under the laws administered by VA may renounce their right to that benefit.

(b) *How to renounce a benefit.* The renunciation of the right to receive a VA benefit must be in writing and must be signed by the beneficiary, and not by a fiduciary or by a representative. The renunciation must be for the entire benefit, not a portion of it.

(c) *Effective date of renouncement.* VA will discontinue payment of renounced benefits effective the last day of the month in which VA received the renouncement. If payments had been suspended, VA will discontinue payment of renounced benefits effective the first day of the month that follows the month for which VA last paid benefits.

(d) *Effect of renouncement of DIC on the rights of other beneficiaries.—(1) Effect on other beneficiaries in the same class.* The renouncement of DIC by one beneficiary does not increase the rate payable to any other DIC beneficiary in the same class. For example, the renouncement of DIC by one child will not increase the DIC rate payable to another child.

(2) *Effect of renouncement by surviving spouse on rights of children.* The renouncement of DIC by a surviving spouse does not entitle a child under the age of 18 to DIC, or increase the DIC rate payable to a child over the age of 18.

(e) *Reapplying for renounced benefits.—(1) General rules.*

(i) A beneficiary who renounced the right to receive a VA benefit may reapply for the same benefit at any time. VA will treat the new application as an original claim.

(ii) Except as provided otherwise in paragraph (e)(2) of this section, the effective date for the award of benefits resulting from the new application will be the date of receipt of that application.

(2) *Special rule applicable to pension and parents' DIC benefit renouncements.* If a beneficiary who has renounced pension or parents' DIC benefits files a new application for the same benefit within one year after renouncement, the application will not be treated as an original application and the benefit will be payable as if VA never received the renouncement.

(Authority: 38 U.S.C. 501(a), 5112(a), 5306)

Cross Reference: See § 5.83(c)(4) for procedures VA uses to discontinue payments of renounced benefits.

§§ 5.684—5.689 [Reserved]

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