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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AG47

Small Business Size Standards; Manufacturing; Correction

AGENCY: U.S. Small Business Administration.

ACTION: Correcting amendment.

SUMMARY: This document corrects an error in the U.S. Small Business Administration's (SBA) interim final rule that appeared in the **Federal Register**, which adopted North American Industry Classification System 2012 (NAICS 2012) for small business size standards. This document also removes the entry for NAICS 315192 in its entirety. These corrections do not affect small business size standards.

DATES: Effective November 27, 2013, and applicable beginning October 1, 2012.

FOR FURTHER INFORMATION CONTACT: Khem Sharma, Chief, Office of Size Standards, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

SUPPLEMENTARY INFORMATION: This correction removes an errant typographical character, which inadvertently appeared before the NAICS 339910 entry in the table in § 121.201. This document also removes the entry for NAICS 315192 in its entirety. These corrections do not affect small business size standards.

In FR Doc. 2012–19973 appearing on page 49991 of the August 20, 2012 issue of the **Federal Register**, a correction is necessary on page 50011. Specifically, it is necessary to remove the less-than-or-equal-to (≤) symbol that precedes NAICS 339910 that was not included in SBA's submission for publication. This document removes the unintended character that derived from a coding error in the publication process.

In addition, the entry for NAICS 315192, Underwear and Nightwear Knitting Mills, should be deleted from the CFR. On page 49994 of the August 20, 2012 issue of the **Federal Register**, Table 2 indicates that NAICS 315192 was consolidated with another industry to create a new one, namely NAICS 315190, Other Apparel Knitting Mills. That is, under NAICS 2012, NAICS 315192 is no longer a valid industry. In addition, on page 50008, the rule states ''y. remove . . . 315192 . . .'' The revised table, ''Small Business Size Standards by NAICS Industry'' correctly includes NAICS 315190. However, NAICS 315192 was not removed from the table.

Need for Correction

The purpose of this action is to correct the CFR by removing an erroneous character from the entry for NAICS 339910.

This correction also removes the entire entry for NAICS 315192 from the ''Small Business Size Standards by NAICS Industry'' (13 CFR 121.201), because the industry does not exist in NAICS 2012. The activities that NAICS 2007 had included in NAICS 315192 are now in NAICS 315190.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For the reasons set forth in the preamble, SBA amends 13 CFR part 121 by making the following correcting amendment:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 662, 694a(9).

■ 2. In § 121.201, in the table:

■ a. Remove entry 315192, ''Underwear and Nightwear Knitting Mills''; and

■ b. Revise entry ''339910'' to read as follows:

§ 121.201 What size standards has SBA identified by North American Industry Classification System codes?

* * * * *

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

NAICS Code	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
*	* * * * *	*	*
339910	Jewelry and Silverware Manufacturing		500
*	* * * * *	*	*

Dated: November 11, 2013.

Calvin Jenkins,

Deputy Associate Administrator, for Government Contracting and Business Development.

[FR Doc. 2013–26762 Filed 11–26–13; 8:45 am]

BILLING CODE 8205–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2013–1000; Special Conditions No. 25–505–SC]

Special Conditions: Boeing Model 777–200, –300, and –300ER Series Airplanes; Aircraft Electronic System Security Protection From Unauthorized External Access.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Boeing Model 777–200, –300, and –300ER series airplanes. These airplanes, as modified by ARINC Aerospace Company, will have novel or unusual design features associated with Class 3 Electronic Flight Bags (EFB) and wireless local area data networks (LAN) associated with the EFB architecture and existing airplane network systems. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* The effective date of these special conditions is November 27, 2013.

FOR FURTHER INFORMATION CONTACT: Varun Khanna, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–1298; facsimile 425–227–1149.

SUPPLEMENTARY INFORMATION:

Background

On August 21, 2012, ARINC Aerospace Company applied for a change to Type Certificate No. T00001SE Rev. 30 dated June 6, 2012 for installation of Class 3 EFBs and related LANs in the Boeing Model 777–200, –300, and –300ER Series Airplanes. The Boeing Model 777–200 airplanes are long-range, wide-body, twin-engine jet airplanes with a maximum capacity of 440 passengers. The Boeing Model 777–300 and 777–300ER series airplanes have a maximum capacity of 550 passengers. The Model 777–200, –300, and –300ER series airplanes have fly-by-wire controls, software-configurable avionics, and fiber-optic avionics networks.

The proposed Class 3 EFB architecture is novel or unusual for commercial transport airplanes by allowing connection to previously isolated data networks connected to systems that perform functions required for the safe operation of the airplane. This proposed data network and design integration may result in security vulnerabilities from intentional or unintentional corruption of data and systems critical to the safety and maintenance of the airplane. The existing regulations and guidance material did not anticipate this type of system architecture or electronic access to aircraft systems. Furthermore, regulations and current system safety assessment policy and techniques do not address potential security vulnerabilities, which could be caused by unauthorized access to aircraft data buses and servers.

Type Certification Basis

Under Title 14, Code of Federal Regulations (14 CFR) 21.17, ARINC Aerospace Company must show that the Boeing Model 777–200, –300, and –300ER series airplanes meet the applicable provisions of 14 CFR part 25, as amended by the following for each model airplane:

For Model 777–200 airplanes—Title 14 CFR part 25, as amended by Amendment 25–1 through Amendment 25–82.

For Model 777–300 airplanes—Title 14 CFR part 25, as amended by Amendment 25–1 through Amendment 25–86.

For Model 777–300ER airplanes—Title 14 CFR part 25, as amended by Amendment 25–1 through Amendment 25–98.

In addition, the certification basis includes certain special conditions, exemptions, or later amended sections of the applicable part that are not relevant to these special conditions. Special conditions, as defined in Sec. 11.19, are issued in accordance with Sec. 11.38 and become part of the type certification basis in accordance with Sec. 21.101.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Boeing Model 777–200, –300, and –300ER series airplanes because of a novel or unusual design feature, special conditions are prescribed under § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, the proposed special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and proposed special conditions, the Boeing Model 777–200, –300, and –300ER series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36 and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR 11.19, under § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The Boeing Model 777–200, –300, –300ER series airplanes will incorporate the following novel or unusual design features:

Multiple Electronic Flight Bags (EFBs) and several connected networks that will interface to existing aircraft systems. The proposed network architecture is used for a diverse set of functions, providing data connectivity between systems, including:

1. Flight-safety related control and navigation systems,
2. Operator business and administrative support (operator information services),
3. Passenger information systems, and,
4. Access by systems external to the airplane.

Discussion

The architecture and network configuration in the Boeing Model 777–200, –300, and –300ER series airplanes may allow increased connectivity to, or access by, external airplane sources, airline operations, and maintenance systems to the aircraft control functions and airline information services. The aircraft control functions and airline information services perform functions required for the safe operation and maintenance of the airplane. Previously these functions and services had very limited connectivity with external sources. The architecture and network

configuration may allow the exploitation of network security vulnerabilities resulting in intentional or unintentional destruction, disruption, degradation, or exploitation of data, systems, and networks critical to the safety and maintenance of the airplane. The existing regulations and guidance material did not anticipate these types of airplane system architectures. Furthermore, 14 CFR regulations and current system safety assessment policy and techniques do not address potential security vulnerabilities, which could be exploited by unauthorized access to airplane systems, data buses, and servers. Therefore, these special conditions are issued to ensure that the security (i.e., confidentiality, integrity, and availability) of airplane systems is not compromised by unauthorized wired or wireless electronic connections.

For the reasons discussed above, these special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the Boeing Model 777–200, –300, –300ER series airplanes. Should ARINC Aerospace Company apply at a later date for a change to the type certificate to include another model on the same type certificate incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on Boeing Model 777–200, –300, –300ER series airplanes. It is not a rule of general applicability.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. Therefore, the FAA has determined that prior public notice and comment are unnecessary, and good cause exists for adopting these special conditions upon publication in the **Federal Register**.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Boeing Model 777–200, –300, –300ER series airplanes modified by ARINC Aerospace Company.

Aircraft Electronic System Security Protection from Unauthorized External Access

1. The applicant must ensure airplane electronic system security protection from access by unauthorized sources external to the airplane, including those possibly caused by maintenance activity.
2. The applicant must ensure that electronic system security threats are identified and assessed, and that effective electronic system security protection strategies are implemented to protect the airplane from all adverse impacts on safety, functionality, and continued airworthiness.
3. The applicant must establish appropriate procedures to allow the operator to ensure that continued airworthiness of the aircraft is maintained, including all post Type Certification modifications that may have an impact on the approved electronic system security safeguards.

Issued in Renton, Washington, on November 15, 2013

John Piccola,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–28407 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2013–0999; Special Conditions No. 25–506–SC]

Special Conditions: Boeing Model 777–200, –300, and –300ER Series Airplanes; Aircraft Electronic System Security Protection from Unauthorized Internal Access.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Boeing Model 777–200, –300, and –300ER series airplanes. These airplanes, as modified by ARINC Aerospace Company, will have novel or unusual design features associated with Class 3 Electronic Flight Bags (EFB) and wireless local area data networks (LAN) associated with the EFB architecture and existing airplane network systems. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* The effective date of these special conditions is November 27, 2013.

FOR FURTHER INFORMATION CONTACT: Varun Khanna, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–1298; facsimile 425–227–1149.

SUPPLEMENTARY INFORMATION:

Background

On August 21, 2012, ARINC Aerospace Company applied for a change to Type Certificate No. T00001SE Rev. 30 dated June 6, 2012 for installation of Class 3 EFBs and related LANs in the Boeing Model 777–200, –300, and –300ER Series Airplanes. The Boeing Model 777–200 airplanes are long-range, wide-body, twin-engine jet airplanes with a maximum capacity of 440 passengers. The Boeing Model 777–300 and 777–300ER series airplanes have a maximum capacity of 550 passengers. The Model 777–200, –300, and –300ER series airplanes have fly-by-wire controls, software-configurable avionics, and fiber-optic avionics networks.

The proposed Class 3 EFB architecture is novel or unusual for commercial transport airplanes by allowing connection to previously isolated data networks connected to systems that perform functions required for the safe operation of the airplane. This proposed data network and design integration may result in security vulnerabilities from intentional or unintentional corruption of data and systems critical to the safety and maintenance of the airplane. The existing regulations and guidance material did not anticipate this type of system architecture or electronic access to aircraft systems. Furthermore, regulations and current system safety assessment policy and techniques do

not address potential security vulnerabilities, which could be caused by unauthorized access to aircraft data buses and servers.

Type Certification Basis

Under Title 14, Code of Federal Regulations (14 CFR) 21.17, ARINC Aerospace Company must show that the Model 777–200, –300, and –300ER series airplanes meet the applicable provisions of 14 CFR part 25, as amended by the following for each model airplane:

For Model 777–200 airplanes—Title 14 CFR part 25, as amended by Amendment 25–1 through Amendment 25–82.

For Model 777–300 airplanes—Title 14 CFR part 25, as amended by Amendment 25–1 through Amendment 25–86.

For Model 777–300ER airplanes—Title 14 CFR part 25, as amended by Amendment 25–1 through Amendment 25–98.

In addition, the certification basis includes certain special conditions, exemptions, or later amended sections of the applicable part that are not relevant to these special conditions.

Special conditions, as defined in Sec. 11.19, are issued in accordance with Sec. 11.38 and become part of the type certification basis in accordance with Sec. 21.101.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Boeing Model 777–200, –300, and –300ER series airplanes because of a novel or unusual design feature, special conditions are prescribed under § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, the proposed special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and proposed special conditions, the Boeing Model 777–200, –300, and –300ER series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36 and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR 11.19, under § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The Boeing Model 777–200, –300, –300ER series airplanes will incorporate the following novel or unusual design features:

Multiple Electronic Flight Bags (EFBs) and several connected networks that will interface to existing aircraft systems. The proposed network architecture is used for a diverse set of functions, providing data connectivity between systems, including:

1. Flight-safety related control and navigation systems,
2. Operator business and administrative support (operator information services),
3. Passenger information systems, and,
4. Access by systems internal to the airplane.

Discussion

The integrated network configurations in the Boeing Model 777–200, –300, and –300ER series airplanes may allow increased connectivity with external network sources and will have more interconnected networks and systems, such as passenger entertainment and information services than previous airplane models. This may allow the exploitation of network security vulnerabilities and increased risks potentially resulting in unsafe conditions for the airplanes and occupants. This potential exploitation of security vulnerabilities may result in intentional or unintentional destruction, disruption, degradation, or exploitation of data and systems critical to the safety and maintenance of the airplane. The existing regulations and guidance material did not anticipate these types of system architectures. Furthermore, 14 CFR regulations and current system safety assessment policy and techniques do not address potential security vulnerabilities which could be exploited by unauthorized access to airplane networks and servers. Therefore, these special conditions are being issued to ensure that the security (i.e., confidentiality, integrity, and availability) of airplane systems is not compromised by unauthorized wired or wireless electronic connections between airplane systems and the passenger entertainment services.

For the reasons discussed above, these special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the Boeing Model 777–200, –300, –300ER series airplanes. Should ARINC Aerospace Company apply at a later date for a change to the type certificate to include another model on the same type certificate incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on Boeing Model 777–200, –300, –300ER series airplanes. It is not a rule of general applicability.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. Therefore, the FAA has determined that prior public notice and comment are unnecessary, and good cause exists for adopting these special conditions upon publication in the **Federal Register**.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Boeing Model 777–200, –300, –300ER series airplanes modified by ARINC Aerospace Company.

Aircraft Electronic System Security Protection from Unauthorized Internal Access

1. The applicant must ensure that the design provides isolation from, or airplane electronic system security protection against, access by unauthorized sources internal to the airplane. The design must prevent inadvertent and malicious changes to, and all adverse impacts upon, airplane equipment, systems, networks, or other assets required for safe flight and operations.

2. The applicant must establish appropriate procedures to allow the

operator to ensure that continued airworthiness of the aircraft is maintained, including all post STC modifications that may have an impact on the approved electronic system security safeguards.

Issued in Renton, Washington, on November 15, 2013.

John Piccola,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–28408 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0974; Directorate Identifier 2013–NM–209–AD; Amendment 39–17675; AD 2013–24–01]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for The Boeing Company Model 747–8 and 747–8F series airplanes and Model 787–8 airplanes powered by GEnx engines. This AD requires revising the airplane flight manual to advise the flight crew of potential ice crystal icing (ICI) conditions at high altitudes, and to prohibit operation in moderate and severe ICI conditions. This AD also requires inspecting the engine after any ICI event is detected by the flight crew. This AD was prompted by reports of engine damage and thrust loss events as a result of flying in high altitude ICI conditions. We are issuing this AD to ensure that the flight crews have operating instructions to avoid flight into ICI conditions that can lead to engine damage and thrust loss events; unrecoverable thrust loss on multiple engines can lead to a forced landing.

DATES: This AD is effective November 27, 2013.

We must receive comments on this AD by January 13, 2014.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Sue Lucier, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6438; fax: 425–917–6590; email: *suzanne.lucier@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

Over the past decade, we have been aware of temporary engine thrust loss, and other engine-related events that occurred in ice crystal icing (ICI) conditions at high altitudes. These events have prompted the release of ADs on various airplane models equipped with General Electric (GE) CF6–80 series engines. Each event was in or near convective weather conditions that included ice crystal icing.

This type of icing does not appear on radar due to its low reflectivity, and neither the airplane ice detector nor visual indications reliably indicate the presence of icing conditions. Therefore, it is often undetected by the flight crew. Flight in these conditions can cause ice crystals to accumulate in the core gas flow path of the engine. In the events leading to those prior ADs, the ice has shed during throttle transients and in the descent phase of flight, causing temporary thrust loss.

Since the beginning of 2013, similar events have now occurred on Model 747–8 and 747–8F series airplanes powered by GEnx-2B engines and Model 787–8 airplanes powered by GEnx-1B engines. The new events that prompted this AD, however, have occurred during the cruise phase of flight and caused permanent damage (beyond maintenance manual limits) to the engine compressor. In all thrust loss events, data indicate that ice crystals entered and collected in the initial stages of the compressor. Engine temperature data indicate small ice accretions were shed through the core of the engine.

All of these ICI events occurred during cruise at 33,000 feet or above, either within or after the airplane traversed a large Mesoscale Convective System (MCS). MCSs are areas where several thunderstorms have merged, with a continuous cloud larger than 100 kilometers (62 miles) across.

Within or near MCSs, ICI events have occurred where convective activity has driven a significant quantity of moisture, in the form of ice crystals, to altitudes at or above the tropopause. ICI events tend to occur in warm geographic locations.

As of the date of this AD, there have been nine events on Model 747–8 airplanes and Model 787–8 airplanes.

During two events on Model 747–8F airplanes, two engines experienced thrust losses during the cruise phase of flight. In one of these events, one of the engines recovered to idle but would not accelerate and was left at idle for the rest of the flight. The other engine recovered and operated normally for the rest of the flight. In both airplane events, subsequent inspections of all four engines revealed compressor damage on both of the event engines as well as damage to a third engine that had not experienced a thrust loss.

In four other events—one on a Model 787–8 airplane and three on Model 747–8 airplanes—uncommanded engine decelerations (i.e., thrust losses) of approximately 20 seconds in duration occurred. All engines automatically recovered commanded thrust without crew action and operated normally for the rest of the flight.

In three other events on Model 747–8 airplanes, at least one engine showed elevated vibrations on the low-speed engine spool (N1) while in ICI conditions. The vibrations stopped after the airplanes exited the weather system, and the engines operated normally for the rest of the flight.

Unrecoverable thrust loss on multiple engines, due to operation in high altitude clouds containing ice crystals, could lead to a forced landing.

FAA's Determination

We are issuing this AD because we evaluated all the relevant information

and determined the unsafe condition described previously is likely to exist or develop in other products of these same type designs.

AD Requirements

This AD requires revising the Certificate Limitations and Operating Procedures chapters of the AFM to advise the flight crew of potential ICI conditions at high altitudes, and to provide procedures to prohibit flight into those conditions.

This AD also requires engine inspections after any event where the flight crew reports the appearance of the ''ENGINE THRUST'' message on the engine indication and crew alert system (EICAS) for any engine. The intent of the inspection requirement is to verify the airworthiness of the airplane for future flights. Because of thrust requirements on the different airplane models, the inspection is required before further flight on a minimum of three engines on Model 747–8 and 747–8F series airplanes, and on both engines on Model 787–8 airplanes.

Interim Action

We consider this AD interim action. If final action is later identified, we might consider further rulemaking then.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because flight in potential ICI at high altitudes could result in engine damage and loss of thrust and consequent forced landing. Therefore, we find that notice and opportunity for prior public comment are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2013–0974 and Directorate Identifier 2013–NM–209–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Costs of Compliance

We estimate that this AD affects 14 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS: AFM REVISIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM revisions	1 work-hour × $85 per hour = $85	$0	$85	$1,190

ESTIMATED COSTS: INSPECTION

Action	Labor cost	Parts cost	Cost per product
Inspection	2 work-hours × $85 per hour = $170 per engine	$0	$680 per airplane

We have received no definitive data that would enable us to provide cost estimates for the on-condition corrective actions specified in this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2013–24–01 The Boeing Company: Amendment 39–17675; Docket No. FAA–2013–0974; Directorate Identifier 2013–NM–209–AD.

(a) Effective Date

This AD is effective November 27, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company airplanes, certificated in any category, identified in paragraphs (c)(1) and (c)(2) of this AD.

(1) Model 747–8 and 747–8F series airplanes powered by GEnx-2B67 or GEnx-2B67B engines.

(2) Model 787–8 airplanes powered by GEnx-1B64, GEnx-1B67, GEnx-1B70, GEnx-1B64/P1, GEnx-1B67/P1, GEnx-1B70/P1, or GEnx-1B70/75/P1 engines.

Note 1 to paragraph (c)(2) of this AD: The engine nameplate may also include a suffix such as ''G03,'' which is the applicable Bill of Materials (See FAA Type Certification Data Sheet T00021SE basic model identifier).

(d) Subject

Air Transport Association (ATA) of America Code 71, Power plant.

(e) Unsafe Condition

This AD was prompted by reports of engine damage and thrust loss events as a result of flying in high altitude ice crystal icing (ICI) conditions. We are issuing this AD to ensure that the flight crews have operating instructions to avoid flight into ICI conditions that can lead to engine damage and thrust loss events. We are also issuing this AD to ensure the airplane has a minimum number of airworthy engines following a potential high altitude ICI encounter. Operation with more than one engine having icing damage can lead to a common cause loss of thrust on multiple engines, which can lead to a forced landing.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Revision of Airplane Flight Manual (AFM): Certificate Limitations

Within 7 days after the effective date of this AD, revise the Certificate Limitations chapter of the applicable Boeing AFM to include the statement provided in figure 1 to paragraph (g) of this AD. This may be done by inserting a copy of this AD into the AFM.

Figure 1 to Paragraph (g) of This AD—Certificate Limitations

AVOIDANCE OF ICE CRYSTAL ICING

(Required by AD 2013–24–01.)

In order to prevent loss of thrust and engine damage due to ice crystal icing, for operations at or above 30,000 feet, when approaching, or in, instrument meteorological conditions or visible moisture:

The flight crew must comply with the Avoidance of Ice Crystal Icing procedure contained in the Operating Procedures chapter of this manual.

When following the Avoidance of Ice Crystal Icing procedure, flight is prohibited within 50NM of amber or red radar returns that are displayed below the airplane's flight path.

Note 2 to figure 1 to paragraph (g), figure 2 to paragraph (h), and figure 3 to paragraph (i) of this AD: When statements identical to those in figures 1, 2, and 3 to paragraphs (g), (h), and (i) of this AD, respectively, have been included in the applicable chapters of the general revisions of the applicable AFM, the general revisions may be inserted into the AFM, and the copy of this AD may be removed from the AFM.

(h) AFM Revision: Model 747–8 and 747–8F Operating Procedures

For Model 747–8 (Intercontinental) and 747–8F (Freighter) series airplanes: Within 7 days after the effective date of this AD, revise the Operating Procedures chapter of the Boeing 747–8 AFM to include the statement provided in figure 2 to paragraph (h) of this AD. This may be done by inserting a copy of this AD into the AFM.

Figure 2 to Paragraph (h) of This AD—Model 747–8 Operating Procedures

AVOIDANCE OF ICE CRYSTAL ICING

(Required by AD 2013–24–01.)

This procedure is required by the AVOIDANCE OF ICE CRYSTAL ICING limitation contained in the Certificate Limitations chapter of this manual. The language below shall not be modified.

Operations in ice crystal icing can cause unrecoverable loss of thrust and engine damage due to ice crystal icing.

For operations at or above 30,000 feet, when approaching, or in, instrument meteorological conditions or visible moisture:

Operate weather radar in automatic mode and gain knob set to the 12 o'clock position, or if in manual mode adjust gain to maximum and set tilt between −1 and −3.

If areas of green, amber or red weather radar returns are observed along the flight path:

Use manual weather radar tilt control mode and vary the tilt between −3 and −5 degrees and set the gain knob to the 12 o'clock position to determine if amber or red returns are present below the airplane's flight path.

Flight is prohibited within 50NM of amber or red radar returns that are displayed below the airplane's flight path.

(i) AFM Revision: Model 787–8 Operating Procedures

For Model 787–8 airplanes: Within 7 days after the effective date of this AD, revise the Operating Procedures chapter of the Boeing 787 AFM to include the statement provided in figure 3 to paragraph (i) of this AD. This may be done by inserting a copy of this AD into the AFM.

Figure 3 to Paragraph (i) of This AD—Model 787–8 Operating Procedures

AVOIDANCE OF ICE CRYSTAL ICING

(Required by AD 2013–24–01.)

This procedure is required by the AVOIDANCE OF ICE CRYSTAL ICING limitation contained in the Certificate Limitations chapter of this manual. The language below shall not be modified.

Operations in ice crystal icing can cause unrecoverable loss of thrust and engine damage due to ice crystal icing.

For operations at or above 30,000 feet, when approaching, or in, instrument meteorological conditions or visible moisture:

Operate weather radar in automatic mode and 0 manual gain adjustment, or if in manual mode adjust gain to maximum and set tilt between −1 and −3.

If areas of green, amber or red weather radar returns are observed along the flight path:

Use manual weather radar tilt control mode and vary the tilt between −3 and −5 degrees and select 0 manual gain adjustment to determine if amber or red returns are present below the airplane's flight path.

Flight is prohibited within 50NM of amber or red radar returns that are displayed below the airplane's flight path.

(j) Post-Event Inspections

After any flight crew report of the appearance of an engine indicating and crew alerting system (EICAS) message that displays ''ENG THRUST (L,R)'' (for Model 787–8 airplanes) or ''ENG (1, 2, 3, or 4) THRUST'' (for Model 747–8 and 747–8F airplanes) during operation at or above 30,000 feet pressure altitude: Do borescope inspections of the first stage blade of the high pressure compressor of the engines to detect damage, as specified in paragraph (j)(1) or (j)(2) of this AD, as applicable. Correct any damage before further flight.

(1) For Model 747–8 and 747–8F series airplanes: Before further flight, inspect each engine for which an EICAS ENGINE THRUST message was displayed. A minimum total of 3 engines must be inspected before further flight. Within 5 flight cycles after the EICAS message was displayed, inspect the fourth engine, unless already accomplished as specified in this paragraph.

(2) For Model 787–8 airplanes: Before further flight, inspect both engines.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (k) of this AD. Information may be emailed to *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector,

or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office.

(l) Related Information

(1) For more information about this AD, contact Sue Lucier, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6438; fax: 425–917–6590; email: *suzanne.lucier@faa.gov.*

(2) Refer to the applicable information specified in paragraph (l)(2)(i) or (l)(2)(ii) of this AD for guidance on inspecting the engine and correcting damage.

(i) For Model 747–8 and 747–8F series airplanes: Refer to Task 72–00–00–290–801–G00, High Pressure Compressor Section (with a Borescope) Detailed Inspection, of Subject 72–00–00, Engine—Inspection/Check, of Chapter 72, Engine, of the Boeing 747–8 Aircraft Maintenance Manual.

(ii) For Model 787–8 airplanes: Refer to Data Module DMC–B787–A–G72–00–00–06B–280C–A, High Pressure Compressor Section (with a Borescope)—Special Detailed Inspection, of the Boeing 787–8 Aircraft Maintenance Manual.

(3) For Boeing service information identified in this AD that is not incorporated by reference, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(m) Material Incorporated by Reference

None.

Issued in Renton, Washington, on November 22, 2013.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–28638 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2013–0931; Airspace Docket No. 13–AWP–6]

RIN 2120–AA66

Amendment of Restricted Area R–7201 Farallon De Medinilla Island; Mariana Islands, GU

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; technical amendment.

SUMMARY: This action makes a minor correction to the longitude coordinate in the boundary of restricted area R–7201, Farallon De Medinilla Island, Mariana Islands, Guam. This change is due to the National Oceanic and Atmospheric Administration's (NOAA) adoption of a revised datum which resulted in a minor shift in the charted location of Farallon De Medinilla Island. This action adjusts the longitude coordinate of the restricted area to ensure that it is charted in the proper position over the Island.

DATES: *Effective date:* December 27, 2013.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace Policy and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Background

Based on a NOAA survey in 2010, it was determined that Farallon De Medinilla Island (FDM) was not plotted properly on the NOAA charts. As a result, the datum for charting the FDM inset on NOAA Chart 81086 was corrected based on the survey findings. This requires a minor adjustment in the longitude coordinate for R–7201 to take into account the revised positioning of FDM on NOAA Chart 81086 and to ensure that the restricted area is centered over FDM on the current NOAA chart.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 73 by making a minor correction to the longitude coordinate in the description of restricted area R–7201, Farallon De Medinilla Island, Mariana Islands, Guam. This action changes the longitude coordinate from ''long. 146°04′39″ E.'' to ''long. 146°03′31″ E.''

This change does not affect the designated altitudes or activities conducted within the restricted area. Because this is a minor change that merely provides a more accurate plotting of the FDM Island and the overlying restricted airspace to match the amended NOAA chart datum, notice and public procedures under 5 U.S.C. 553(b) are unnecessary.

The FAA has determined that this action only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as amends the description of restricted area R–7201, Farallon De Medinilla Island, Mariana Islands.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, Environmental Impacts: Policies and Procedures, paragraph 311d. This action is an administrative change to the description of affected restricted area R–7201 to reflect a more accurate geographic coordinate. It does not alter the dimensions, altitudes, time of designation or use of the airspace; therefore, it is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exists that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73, as follows:

PART 73—SPECIAL USE AIRSPACE

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 73.72 [Amended]

■ 2. Section 73.72 is amended as follows:

* * * * *

R–7201 Farallon De Medinilla Island, Mariana Islands, GU [Amended]

By removing the sentence under Boundaries and adding in their place:

Boundaries. The area within a 3-nautical mile radius of lat. 16°01′04″ N., long. 146°03′31″ E.

Issued in Washington, DC, on November 19, 2013.

Gary A. Norek,

Manager, Airspace Policy and ATC Procedures Group.

[FR Doc. 2013–28481 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PART 103

[CBP Dec. 13–18]

Technical Corrections Relating to the Procedures for the Production or Disclosure of Information in State or Local Criminal Proceedings

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends U.S. Customs and Border Protection (CBP) regulations to update the list of supervisors authorized to allow their employees to testify in state or local criminal proceedings in response to a demand of a court, administrative agency, or other authority. The applicable regulation was promulgated by the U.S. Customs Service prior to the creation of CBP as part of the Department of Homeland Security (DHS). The changes are necessary to more accurately reflect the current CBP organizational structure. This document also makes non-substantive editorial and nomenclature changes to reflect the transfer of the legacy U.S. Customs Service of the Department of the Treasury to DHS and the creation of U.S. Customs and Border Protection.

DATES: *Effective Date:* November 27, 2013.

FOR FURTHER INFORMATION CONTACT: Howard Charles, Office of Chief Counsel, 202–344–2759, *howard.charles@dhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

A. Production or Disclosure in Federal, State, Local, and Foreign Proceedings

Title 19, Code of Federal Regulations (19 CFR), Part 103, Subpart B, sets forth the procedures to be followed with respect to the production or disclosure of any information, including testimony, in all federal, state, local, and foreign proceedings when a demand of a court, administrative agency, or other authority is issued for such information. Although 19 CFR 103.22(a) generally requires prior written approval from the Chief Counsel of the former U.S. Customs Service, 19 CFR 103.26 allows certain agency supervisors to authorize their employees to testify, disclose, or produce certain information in state or local criminal cases when the demand is made by prosecutors. The listed agency supervisors include: port directors, special agents in charge, and chiefs of field laboratories.

B. Establishment and Reorganization of CBP Under the Homeland Security Act of 2002

The Department of Homeland Security (DHS) was established on January 24, 2003, pursuant to the Homeland Security Act of 2002. *See* Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, codified at 6 U.S.C. 111. Section 403(1) of the Homeland Security Act of 2002 transferred the functions, personnel, assets, and liabilities of the U.S. Customs Service of the Department of the Treasury, including the functions of the Secretary of the Treasury, to the Secretary of Homeland Security, with certain exceptions pertaining to Customs revenue functions not relevant to this final rule.

The reorganization under DHS resulted in the consolidation of certain existing organizations as well as the creation of new divisions, or offices, within U.S. Customs and Border Protection (CBP). The Office of Field Operations (OFO), Office of Internal Affairs (IA), U.S. Border Patrol (USBP), Office of Air and Marine (OAM), and Laboratory and Scientific Services (LSS) [1] were established under CBP following the reorganization under DHS. Similarly, under the DHS reorganization the investigative functions of the former U.S. Customs Service were reassigned to U.S. Immigration and Customs Enforcement (ICE).[2]

C. Regulatory Amendment

The list of agency supervisors contained in 19 CFR 103.26 who can authorize their employees to testify or provide information in state or local criminal cases has not been updated to reflect the organizational structure of CBP. As such, it does not include personnel from USBP or OAM and it includes LSS position titles that no longer exist in the CBP organization.

Therefore, it is necessary to amend 19 CFR 103.26 to include the appropriate officials within CBP, including USBP, OAM, and LSS personnel.

Under CBP's current organizational structure, ''port directors,'' ''special agents in charge within the Office of Internal Affairs,'' ''chief patrol agents'', ''directors within the Office of Air and Marine'', ''directors of field laboratories'', and ''any supervisor of such officials'' are the appropriate officials within OFO, IA, USBP, OAM, and LSS, respectively, who are authorized to allow employees under their supervision to provide information and testify in state or local criminal proceedings.

For the reasons described above, and to more accurately reflect the current CBP organizational structure, this final rule amends 19 CFR 103.26 by adding ''chief patrol agents'', ''directors within the Office of Air and Marine'', and ''any supervisor of such officials''; and by replacing ''chiefs of field laboratories'' with ''directors of field laboratories'' in the list of personnel authorized to allow employees under their supervision to testify, disclose, or produce certain information in state or local criminal proceedings.

This document also amends 19 CFR part 103, Subpart B to reflect the transfer of the legacy U.S. Customs Service of the Department of the Treasury to DHS and the subsequent renaming of the agency as U.S. Customs and Border Protection (CBP).

II. Statutory and Regulatory Requirements

A. Inapplicability of Public Notice and Delayed Effective Date Requirements

This amendment merely updates the regulations to reflect the current organizational structure of CBP as it relates to the supervisors authorized to allow employee testimony in state and local criminal proceedings and to reflect

[1] LSS was the Office of Technical Services until 1992 when it was renamed LSS. LSS transitioned to CBP's Office of Information and Technology from the Office of Field Operations on September 1, 2000. LSS provides CBP with forensic and scientific analysis in trade enforcement. The field laboratories use mobile labs to provide on-site emergency response and analysis at the border.

[2] CBP subsequently established IA and special agents in charge within that office to investigate internal matters.

the transfer of the legacy U.S. Customs Service of the Department of the Treasury to DHS and the subsequent renaming of the agency. As this rule pertains to agency organization, procedure, or practice it is exempt from prior notice and public comment pursuant to 5 U.S.C. 553(b)(A). For this same reason, pursuant to 5 U.S.C. 553(d)(3), CBP finds that good cause exists for not providing a delayed effective date.

B. The Regulatory Flexibility Act and Executive Order 12866

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) do not apply. This amendment does not meet the criteria for a ''significant regulatory action'' as specified in Executive Order 12866, as supplemented by Executive Order 13563.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Executive Order 13132

The rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13123, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

E. Signing Authority

This document is limited to technical corrections of CBP regulations. Accordingly, it is being signed under the authority of 19 CFR 0.1(b).

List of Subjects in 19 CFR Part 103

Administrative practice and procedure, Confidential business information, Courts, Freedom of information, Law enforcement, Privacy, Reporting and recordkeeping requirements.

Amendments to Regulations

For the reasons stated in the preamble, part 103 of title 19 of the Code of Federal Regulations (19 CFR Part 103) is amended as set forth below.

PART 103—GENERAL PROVISIONS

■ 1. The general authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

* * * * *

§ 103.21 [Amended]

■ 2. Amend § 103.21 by:

■ a. Removing the words ''Customs'' and ''the Customs Service'' and adding in their place ''CBP'';

■ b. Removing the words ''Department of the Treasury'' and adding in their place ''Department of Homeland Security''; and

■ c. Removing the words ''the United States Customs Service'' and adding in their place ''U.S. Customs and Border Protection''.

§§ 103.22, 103.23, 103.24, 103.25, 103.27 [Amended]

■ 3. Amend §§ 103.22, 103.23, 103.24, 103.25, 103.27 by removing the words ''Customs'' and ''the Customs Service'' and adding in their place ''CBP''.

§ 103.26 [Amended]

■ 4. Amend § 103.26 by:

■ a. Removing the words ''Port directors, special agents in charge, and chiefs of field laboratories'' and adding in their place ''Port directors, special agents in charge within the Office of Internal Affairs, chief patrol agents, directors within the Office of Air and Marine, directors of field laboratories, or any supervisor of such officials''.

■ b. Removing the word ''Customs'' and adding in its place ''CBP''.

Dated: November 18, 2013.

Thomas S. Winkowski,

Acting Commissioner.

[FR Doc. 2013–27967 Filed 11–26–13; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9642]

RIN 1545–BL48

Information Reporting of Mortgage Insurance Premiums

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations that require information reporting by persons who receive mortgage insurance premiums, including prepaid premiums, aggregating $600 or more during any calendar year. The final regulations implement reporting requirements that result from the extension of the treatment of mortgage insurance premiums made by the American Taxpayer Relief Act of 2012. These regulations will affect any person who, in the course of a trade or business, receives from an individual mortgage insurance premiums that in the aggregate total $600 or more during a calendar year.

DATES: *Effective Date:* These regulations are effective on November 27, 2013.

Applicability Date: For dates of applicability, see § 1.6050H–3(g).

FOR FURTHER INFORMATION CONTACT: Janet Engel Kidd at (202) 317–6844 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 6050H(h) of the Internal Revenue Code (Code) relating to reporting requirements for mortgage insurance premiums. Section 6050H(h)(1), enacted on December 20, 2006, by section 419(c) of the Tax Relief and Health Care Act of 2006, Public Law 109–432 (120 Stat. 2967), provides that the Secretary may, by regulations, require any person who, in the course of a trade or business, receives payments of mortgage insurance premiums from an individual aggregating $600 or more during any calendar year to file a return regarding those payments in the form, at the time, and containing the information prescribed by the Secretary. Under section 6050H(h)(2), on or before January 31 of the year following the year in which the premium is received, a person required to file an information return under section 6050H(h)(1) must send a written statement to the individual to whom the information return relates showing the information prescribed by the Secretary. Section 6050H(h)(3)(A) provides that rules similar to the rules in section 6050H(c), relating to the applicability of the section 6050H reporting requirements to governmental units, will apply with respect to mortgage insurance premiums. Section 6050H(h)(3)(B) defines the term ''mortgage insurance'' to mean mortgage insurance provided by the Veterans Administration (the predecessor to the Department of

Veterans Affairs), the Federal Housing Administration, or the Rural Housing Administration (the predecessor to the Rural Housing Service), and private mortgage insurance (as defined by section 2 of the Homeowners Protection Act of 1998) (12 U.S.C. 4901), as in effect on the date of enactment of section 6050H(h), which is the same definition as ''qualified mortgage insurance'' in section 163(h)(4)(E).

In general, section 163(h)(3)(E) treats premiums paid for qualified mortgage insurance by a taxpayer during the taxable year in connection with acquisition indebtedness with respect to a qualified residence as qualified residence interest. Prior to amendment in 2013, section 163(h)(3)(E) was effective for amounts paid or accrued between January 1, 2007, and December 31, 2011, or properly allocable to any period ending on or before December 31, 2011, on mortgage insurance contracts issued on or after January 1, 2007. Section 204 of the American Taxpayer Relief Act of 2012 (ATRA), Public Law 112–240, 126 Stat. 2313, enacted on January 2, 2013, retroactively applied the tax treatment of qualified mortgage insurance premiums as qualified residence interest for 2012, and it extended that treatment to premiums paid or accrued on or before December 31, 2013, or properly allocable to any period ending on or before December 31, 2013, on mortgage insurance contracts issued on or after January 1, 2007. Unless extended or made permanent by further legislation, section 163(h)(3)(E) will not apply to amounts paid or accrued after 2013 or properly allocable to any period after 2013.

On May 7, 2009, the Treasury Department and the IRS published temporary regulations (TD 9449) under section 163 in the **Federal Register** (74 FR 21256) that explained how to allocate prepaid qualified mortgage insurance premiums to determine the amount of the prepaid premium that is treated as qualified residence interest each taxable year. The temporary regulations also provided guidance as to reporting requirements under section 6050H(h) to reporting entities receiving premiums, including prepaid premiums, for mortgage insurance. On the same day, the Treasury Department and the IRS published a notice of proposed rulemaking (REG–107271–08) cross-referencing the temporary regulations in the **Federal Register** (74 FR 21295). No public hearing was requested or held. No comments responding to the notice of proposed rulemaking were received.

On May 7, 2012, the Treasury Department and the IRS published final regulations (TD 9588) in the **Federal Register** (77 FR 26698) adopting the proposed regulations under section 163 relating to the allocation of prepaid qualified mortgage insurance premiums, as amended. Those final regulations did not finalize the proposed regulations relating to the reporting requirements under section 6050H(h) for entities receiving mortgage insurance premiums. At that time, the deduction for qualified mortgage insurance premiums under section 163 did not apply to amounts paid or accrued after December 31, 2011, and the Treasury Department and the IRS determined not to require the reporting of nondeductible premiums. The temporary regulations on the reporting requirements, which were in § 1.6050H–3T, expired on May 4, 2012.

Explanation of Revisions

The final regulations adopt the proposed regulations under § 1.6050H–3 with two minor revisions. The first is the addition of new paragraph (d), which cross-references § 1.6050H–2 regarding the time, form, and manner of reporting qualified mortgage interest. The addition of this cross-reference is intended to clarify that rules similar to the rules applicable to the time, form, and manner of reporting interest received on qualified mortgages apply to amounts required to be reported under § 1.6050H–3(a) . For instance, mortgage insurance premiums are reported on a Form 1098, ''Mortgage Interest Statement,'' if the premiums received from that individual in the aggregate total $600 or more.

The second revision relates to the effective date and applicability of these final regulations. On January 2, 2013, ATRA extended section 163(h) for premiums paid or accrued on or before December 31, 2013, or properly allocable to any period ending on or before December 31, 2013, on mortgage insurance contracts issued on or after January 1, 2007. In addition, ATRA extended section 163(h) retroactively for qualified mortgage insurance premiums paid or accrued during 2012. These final regulations under § 1.6050H–3 require information reporting for mortgage insurance premiums received on or after January 1, 2013, and during periods to which section 163(h)(3)(E) is applicable. However, there were no final or temporary regulations requiring information reporting with respect to qualified mortgage insurance premiums paid or accrued during 2012. Therefore, information reporting with respect to qualified mortgage insurance premiums was not required for premiums paid or accrued during 2012.

Because information reporting with respect to mortgage insurance premiums received during 2012 was not required, no penalty under section 6721 or section 6722 will apply with respect to the failure to report mortgage insurance premiums received during 2012.

Further, the fact that an individual did not receive a Form 1098 reporting the amount of mortgage insurance premiums paid for 2012 does not affect whether the individual satisfied the requirements under section 163(h) to treat qualified mortgage insurance premiums as qualified residence interest. Accordingly, any individual who paid or accrued qualified mortgage insurance premiums in the calendar year ending December 31, 2012, or properly allocated these premiums to the calendar year ending December 31, 2012, on mortgage insurance contracts issued on or after January 1, 2007, and who did not previously treat those amounts as qualified residence interest, may, within the applicable period of limitations, file a Form 1040X, ''Amended U.S. Individual Income Tax Return,'' for 2012 to claim a refund based on the treatment of those amounts as qualified residence interest.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that this rule merely reinstates the mortgage insurance information reporting requirements on the Form 1098 that previously existed from 2007 through 2011. In addition, persons receiving mortgage insurance premiums already are required to file the Form 1098 to report interest received on qualified mortgages and completing the mortgage insurance premiums box imposes little or no incremental burden in time or expense. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. Chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these final regulations was submitted to the Chief Counsel for Advocacy of the

Small Business Administration for comment on its impact on small business, and no comments were received.

Drafting Information

The principal author of these regulations is Janet Engel Kidd, Office of the Associate Chief Counsel, Procedure and Administration.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
Section 1.6050H–3 is also issued under 26 U.S.C. 6050H(h). * * *

■ **Par. 2.** Section 1.6050H–3 is added to read as follows:

§ 1.6050H–3 Information reporting of mortgage insurance premiums.

(a) *Information reporting requirements.* Any person who, in the course of a trade or business, receives premiums, including prepaid premiums, for mortgage insurance (as described in paragraph (b) of this section) from any individual aggregating $600 or more for any calendar year, must make an information return setting forth the total amount received from that individual during the calendar year.

(b) *Scope.* Paragraph (a) of this section applies to mortgage insurance provided by the Federal Housing Administration, Department of Veterans Affairs, or the Rural Housing Service (or their successor organizations), or to private mortgage insurance (as defined by section 2 of the Homeowners Protection Act of 1998 (12 U.S.C. 4901) as in effect on December 20, 2006). The rule stated in paragraph (a) of this section applies to the receipt of all payments of mortgage insurance premiums, by cash or financing, without regard to source.

(c) *Aggregation.* Whether a person receives $600 or more of mortgage insurance premiums is determined on a mortgage-by-mortgage basis. A recipient need not aggregate mortgage insurance premiums received on all of the mortgages of an individual to determine whether the $600 threshold is met. Therefore, a recipient need not report mortgage insurance premiums of less than $600 received on a mortgage, even though it receives a total of $600 or more of mortgage insurance premiums on all of the mortgages for an individual for a calendar year.

(d) *Time, form, and manner of reporting.* Mortgage insurance premiums required to be reported under paragraph (a) of this section must be reported on the Form 1098 or successor form that is filed pursuant to § 1.6050H–2(a) with respect to the mortgage of the individual who paid the mortgage insurance premiums. For the requirements for furnishing statements with respect to Forms 1098 filed with the Internal Revenue Service, see § 1.6050H–2(b).

(e) *Cross reference.* For rules concerning the allocation of certain prepaid qualified mortgage insurance premiums, see § 1.163–11 of this chapter.

(f) *Limitation on the reporting of mortgage insurance premiums.* This section applies to mortgage insurance premiums described in paragraph (b) of this section that are paid or accrued on or after January 1, 2013, and during periods to which section 163(h)(3)(E) applies. This section does not apply to any amounts of mortgage insurance premiums that are allocable to any periods to which section 163(h)(3)(E) does not apply.

(g) *Effective/applicability date.* This section applies to mortgage insurance premiums received on or after January 1, 2013. For regulations applicable before May 5, 2012, see § 1.6050H–3T as contained in 26 CFR part 1 (revised as of April 1, 2012).

§ 1.6050H–3T [Removed]

■ **Par. 3.** Section 1.6050H–3T is removed.

John M. Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: October 1, 2013.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2013–28381 Filed 11–26–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2013–0011]

RIN 1625–AA00

Safety Zones; Pacific Northwest Grain Handlers Association Facilities; Columbia and Willamette Rivers

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing temporary safety zones around the following Pacific Northwest Grain Handlers Association facilities: The Columbia Grain facility on the Willamette River in Portland, OR, the United Grain Corporation facility on the Columbia River in Vancouver, WA, the Temco Irving facility on the Willamette River in Portland, OR, the Temco Kalama facility on the Columbia River in Kalama, WA, and the Louis Dreyfus Commodities facility on the Willamette River in Portland, OR. These safety zones extend approximately between the navigable channel and the shoreline of the facility described. These safety zones have been established to ensure that on-water protest activities near these facilities do not create hazardous navigation conditions for vessels protesting, transiting in the navigable channel, or attempting to moor at the facilities and that any on-water activities do not create hazardous conditions while grain-shipment vessels are moored at the facilities.

DATES: This rule is effective without actual notice from November 27, 2013 until November 27, 2015. For the purposes of enforcement, actual notice will be used from the date the rule was signed, October 31, 2013, until November 27, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2013–0011]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Open Docket Folder'' on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email LTJG Ian P. McPhillips, Waterways Management Division, Marine Safety Unit Portland, U.S. Coast Guard; telephone (503) 240–9319, email *msupdxwwm@uscg.mil*. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking
TFR Temporary Final Rule

A. Regulatory History and Information

On August 6, 2013, the Coast Guard published a temporary interim rule and request for comments titled, ''Safety Zones; Pacific Northwest Grain Handlers Association Facilities; Columbia and Willamette Rivers'' in the **Federal Register** (78 FR 47567). In that temporary interim rule, the Coast Guard established temporary safety zones near five Pacific Northwest Grain Handlers Association facilities. Although the Coast Guard had good cause to issue that temporary interim rule without first publishing a proposed rule, the Coast Guard invited the submission of post-promulgation comments and related material regarding that rule through September 5, 2013. No request for a public meeting was received. The Coast Guard received one submission to the docket that raised several objections.

B. Basis and Purpose

Coast Guard Captains of the Port are granted authority to establish safety and security zones in 33 CFR 1.05–1(f) for safety and environmental purposes as described in 33 CFR Part 165.

These safety zones are being implemented to ensure the safe navigation of maritime traffic on the Columbia and Willamette Rivers and their tributaries while grain-shipment and grain-shipment assist vessels transit to and from these Pacific Northwest Grain Handlers Association facilities and to ensure that vessels remain safely moored at these Coast Guard regulated facilities. These safety zones are intended to ensure that members of the maritime public, in particular, those engaged in commerce and protest activities on the water, are not injured. Recreational boating, fishing, and protest activity afloat in these safety zones is particularly hazardous because of the effects of strong river currents, the maneuvering characteristics of grain-shipment vessels, and the safety-sensitive mid-stream personnel transfers conducted by grain-shipment assist vessels with which recreational boaters and protesters may be unfamiliar. These safety zones apply equally to all waterway users and are intended to allow maximum use of the waterway consistent with safe navigation. The impact of the safety zones on maritime activity in the area is minimal because the safety zones are of a limited size and do not encroach on the navigation channel. Grain-shipment vessel means any vessel bound for or departing or having previously loaded cargo at any of the following waterfront facilities: Columbia Grain in Portland, OR; United Grain Corporation in Vancouver, WA; Temco Irving in Portland, OR; Temco Kalama in Kalama, WA; or Louis Dreyfus Commodities in Portland, OR. This includes any vessel leaving anchor in the Columbia and Willamette Rivers that is bound for or had previously departed from the aforementioned waterfront facilities. Grain-shipment assist vessel means any vessel bound for or departing from a grain-shipment vessel to assist it in navigation during the movement of the grain-shipment vessel in the Columbia and Willamette Rivers and their tributaries. This includes but is not limited to tugs, pilot boats, and launches.

C. Discussion of Comments, Changes and the Final Rule

This temporary final rule is unchanged from the temporary interim rule that was published on August 6, 2013 (78 FR 47567) as no substantive changes have been deemed necessary. One commenter submitted a letter to the docket containing several objections. The commenter addressed the inclusion of the safety zone around the Louis Dreyfus facility, which was not included in the previous rule published on February 4, 2013. The Louis Dreyfus facility was not previously included because it was undergoing repairs and was not operational. The Coast Guard has included the Louis Dreyfus facility in this rule based on the facility's plans to begin fulltime operations within the enforcement period of this rule.

The commenter asserted that the safety zones were unnecessary and overbroad. Specifically, the commenter questioned the necessity of the size of these zones. The sizes of these zones are based on the average size of the grain-shipment vessels operating on the river and the average speed of the vessels during their approach. The commenter asserted that deep-draft vessels on the Columbia and Willamette Rivers typically approach at 1 to 2 knots when entering the final 250 yards before the terminal, and therefore, a narrower safety zone of 50–70 yards would still provide a two-minute pre-collision period. The Coast Guard disagrees that a safety zone of 50–70 yards would provide a sufficient buffer to prevent collisions. As vessels are mooring, their speed and direction are frequently changing. Based on these dynamic conditions, we believe the width and size of these safety zones are necessary to significantly reduce the risk posed by limited ship-to-boat communications or propulsion failure by vessels or watercraft operating in the vicinity of grain-shipment vessels.

The commenter also asserts that the Coast Guard has failed to state why the safety zones are necessary and that it appears the safety zones were enacted as the result of union animus. Coast Guard Captains of the Port are delegated authority to establish safety and security zones in 33 CFR 1.05–1(f) for safety and environmental purposes as described in 33 CFR Part 165. The Coast Guard has previously stated that the purpose of this rule is to ensure the safe navigation of maritime traffic on the Columbia and Willamette Rivers and their tributaries while grain-shipment and grain-shipment assist vessels transit to and from these Pacific Northwest Grain Handlers Association facilities. These safety zones are intended to mitigate the hazardous conditions created by small recreational vessels operating in close proximity to large and less-maneuverable, commercial deep-draft vessels and tug and barge configurations, which are typically between 300 and 800 feet in length. In addition to mitigating the navigational dangers associated with operating a small vessel in close proximity to less-maneuverable deep-draft grain-shipment vessels, the Coast Guard believes these safety zones are necessary to protect the safety-sensitive mid-stream personnel transfers conducted by grain-shipment assist vessels with which recreational boaters and protesters may be unfamiliar.

The Coast Guard also disagrees with the commenter's assertion that the safety zones were enacted out of union animus. The Coast Guard respects the First Amendment rights of protesters. These safety zones do not single out protesters, but apply equally to all waterway users and are intended to allow maximum use of the waterway consistent with safe navigation. The safety zones created by this rule do not prohibit members of the public from assembling on the water to express their points of view. The Captain of the Port has, in coordination with protesters, recommended areas on the water in the

vicinity of these safety zones where those desiring to do so can assemble and express their views to the intended audience without compromising navigational safety.

The commenter asserted that the proposed rule would prevent protesters from engaging in peaceful protest activities. The Coast Guard disagrees. The safety zones created by this rule do not prohibit protest activities on the Columbia and Willamette Rivers. Instead, these safety zones are intended to mitigate the hazardous conditions created by small recreational vessels operating in close proximity to large and less-maneuverable commercial deep-draft vessels and tug and barge configurations, which are typically between 300 and 800 feet in length. The safety zones apply to all vessels not otherwise exempted and are intended to ensure the safe navigation of maritime traffic and to protect the safety of life and property on the Columbia and Willamette rivers and all adjoining tributaries.

The commenter also asserted that this rule is inconsistent with the National Labor Relations Act, 29 U.S.C. 151 *et seq.,* because it prohibits picketing activity. However, the safety zones in this rule do not prohibit picketing, or other concerted activities by employees. Vessel operators, including those engaged in picketing activity, may operate in any part of the river outside of the zones so long as they do so in accordance with the navigational rules.

The commenter disagreed with the Coast Guard's suggested use of on-water assembly areas. Prior to promulgation of the initial safety zone, outreach meetings were held between the local Captain of the Port, Columbia River Pilots, and union members. Based on input from these meetings, the Coast Guard designated on-water assembly areas where protesters could safely exercise their First Amendment rights. However, protestors are not required to restrict their protest activities to these assembly areas and may operate in any part of the river outside of the zones so long as they do so in accordance with the navigational rules.

The commenter expressed the importance of ''on-water picketing'' in publicizing the ongoing labor dispute and stated that the safety zones unnecessarily burden the ability of protesters to convey their message to their intended audience of ''incoming vessels.'' The Coast Guard disagrees. Nothing in this rule prevents union members from protesting on the water. The safety zones created by the rule apply to all vessels not otherwise exempted and are intended to ensure the safe navigation of maritime traffic and protect the safety of life and property on the Columbia and Willamette rivers and all adjoining tributaries. The zones address the hazardous conditions for vessels operating in the area due to the maneuvering characteristics of grain-shipment vessels and the safety sensitive mid-stream personnel transfers conducted by grain-shipment assist vessels with which recreational boaters and protesters may be unfamiliar. Vessel operators, including protestors, may operate in any part of the river outside of the zones so long as they do so in accordance with the navigational rules. Additionally, the safety zones are not so large as to prevent vessels from coming within sight or sound of inbound grain-shipment and grain-shipment assist vessels. The recommended on-water assembly areas were proposed specifically to identify locations outside of the safety zones that allow protestors to safely communicate with their intended audience.

Finally, the commenter asserts that the enforcement of these safety zones for a limited amount of time underscores the singling out of labor unions for differential treatment. The Coast Guard disagrees. The safety zones address safety hazards created by the navigation of recreational vessels in close proximity to the facilities to which large and less-maneuverable grain-shipment vessels are transiting. The enforcement of the safety zones for limited time periods is not for the purpose of singling out labor unions but is for the purpose of minimizing the impact on marine operators. The Coast Guard will enforce the safety zones for the minimal amount of time necessary to help ensure the safe navigation for all vessels in the vicinity. The safety zones created by this rule apply to all vessels not otherwise exempted, regardless of whether they are engaged in union activities.

D. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on these statutes and executive orders.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. Although this rule will restrict access to the regulated areas, the effect of this rule will not be significant because: (i) The safety zones are limited in size; (ii) the official on-scene patrol may authorize access to the safety zones; (iii) the safety zones will effect limited geographical locations for a limited time; and (iv) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received 0 comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities some of which may be small entities: The owners and operators of vessels intending to operate in the area covered by the safety zones created in this rule.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons: (i) The safety zones are limited in size; (ii) the official on-scene patrol may authorize access to the safety zones; (iii) the safety zones will effect limited geographical locations for a limited time; and (iv) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this rule. If this rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine

compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. In preparing this temporary final rule, the Coast Guard carefully considered the rights of lawful protestors. The safety zones created by this rule do not prohibit members of the public from assembling on shore or expressing their points of view from locations on shore. In addition, the Captain of the Port has, in coordination with protesters, recommended water areas in the vicinity of these safety zones where those desiring to do so can assemble and express their views without compromising navigational safety. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

9. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

10. Protection of Children From Environmental Health Risks

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

11. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of temporary safety zones around the Columbia Grain facility on the Willamette River in Portland, OR, the United Grain Corporation facility on the Columbia River in Vancouver, WA, the Temco Irving facility on the Willamette River in Portland, OR, the Temco Kalama facility on the Columbia River in Kalama, WA, and the Louis Dreyfus Commodities facility on the Willamette River in Portland, OR. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR Part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T13–240 to read as follows:

§ 165.T13–240 Safety Zones; Pacific Northwest Grain Handlers Association Facilities; Columbia and Willamette Rivers.

(a) *Definitions.* As used in this section:

(1) *Federal Law Enforcement Officer* means any employee or agent of the United States government who has the authority to carry firearms and make warrantless arrests and whose duties involve the enforcement of criminal laws of the United States.

(2) *Navigable waters of the United States* means those waters defined as such in 33 CFR part 2.

(3) *Navigation Rules* means the International Regulations for Preventing Collisions at Sea, 1972 (commonly called 72 COLREGS) and the Inland Navigation Rules published in 33 CFR Part 83.

(4) *Official Patrol* means those persons designated by the Captain of the Port to monitor a vessel safety zone, permit entry into the zone, give legally enforceable orders to persons or vessels within the zone and take other actions authorized by the Captain of the Port. Federal Law Enforcement Officers authorized to enforce this section are designated as the Official Patrol.

(5) *Public vessel* means vessels owned, chartered, or operated by the United States, or by a State or political subdivision thereof.

(6) *Grain-shipment vessel* means any vessel bound for, departing from, or having previously loaded cargo at any of the following waterfront facilities: Columbia Grain in Portland, OR, United Grain Corporation in Vancouver, WA, Temco Irving in Portland, OR, Temco Kalama in Kalama, WA, or Louis Dreyfus Commodities in Portland, OR. This includes any vessel leaving anchor in the Columbia and Willamette Rivers that is bound for or had previously departed from the aforementioned waterfront facilities.

(7) *Grain-shipment assist vessel* means any vessel bound for or departing from a grain-shipment vessel to assist it in navigation during the movement of the grain-shipment vessel in the Columbia and Willamette Rivers and their tributaries. This includes but is not limited to tugs, pilot boats, and launches.

(8) *Oregon Law Enforcement Officer* means any Oregon Peace Officer as defined in Oregon Revised Statutes section 161.015.

(9) *Washington Law Enforcement Officer* means any General Authority Washington Peace Officer, Limited Authority Washington Peace Officer, or Specially Commissioned Washington Peace Officer as defined in Revised Code of Washington section 10.93.020

(b) *Locations.* The following areas are safety zones:

(1) *Columbia Grain.* All navigable waters of the United States within the Sector Columbia River Captain of the Port Zone enclosed by three lines and the shoreline: line one starting on the shoreline at 45–38′34″ N/122–46′11″ W then heading 150 yards offshore to 45–38′37″ N/122–46′16″ W then heading up river 380 yards to 45–38′30″ N/122–46′28″ W then heading 150 yards to the shoreline ending at 45–38′27″ N/122–46′24″ W.

(2) *United Grain Corporation.* All navigable waters of the United States within the Sector Columbia River Captain of the Port Zone enclosed by three lines and the shoreline: line one starting on the shoreline at 45–37′52″ N/122–41′46″ W then heading 150 yards offshore to 45–37′48″ N/122–41′50″ W then heading up river 470 yards to 45–37′40″ N/122–41′34″ W then heading 175 yards to the shoreline ending at 45–37′44″ N/122–41′29″ W.

(3) *Temco Portland.* All navigable waters of the United States within the Sector Columbia River Captain of the Port Zone enclosed by three lines and the shoreline: line one starting on the shoreline at 45–32′10″ N/122–40′34″ W then heading 150 yards offshore to 45–32′09″ N/122–40′39″ W then heading up river 275 yards to 45–32′01″ N/122–40′33″ W then heading 150 yards to the shoreline ending at 45–32′04″ N/122–40′28″ W.

(4) *Temco Kalama.* All navigable waters of the United States within the Sector Columbia River Captain of the Port Zone enclosed by three lines and the shoreline: line one starting on the shoreline at 45–59′10″ N/122–50′09″ W then heading 150 yards offshore to 45–59′09″ N/122–50′14″ W then heading up river 385 yards to 45–58′58″ N/122–50′07″ W then heading 150 yards to the shoreline ending at 45–59′00″ N/122–50′01″ W.

(5) *Louis Dreyfus Commodities.* All navigable waters of the United States within the Sector Columbia River Captain of the Port Zone enclosed by three lines and the shoreline: line one starting on the shoreline at 45–31′49″ N/122–40′15″ W then heading 70 yards offshore to 45–31′48″ N/122–40′17″ W then heading up river 300 yards to 45–31′41″ N/122–40′09″ W then heading 100 yards to the shoreline ending at 45–31′43″ N/122–40′06″ W.

(c) *Effective Period.* This section is effective without actual notice from November 27, 2013 until November 27, 2015 and will be activated for enforcement as described in paragraph (d) of this section. Actual notice will be used from the date the rule was signed, October 31, 2013, until November 27, 2013.

(d) *Enforcement Periods.* The Sector Columbia River Captain of the Port will cause notice of the enforcement of the grain facilities safety zones to be made by all appropriate means to effect the widest publicity among the affected segments of the public as practicable, in accordance with 33 CFR 165.7. Such means of notification may include, but are not limited to, Broadcast Notices to Mariners or Local Notices to Mariners. The Sector Columbia River Captain of the Port will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone is suspended.

Upon notice of enforcement by the Sector Columbia River Captain of the Port, the Coast Guard will enforce the safety zone in accordance with the rules set out in this section. Upon notice of suspension of enforcement by the Sector Columbia River Captain of the Port, all persons and vessels are authorized to enter, transit, and exit the safety zone, consistent with the Navigation Rules.

(e) *Regulation.* (1) In accordance with the general regulations in section 165.23 of this part, entry into or movement within these zones is prohibited unless authorized by the Sector Columbia River Captain of the Port, the official patrol, or other designated representatives of the Captain of the Port.

(2) To request authorization to enter or operate within the safety zone contact the on-scene official patrol on VHF–FM channel 16 or 13, or the Sector Columbia River Command Center at phone number (503) 861–6211. Authorization will be granted based on the necessity of access and consistent with safe navigation.

(3) Vessels authorized to enter or operate within the safety zone shall operate at the minimum speed necessary to maintain a safe course and shall proceed as directed by the on-scene official patrol. The Navigation Rules shall apply at all times within the safety zone.

(4) When conditions permit, the on-scene official patrol, or a designated representative of the Captain of the Port at the Sector Columbia River Command Center, should:

(i) Permit vessels constrained by their navigational draft or restricted in their ability to maneuver to enter or operate within the safety zone in order to ensure a safe passage in accordance with the Navigation Rules; and

(ii) Permit commercial vessels anchored in a designated anchorage area to remain at anchor within the safety zone; and

(iii) Permit vessels that must transit via a navigable channel or waterway to enter or operate within the safety zone in order to do so.

(f) *Exemption.* Public vessels as defined in paragraph (a) of this section are exempt from complying with paragraph (e) of this section.

(g) *Enforcement.* Any Coast Guard commissioned, warrant, or petty officer may enforce the rules in this section. In the navigable waters of the United States to which this section applies, when immediate action is required and representatives of the Coast Guard are not present or are not present in sufficient force to provide effective enforcement of this section, any Federal Law Enforcement Officer, Oregon Law Enforcement Officer, or Washington Law Enforcement Officer may enforce the rules contained in this section

pursuant to 46 U.S.C. 70118. In addition, the Captain of the Port may be assisted by other federal, state, or local agencies in enforcing this section.

(h) *Waiver.* The Captain of the Port Columbia River may waive any of the requirements of this section for any vessel or class of vessels upon finding that operational conditions or other circumstances are such that application of this section is unnecessary or impractical for the purpose of port safety or environmental safety.

Dated: October 31, 2013.

B.C. Jones,

Captain, U.S. Coast Guard, Captain of the Port, Sector Columbia River.

[FR Doc. 2013–28362 Filed 11–26–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AO59

Copayment for Extended Care Services

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document promulgates Department of Veterans Affairs (VA) final regulations amending the definition of ''spousal resource protection amount'' to reference the Maximum Community Spouse Resource Standard, which is adjusted and published each year by the Centers for Medicare and Medicaid Services (CMS). This change has the immediate effect of increasing the spousal resource protection amount from $89,280 to $115,920, and ensures that the spousal resource protection amount will stay consistent with the comparable protection for the spouses of Medicaid recipients.

DATES: *Effective Date:* This rule is effective December 27, 2013.

FOR FURTHER INFORMATION CONTACT: Kristin J. Cunningham, Director Business Policy, Chief Business Office, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420; (202) 461–1599. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On April 22, 2013, VA published in the **Federal Register** (78 FR 23702) a proposal to amend the definition of ''spousal resource protection amount'' found at 38 CFR 17.111(d)(2)(vi). The spousal resource protection amount is the amount of liquid assets of a veteran and community (i.e., not institutionalized) spouse that is considered unavailable when calculating the veteran's maximum monthly copayment obligation for extended care services longer than 180 days. We proposed to define the ''spousal resource protection amount'' by reference to the Maximum Community Spouse Resource Standard, which is published each year by the Centers for Medicare and Medicaid Services (CMS) and is adjusted annually based on the Consumer Price Index. Previously, the spousal resource protection amount used by VA was set at $89,280 and did not adjust annually. Under the proposed change, this amount would immediately increase to the current CMS standard of $115,920, and would automatically adjust on an annual basis consistent with the comparable protection for the spouses of Medicaid recipients.

In addition, we proposed to remove § 17.111(g), which consists entirely of a copy of VA Form 10–10EC, Application for Extended Care Services.

Interested persons were invited to submit comments to the proposed rule on or before June 21, 2013. We received one comment advocating for increased funding for medical services provided to military spouses, which is beyond the scope of this rulemaking. We received no substantive comments addressing the substance of the proposed rule or suggesting any changes. Therefore, based on the rationale set forth in the proposed rule, VA is adopting the provisions of the proposed rule as a final rule with no changes.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule 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 final rule will directly affect only individuals and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the 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 effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action'' requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at *http://www1.va.gov/orpm/,* by following the link for ''VA Regulations Published.''

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 the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Chief of Staff, Department of Veterans Affairs, approved this document on November 21, 2013, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

Dated: November 22, 2013.

Robert C. McFetridge,

Director, Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 17 as set forth below:

PART 17—MEDICAL

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

■ 2. Amend § 17.111 by:

■ a. Revising paragraph (d)(2)(vi).

■ b. Removing paragraph (g).

The revision reads as follows:

§ 17.111 Copayments for extended care services.

* * * * *

(d) * * *

(2) * * *

(vi) *Spousal resource protection amount* means the value of liquid assets equal to the Maximum Community Spouse Resource Standard published by the Centers for Medicare and Medicaid Services (CMS) as of January 1 of the current calendar year if the spouse is residing in the community (not institutionalized).

* * * * *

[FR Doc. 2013–28436 Filed 11–26–13; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2012–0706; FRL–9399–8]

Metaldehyde; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of metaldehyde in or on multiple commodities which are identified and discussed later in this document. This regulation additionally removes the established tolerances in or on berry group 13 and strawberry, as the tolerances will be superseded by tolerances established by this action. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 27, 2013. Objections and requests for hearings must be received on or before January 27, 2014, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2012–0706, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Lois Rossi, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2012–0706 in the subject line on

the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 27, 2014. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2012–0706, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of September 28, 2012 (77 FR 59578) (FRL–9364–6), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 2E8070) by IR–4, 500 College Rd. East, Suite 201 W., Princeton, NJ 08540. The petition requested that 40 CFR 180.523 be amended by establishing tolerances for residues of the molluscicide metaldehyde in or on berry, low growing, subgroup 13–07G at 6.25 parts per million (ppm); bushberry subgroup 13–07B at 0.15 ppm; caneberry subgroup 13–07A at 0.15 ppm; corn, field, forage at 0.25 ppm; corn, field, grain at 0.05 ppm; corn, field, stover at 0.15 ppm; corn, sweet, kernel plus cob with husks removed at 0.05 ppm; grass, forage at 1.5 ppm; grass, hay at 1.8 ppm; leaf petioles subgroup 4B at 0.80 ppm; peppermint, oil at 14 ppm; peppermint, tops at 3.5 ppm; soybean, seed at 0.05 ppm; spearmint, oil at 14 ppm; spearmint, tops at 3.5 ppm; taro, corm at 0.25 ppm; and taro, leaves at 0.60 ppm. That document referenced a summary of the petition prepared on behalf of IR–4 by Lonza, Inc., the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has revised the proposed tolerances for several commodities and has determined that tolerances on sweet corn forage and stover are necessary. The Agency has also determined that the tolerance expression should be revised for all commodities. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for metaldehyde including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with metaldehyde follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The toxicity profile of metaldehyde demonstrates that the principal toxic effects are clinical signs of neurotoxicity, as well as changes in the liver and testes/prostate following repeated oral dosing. The dog is the most sensitive species for neurotoxic effects. Nervous system effects observed in the subchronic and chronic oral toxicity studies include: Ataxia and tremors; emesis; rapid respiration in dogs and maternal rats; limb paralysis, spinal cord necrosis, and hemorrhage in maternal rats; salivation; and twitching. Liver effects include increased liver weight, increased incidence of liver lesions (hepatocellular necrosis, hepatocellular hypertrophy and inflammation), and an increased incidence of hepatocellular adenomas in female rats and in both sexes of mice. In dogs, atrophy of the testes and prostate was observed following subchronic and chronic exposure.

In the rat developmental toxicity study, maternal toxicity was observed as evidenced by clinical signs including ataxia, tremors, and twitching at the highest dose tested in the absence of developmental toxicity. There was no observed developmental or maternal toxicity in the rabbit developmental toxicity study. In the 2-generation rat reproductive toxicity study, mortality and clinical signs including limb paralysis, spinal cord necrosis and hemorrhage were observed in the maternal animals. Effects on the offspring in the rat reproductive toxicity study consisted of decreased pup body weight and body weight gains; reproductive toxicity was not observed.

In the rat, clinical signs of neurotoxicity occurred at high dose levels following repeated oral exposures. In the 90-day neurotoxicity study, bilateral hindlimb paralysis was observed in one female rat at the highest dose tested.

Chronic feeding studies in rats and mice indicated that metaldehyde produced liver effects characterized by liver hypertrophy and liver tumors. The chronic mouse toxicity study showed that metaldehyde was associated with a common tumor in both sexes (liver tumors, adenomas), and the rat chronic toxicity study showed that metaldehyde was associated with liver adenomas in the female. EPA has classified metaldehyde as having ''suggestive evidence of carcinogenicity'' and has determined that quantification of risk using a nonlinear reference dose (RfD)

approach, using the chronic RfD/population-adjusted dose (PAD), will adequately account for all chronic toxicity, including carcinogenicity, that could result from exposure to metaldehyde. That conclusion is based on the following considerations:

1. Tumors found are commonly seen in the mouse.
2. Liver tumors (adenomas) in both species were benign.
3. Metaldehyde is not mutagenic.
4. No carcinogenic response was seen in the male rat.
5. Incidence of adenomas at the high dose in the female rat was within the historical control range of the testing lab.
6. Both the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the chronic rat study on which the chronic RfD/PAD was based are well below the dose at which adenomas were seen.

Specific information on the studies received and the nature of the adverse effects caused by metaldehyde as well as the NOAEL and the LOAEL from the toxicity studies can be found at *http://www.regulations.gov* in document: ''Metaldehyde; Human Health Risk Assessment for Proposed Uses on Grass Grown for Seed, Leaf Petioles [Crop Subgroup 4B], Wetland Taro, Field & Sweet Corn, Mint, and Soybeans, and for Amendments to Existing Tolerances [Crop Subgroups 13–07A, B, & G]'' in pp. 37–43 in docket ID number EPA–HQ–OPP–2012–0706.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which the NOAEL and the LOAEL are identified. Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a PAD or RfD—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for metaldehyde used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR METALDEHYDE FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/Scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for Risk assessment	Study and toxicological effects
Acute dietary (General population including infants and children and females 13–49).	NOAEL = 30 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Acute RfD = 0.30 mg/kg/day. aPAD = 0.30 mg/kg/day	Chronic dog oral toxicity study. LOAEL = 90 mg/kg/day, based on clinical signs (ataxia, tremor, salivation, twitching) seen on day 1 of dosing (both sexes).
Chronic dietary (All populations)	NOAEL = 10 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.10 mg/kg/day. cPAD = 0.10 mg/kg/day	Chronic dog oral toxicity study. LOAEL = 30 mg/kg/day, based on death and atrophy of the testes and prostate.
Incidental oral short-term (1 to 30 days).	NOAEL = 30 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Chronic dog oral toxicity study. LOAEL = 90 mg/kg/day, based on clinical signs (ataxia, tremor, salivation, twitching) seen on day 1 of dosing (both sexes).
Incidental oral intermediate-term (1 to 6 months).	NOAEL = 10 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Chronic dog oral toxicity study. LOAEL = 30 mg/kg/day, based on death and atrophy of the testes and prostate.
Inhalation short-term (1 to 30 days).	NOAEL = 30 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Chronic dog oral toxicity study. LOAEL = 90 mg/kg/day, based on clinical signs (ataxia, tremor, salivation, twitching) seen on day 1 of dosing (both sexes).
Cancer (Oral, dermal, inhalation).	Classification: Suggestive Evidence of Carcinogenicity; EPA has determined that quantification of risk using the chronic RfD/PAD will adequately account for all chronic toxicity, including carcinogenicity.		

FQPA SF = Food Quality Protection Act Safety Factor. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligram/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to metaldehyde, EPA considered exposure under the petitioned-for tolerances as well as all existing metaldehyde tolerances in 40 CFR 180.523. EPA assessed dietary

exposures from metaldehyde in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. Such effects were identified for metaldehyde. In estimating acute dietary exposure, EPA used the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM–FCID) Version 3.16, which uses food consumption data from the U.S. Department of Agriculture's (USDA's) National Health and Nutrition Examination Survey, ''What We Eat in America'' (NHANES/WWEIA) from 2003 through 2008. As to residue levels in food, EPA used tolerance-level residues for all commodities and 100 percent crop treated (PCT) estimates. The Agency also assumed processing factors to be 1.0 for all commodities except for dried tomato, tomato juice, cranberry juice, and high fructose corn syrup; for these commodities, DEEM version 7.81 default processing factors were used.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA's 2003–2008 NHANES/WWEIA. As to residue levels in food, EPA used tolerance-level residues for all commodities and assumed 100 PCT. The Agency also assumed processing factors to be 1.0 for all commodities except for dried tomato, tomato juice, cranberry juice, and high fructose corn syrup; for these commodities, DEEM version 7.81 default processing factors were used.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that chronic RfD/PAD is protective for assessing cancer risk to metaldehyde. Cancer risk was assessed using the same exposure estimates as discussed in Unit III.C.1.ii.

iv. *Anticipated residue and PCT information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for metaldehyde. Tolerance level residues and/or 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for metaldehyde in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of metaldehyde. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Pesticide Root Zone Model Ground Water (PRZM GW), the estimated drinking water concentrations (EDWCs) of metaldehyde for acute exposures are estimated to be 205 parts per billion (ppb) for surface water and 1,740 ppb for ground water. Chronic exposures are estimated to be 136 ppb for surface water and 635 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. The water concentration values of 1,740 ppb and 635 ppb were used to assess the contribution to drinking water for the acute and chronic dietary risk assessments, respectively.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Metaldehyde is currently registered for the following uses that could result in residential exposures: Residential ornamentals and lawn/turf applications. EPA assessed the following residential exposures:

i. Adult handler short-term inhalation exposures from loading/applying metaldehyde products including liquid ready-to-use products (with manually pressurized hand wands, hose-end sprayers, and sprinkler cans) and applying granules (via push-type rotary spreaders, belly grinders, spoons, cups, hands, and shaker cans.)

ii. Metaldehyde incidental postapplication exposures assessed for children, including short-term exposure from hand-to-mouth and object-to-mouth contact with treated turf, and short- and intermediate-term exposures from treated soil ingestion. While EPA did calculate an acute incidental ingestion scenario for toddlers accidentally ingesting granules of metaldehyde, it is not appropriate to aggregate this scenario because it represents poisoning incident which is not likely to overlap with the typical post-application exposure scenario. Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/science/EPA-OPP HED_Residential%20SOPS_Feb2012.pdf.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' EPA has not found metaldehyde to share a common mechanism of toxicity with any other substances, and metaldehyde does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that metaldehyde does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality and Protection Act Safety Factor (FQPA SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional SF when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* Developmental toxicity studies in rats and rabbits and a 2-generation reproduction study in rats are available to assess potential fetal and offspring sensitivity to metaldehyde. There is no evidence of increased qualitative or quantitative susceptibility in any of these studies.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for metaldehyde is complete. EPA has determined that the immunotoxicity study required for pesticide registration is not needed, nor are addition UFs necessary to account for immunotoxicity concerns. The toxicology database reveals no evidence of treatment-related effects on the

immune system suggesting that the immune system is not the primary target organ. EPA considers the NOAELs selected for risk assessment to be protective of any potential immunotoxic effects for infants and children. Given the information regarding the retrospective analysis for immunotoxicity studies and the existing data on metaldehyde toxicity, EPA considers the NOAELs selected for risk assessment to be protective of potential immunotoxic effects for infants and children.

ii. There is a concern for neurotoxicity resulting from exposure to metaldehyde; however, most neurotoxic signs were seen in rats at doses above 100 mg/kg. These neurotoxic signs included:

a. Clinical signs (ataxia, twitching, tremors, prostration, paresis of hind legs) in female rats in the developmental toxicity study.

b. Hindlimb paralysis, necrosis and hemorrhage in the spinal cord and vertebra luxation in F0 dams during the lactation period in the 2-generation reproduction study.

c. Bilateral hindlimb paralysis observed initially on day 10 in one high-dose female sacrificed on day 22 due to poor condition in the 90-day subchronic neurotoxicity study in rats, with no evident neuropathology.

d. Clinical signs (ataxia, tremors, twitching, salivation) in the chronic dog study, which occurred within the first week of exposure and persisted through week 19 (other signs included lateral position, reduced mobility, convulsions, and vocalization in one female, and agitation in another).

EPA has determined that the acute and developmental neurotoxicity studies are not needed, nor are additional uncertainty factors (UFs) necessary to account for neurotoxicity. Neurotoxicity effects observed in the rat occur only at high dose levels. The dog is the more sensitive species for neurotoxic effects and points of departure are based on the chronic dog oral toxicity study, which EPA considers to be protective of any neurotoxicity at higher dose levels. Finally, there is a subchronic neurotoxicity study available for metaldehyde with a clearly defined NOAEL/LOAEL.

iii. There is no evidence that metaldehyde results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to metaldehyde in drinking water. EPA used similarly conservative assumptions to assess postapplication incidental oral exposures of children. These assessments will not underestimate the exposure and risks posed by metaldehyde.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to metaldehyde will occupy 99% of the aPAD for all infants less than 1 year old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to metaldehyde from food and water will utilize 36% of the cPAD for all infants less than 1 year old, the population group receiving the greatest exposure.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Metaldehyde is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to metaldehyde.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 1,900 for adults and 590 for children. Because EPA's level of concern for metaldehyde is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Metaldehyde is currently registered for uses that could result in intermediate-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with intermediate-term residential exposures to metaldehyde.

Using the exposure assumptions described in this unit for intermediate-term exposures, EPA has concluded that the combined intermediate-term food, water, and residential exposures result in an aggregate MOE of 280 for children. Because EPA's level of concern for metaldehyde is a MOE of 100 or below, this MOEs is not of concern.

5. *Aggregate cancer risk for U.S. population.* Based on the data summarized in Unit III.A., EPA has concluded that a nonlinear RfD approach is appropriate for assessing cancer risk to metaldehyde. Cancer risk was assessed using the same cPAD and exposure estimates as discussed in Unit III.A. and Unit III.C.1.ii. for the chronic risk assessment. See Unit III.E.2.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to metaldehyde residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology, a gas chromatography with mass spectrometry (GC/MS) method (EN–CAS Method No. ENC–3/99, Revision 1) is available to enforce the tolerance expression.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health

Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for metaldehyde.

C. Revisions to Petitioned-For Tolerances

Based on the data submitted with the petition, EPA revised the proposed tolerances for several commodities, as follows: Corn, field, forage from 0.25 ppm to 0.30 ppm; corn, field, stover from 0.15 ppm to 0.10 ppm; grass, forage from 1.5 ppm to 2.0 ppm; grass, hay from 1.8 ppm to 2.0 ppm; leaf petioles subgroup 4B from 0.80 ppm to 0.50 ppm; peppermint, oil from 14 ppm to 12 ppm; peppermint, tops from 3.5 ppm to 4.0 ppm; spearmint, oil from 14 ppm to 12 ppm; spearmint, tops from 3.5 ppm to 4.0 ppm; taro, corm from 0.25 ppm to 0.15 ppm; and taro, leaves from 0.60 ppm to 1.0 ppm. The Agency revised these tolerance levels based on analysis of the residue field trial data using the Organization for Economic Cooperation and Development (OECD) tolerance calculation procedures. Additionally, the Agency has determined that tolerances in or on corn, sweet, forage at 0.30 ppm and corn, sweet, stover at 0.10 ppm are necessary. Because sweet corn forage and stover may bear detectable metaldehyde residues and be used as a livestock feedstuff, it was determined that these tolerances should be established in order to support the use of metaldehyde in or on sweet corn.

Finally, the Agency has revised the tolerance expression to clarify:

1. That, as provided in FFDCA section 408(a)(3), the tolerance covers metabolites and degradates of metaldehyde not specifically mentioned.

2. That compliance with the specified tolerance levels is to be determined by measuring only metaldehyde.

V. Conclusion

Therefore, tolerances are established for residues of metaldehyde, 2,4,6,8-tetramethyl-1,3,5,7-tetroxocane, in or on berry, low growing, subgroup 13–07G at 6.25 ppm; bushberry subgroup 13–07B at 0.15 ppm; caneberry subgroup 13–07A at 0.15 ppm; corn, field, forage at 0.30 ppm; corn, field, grain at 0.05 ppm; corn, field, stover at 0.10 ppm; corn, sweet, forage at 0.30; corn, sweet, kernel plus cob with husks removed at 0.05 ppm; corn, sweet, stover at 0.10 ppm; grass, forage at 2.0 ppm; grass, hay at 2.0 ppm; leaf petioles subgroup 4B at 0.50 ppm; peppermint, oil at 12 ppm; peppermint, tops at 4.0 ppm; soybean, seed at 0.05 ppm; spearmint, oil at 12 ppm; spearmint, tops at 4.0 ppm; taro, corm at 0.15 ppm; and taro, leaves at 1.0 ppm;. The regulation additionally removes the tolerances in or on berry group 13 at 0.15 ppm and strawberry at 6.25 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 25, 2013.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.523, revise paragraphs (a) and (c) to read as follows:

§ 180.523 Metaldehyde; tolerances for residues.

(a) *General.* Tolerances are established for residues of the molluscicide metaldehyde, including its metabolites and degradates, in or on the commodities listed in the following table. Compliance with the specified tolerance levels is to be determined by measuring only metaldehyde, 2,4,6,8-

tetramethyl-1,3,5,7-tetroxocane, in or on the commodity.

Commodity	Parts per million
Artichoke, globe	0.07
Berry, low growing, subgroup 13–07G	6.25
Bushberry subgroup 13–07B	0.15
Cactus	0.07
Caneberry subgroup 13–07A	0.15
Corn, field, forage	0.30
Corn, field, grain	0.05
Corn, field, stover	0.10
Corn, sweet, forage	0.30
Corn, sweet, kernel plus cob with husks removed	0.05
Corn, sweet, stover	0.10
Fruit, citrus, group 10	0.26
Grass, forage	2.0
Grass, hay	2.0
Leaf petioles subgroup 4B	0.50
Lettuce	1.73
Peppermint, oil	12
Peppermint, tops	4.0
Spearmint, oil	12
Spearmint, tops	4.0
Taro, corm	0.15
Taro, leaves	1.0
Tomato	0.24
Vegetable, brassica, leafy, group 5	2.5
Watercress	3.2

* * * * *

(c) *Tolerances with regional registrations.* Tolerances with a regional registration as defined in § 180.1(l) are established for residues of the molluscicide metaldehyde, including its metabolites and degradates, in or on the following commodities. Compliance with the specified tolerance level is to be determined by measuring only metaldehyde, 2,4,6,8-tetramethyl-1,3,5,7-tetroxocane, in or on the commodity.

Commodity	Parts per million
Soybean, seed	0.05

* * * * *

[FR Doc. 2013–28370 Filed 11–26–13; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2011–0905; FRL–9902–39]

Etofenprox; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of etofenprox in or on multiple commodities which are identified and discussed later in this document. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 27, 2013. Objections and requests for hearings must be received on or before January 27, 2014, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2011–0905, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Lois Rossi, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2011–0905 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 27, 2014. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2011–0905, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of December 8, 2011 (76 FR 76674) (FRL–9328–8), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 1E7925) by Interregional Research Project No. 4 (IR–4), 500 College Road East, Suite 201 W, Princeton, NJ 08540. The petition requested that 40 CFR 180.620 be amended by establishing tolerances for residues of the insecticide etofenprox, [2-(4-ethoxyphenyl)-2-methylpropyl 3-phenoxybenzyl ether], in or on food and feed commodities at 0.5 parts per million (ppm). That document referenced a summary of the petition prepared by Mitsui, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Currently there are two products that contain etofenprox registered for mosquito control. However, the existing registrations do not allow treatments on or over agricultural areas. IR–4 submitted this petition to establish tolerances for residues of etofenprox in or on food and feed commodities so that the registration can be modified to allow repeated applications (aerial and ground) over agricultural crops, pasture and rangeland.

Based upon review of the data supporting the petition, EPA has modified the level at which tolerances are being established. The reason for this change is explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for etofenprox including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with etofenprox follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

In mammals, the major targets of etofenprox are the liver, thyroid, kidney, and hematopoietic system. Results from subchronic and chronic feeding studies in rats indicate that males may be more sensitive to treatment-related effects of etofenprox than females. All subchronic and chronic toxicity including carcinogenicity studies showed adverse effects (organ weights, histopathology, biochemistry, hematology, and clinical chemistry) in two or more of the target organs/systems. Additionally, decreases in body weights and food consumption were observed in most of the studies.

In a mouse carcinogenicity study, the kidney was the most sensitive target organ, especially in males, and many deaths were attributed to renal lesions. Males showed a positive trend in renal cortical adenomas alone and in combined carcinomas and adenomas; however, tumor incidence was within the historical control range. Other effects included decreased body and thymus gland weights, and increased liver, spleen, and pituitary gland weights. Microscopic changes included centrilobular hepatocyte enlargement.

Relevant toxicity studies showed no quantitative or qualitative evidence of increased susceptibility in offspring. A prenatal developmental toxicity study in rabbits showed no quantitative or qualitative evidence of increased susceptibility in offspring, in that the developmental effects were seen at doses that resulted in maternal toxicity, including death. There was no indication of increased susceptibility of offspring in the 1-generation/developmental study in rats. In the developmental portion of the study, effects were seen in maternal animals, while no effects were observed in the offspring. In the 2-generation reproductive toxicity study in rats, there was also no evidence of increased susceptibility of offspring.

Although etofenprox exposure does result in some neurotoxic effects, these effects only occur at high doses. An acute neurotoxicity study in the adult rat revealed no treatment-related effects. The subchronic neurotoxicity study in the rat showed decreased body weight gains, increased liver weights in all dose groups, and increased incidence of rearing behavior in males and abnormal gait in females. The developmental neurotoxicity study in rats showed increased rearing behavior in mothers at the highest dose tested (HDT). In offspring, eye abnormalities were observed at the high-dose level and effects on motor/locomotor activity and auditory startle response observed at the high-dose level.

The immunotoxicity studies in the rat and mouse were both negative for immunotoxicity.

The cancer classification for etofenprox is ''Not likely to be carcinogenic to humans at doses that do not alter rat thyroid hormone homeostasis.'' This decision was based on the following considerations:

i. Treatment-related thyroid follicular cell tumors were seen in both male and female rats at a dose level considered to be adequate, and not excessive, to assess carcinogenicity;

ii. No treatment-related tumors were seen in male or female mice when tested at a dose that was considered adequate to assess carcinogenicity;

iii. There is no mutagenicity concern for etofenprox based *in vivo* or *in vitro* assays;

iv. The non-neoplastic toxicological evidence (*i.e.,* thyroid growth and thyroid hormonal changes) indicates that etofenprox disrupts the thyroid-pituitary hormonal status; and

v. Rats are substantially more sensitive than humans to the development of thyroid follicular cell tumors in response to thyroid hormone imbalance. The overall weight-of-the-evidence was considered sufficient to indicate that etofenprox induced thyroid follicular tumors through an antithyroid mode of action.

Specific information on the studies received and the nature of the adverse effects caused by etofenprox as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document

titled ''Etofenprox: Section 3 Aggregate Human Health Risk Assessment for a Label Amendment to Remove Application Restriction Over Crop, Range, and Pasture land,'' pp. 36–41 docket ID number EPA–HQ–OPP–2011–0905.

B. Toxicological Points of Departure/ Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/ safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for etofenprox used for human risk assessment is shown in the Table of this unit.

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ETOFENPROX FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (All populations) ..	No adverse effects attributable to a single dose were observed in oral toxicity studies, including developmental toxicity studies in rats and rabbits. Therefore, an acute reference dose was not established.		
Chronic dietary (All populations)	NOAEL = 3.7 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	cRfD = 0.037 mg/kg/day. cPAD = 0.037 mg/kg/day	Combined Chronic Toxicity/Carcinogenicity Study in Rat. LOAEL = 25.5 mg/kg/day based on increased thyroid weights. Related to increased liver weights and histopathology changes in liver and thyroid that occurred at the higher dose.
Incidental oral short- and intermediate-term (1 to 30 days and 1 to 6 months).	NOAEL = 20 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Subchronic Oral Toxicity in Rat. LOAEL = 120 mg/kg/day based on decreased body weight gain, increased liver and thyroid weights with corresponding histopathology, changes in hematology and clinical chemistry.
Incidental oral long-term (> 6 months).	NOAEL = 3.7 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Combined Chronic Toxicity/Carcinogenicity Study in Rat. LOAEL = 25.5 mg/kg/day based on increased thyroid weights. Related to increased liver weights and histopathology changes in liver and thyroid that occurred at the higher dose.
Inhalation short- and intermediate-term (1 to 30 days and 1 to 6 months).	Inhalation study ..... NOAEL = 10.6 mg/kg/day. UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	13-Week Inhalation Toxicity in Rat. LOAEL = 52.3 mg/kg/day based on organ weight changes and histopathological changes in liver, adrenals and thyroid.
Cancer (Oral, dermal, inhalation).	Classification: ''Not likely to be carcinogenic to humans at doses that do not alter rat thyroid hormone homeostasis.''		

FQPA SF = Food Quality Protection Act Safety Factor. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligram/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to etofenprox, EPA considered exposure under the petitioned-for tolerances as well as all existing etofenprox tolerances in 40 CFR 180.620. EPA assessed dietary exposures from etofenprox in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. No such effects were identified in the toxicological studies for etofenprox; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the U.S. Department of Agriculture's (USDA's) National Health and Nutrition Examination Survey, What We Eat in America (NHANES/ WWEIA). The assessment assumed tolerance level residues for all commodities, incorporated estimated percent crop treated (PCT) values, and used the Dietary Exposure Evaluation Model Food Commodity Intake Database (DEEM–FCID) default processing factors. The submitted crop field trial data were conducted at a rate (0.07 lb ai/A) 10X greater than the proposed application rate of at 0.007 lb ai/A per site for mosquito control. The number and locations of field trials were in accordance with the initial

recommendations put forth by the EPA. EPA recommended field trials be conducted at the 1x and 10x rates and indicated that if there were residues detected in the samples collected above the limit of quantification (LOQ) at both 1x and 10x rates, then a tolerance would be required at the level observed at the 1x rate. However, the available crop field trial data do not reflect the number of applications proposed or the use of ground application equipment. Therefore, the Agency considered an analysis submitted by IR–4 of different modeled runs to estimate the residues resulting from multiple aerial applications using the Terrestrial Residue Exposure (TREX) model following repeated ultra low volume (ULV) applications to estimate an upper bound tolerance value. The EPA also evaluated the proposed multiple application scenarios using AGricultural DISPersal (AGDISP) 8.25 and assumed the same application parameters (*e.g.,* drop size distribution, application material, and application height) as considered in the TREX analysis. A deposition rate of 33% was assumed for aerial and ground ULV applications, which corresponds to a residue value of 4.8 ppm (to represent the worst case) with a wind speed of 1 mph. These analysis result in estimated an upper bound value of 4.77 ppm for ground and aerial applications. Therefore, the EPA determined that a tolerance of 5 ppm, which is based on conservative assumptions, is adequate to cover the expected residues. The proposed tolerance of 5 ppm on food and feed commodities significantly increases the dietary burdens of etofenprox in livestock and necessitates establishing tolerances on livestock commodities.

Specific information on the TREX and AGDISP analyses can be found at *http://www.regulations.gov* in the document titled ''Spray Drift Analysis for the Etofenprox Label Amendment (Petition No. 1E7925)'' docket ID number EPA–HQ–OPP–2011–0905.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that etofenprox does not pose a cancer risk to humans at doses that do not alter rat thyroid hormone homeostasis. Because the cPAD is protective of etofenprox's effect on thyroid hormones and dietary exposure to etofenprox for the purpose of assessing cancer risk would be the same or lower than dietary exposure relevant to other chronic endpoints, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and PCT information.* Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- Condition a: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- Condition b: The exposure estimate does not underestimate exposure for any significant subpopulation group.
- Condition c: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6–7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The Agency estimated the PCT for proposed uses of etofenprox as a mosquito adulticide which may result in residues on food and feed commodities. The PCT estimates are for 35 agricultural crops which may be exposed to mosquito adulticide applications of etofenprox. The agricultural crops included in the analysis are apples, pears, oranges, rice, field com, wheat, and 29 crops grown predominantly in California. The EPA relied on national and state level usage data for the most widely used mosquito insecticides to develop percent crop treated estimates for new uses. The general approach to estimating PCT was to assume that all etofenprox mosquito adulticide applications will be made randomly across the landscape without regard to land use patterns. Except for area wide vector control programs, this approach is highly conservative in that mosquito adulticide applications are generally made to populated urban and suburban areas. However, because of the inherent drift of mosquito adulticides into non-target areas, it is realistic to assume that some residues of etofenprox may be found on agricultural crops in the urban-agricultural interface. Using this approach, PCT estimates including residues on rice, which is a registered use, are as follows:

Apples: 1%; almonds: 5%; apricots: 5%; artichokes: 5%; avocados: 5%; broccoli: 5%; Brussels sprouts: 5%; carrots: 5%; cauliflower: 5%; celery: 5%; chicory: 5%; dates: 5%; field corn: 1%; figs: 5%; garlic: 5%; grapes: 5%; honeydew melon: 5%; kiwifruit: 5%; lemons: 5%; nectarines: 5%; olives: 5%; oranges: 15%; pears: 1%; persimmons: 5%; pistachios: 5%; plums: 5%; pluots: 5%; pomegranates: 5%; prunes: 5%; raisins: 5%; rice: 3%; tomatoes: 5%; walnuts: 5%; wheat: 1%; all other crops: (including livestock commodities, milk, and eggs) 3%.

The Agency used the market leader approach to develop upper bound percent crop treated estimates for this new use. Under the market leader approach, this upper bound is estimated as the percent of the crop treated by the most widely used pesticide for the new use. The EPA's usual application of the market leader approach for deriving PCT traditionally focuses on broad categories of pesticides (e.g., insecticides, fungicides, or herbicides) applied directly to crops for control of agricultural pests. In this case, however, EPA determined that this would not be appropriate because mosquito adulticides fill a unique niche in the pesticide marketplace. The amount of general insecticide use on crops has no rational relationship to the amount of mosquito adulticide use. Instead of using the insecticides applied directly on these crops, EPA chose the most widely used mosquito adulticide in the states/regions that the crop is grown in. For occasional area wide vector control programs for West Nile Virus (WNV) or Vector-borne encephalitis (Western Equine Encephalitis, Eastern Equine Encephalitis, or St. Louis Encephalitis) this approach provides an accurate estimate of the PCT for agricultural crops.

These estimates represent the upper bound of use expected during the pesticide's initial five years of registration; that is, PCT for etofenprox is a threshold of use that EPA is reasonably certain will not be exceeded

for each registered use site. The PCT recommended for use in the chronic dietary assessment is calculated as the average PCT of the market leader or leaders, (i.e., the one(s) with the greatest PCT) on that site over the three most recent years of available data. The comparisons are only made among pesticides of the same pesticide type (e.g., the market leader for insecticides on the use site is selected for comparison with a new insecticide). The market leader included in the estimation may not be the same for each year since different pesticides may dominate at different times. Typically, EPA uses USDA National Agricultural Statistics Service (NASS) as the source of data because it is publicly available and directly reports values for PCT. When a specific use site is not reported by USDA/NASS, EPA uses proprietary data and calculates the PCT given reported data on acres treated and acres grown. If no data are available, EPA may extrapolate PCT from other crops (proxies), if the crop management and pest spectrum are substantially similar. A retrospective analysis to validate this approach shows few cases where the PCT for the market leaders were exceeded. Further review of these cases identified factors contributing to the exceptionally high use of a new pesticide. Given the results of this review, to evaluate whether the PCT for etofenprox could be exceeded, EPA considered whether there may be unusually high mosquito pressure or disease transmission potential; whether the market leaders are well established for that use; and whether pest resistance issues with past market leaders provide etofenprox with significant market potential. Given currently available information, EPA concludes it is unlikely that actual PCT for etofenprox will exceed the estimated PCT for new uses during the next five years.

Specific information on the methodology to estimate PCT can be found at *http://www.regulations.gov* in the document titled ''BEAD Estimate of the Percent Crop Treated for New Use (PCTn) of Etofenprox when used as a Mosquito Adulticide in Agricultural Areas'' docket ID number EPA–HQ–OPP–2011–0905.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which etofenprox may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for etofenprox in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of etofenprox. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Tier 1 Rice Model and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of etofenprox for chronic exposures are estimated to be 1.2 ppb for surface water and 3.0×10^{-3} ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 1.2 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Etofenprox is currently registered for the following uses that could result in residential exposures: Cat and dog spot-on treatments, as a bed bug treatment, as indoor space and crack and crevice sprays, and as indoor and outdoor foggers. EPA assessed residential exposure using the following assumptions: Adults can potentially be exposed to etofenprox residues during residential application of etofenprox, including indoor surface-directed and aerosol space spray and outdoor fogger use. Handler exposure is expected to be short-term in duration and because there was no adverse dermal effect identified for etofenprox, risk was assessed only for exposure via the inhalation route. There is also potential for post-application exposure for individuals as a result of being in an environment that has been previously treated with etofenprox. Because of the registered indoor uses, intermediate-term post application exposures are possible. However, since the short- and intermediate-term endpoints and PODs for inhalation and oral routes are the same, the short-term exposure and risk estimates are considered to be protective of potential intermediate-term exposure and risk. Because adverse dermal toxicity effects were not identified for etofenprox, only short- and intermediate-term post-application inhalation exposures were assessed for adults and short- and intermediate-term post-application inhalation and incidental oral exposures were assessed for children. Additionally, long-term post-application incidental oral exposure to children from petting treated cats or dogs was also assessed.

The worst-case residential short-term exposure for adults is from post-application inhalation exposure from treatment of flying insects. The worst-case residential short-term exposure for children 1 to 2 years old is from combined inhalation and oral hand-to-mouth post-application exposures from treatment of flying insects. EPA typically combines exposures for treatments to control the same pests (e.g. flea treatment on surfaces and on pets) because such treatments could reasonably be expected to occur on the same day. But a similar presumption is not generally followed for exposures for treatments to control different pests. For etofenprox, EPA has not combined short-term exposures from use of etofenprox to control flying insects and its use to control fleas, ticks, and bed bugs. Several factors support this approach for etofenprox. First, EPA's manner of estimating short-term residential exposures is very conservative. When assessing individual short-term residential post-application exposure scenarios, EPA assumes exposure occurs at the level of zero-day residues (i.e., day of application residues) on each day of the short-term exposure period (1–30 days), instead of incorporating information on residue decline values. EPA also assumes that an individual performs the same post-application activities, intended to represent high-end exposures as described in the Residential SOPs, for

the same amount of time every day over the short-term exposure period, rather than averaging post-application activity levels and exposures over that period. Second, these exposure estimates are then compared to points of departure that are typically based on weeks of dosing in test animals. Longer exposure periods generally produce lower points of departure. For etofenprox, the short-term risk assessment is particularly conservative because the point of departure for the short-term (1 to 30-days) risk assessment is based on a toxicity study involving continuous exposure over 90 days. Third, usage survey data indicate that concurrent use of separate pesticide products that contain the same active ingredient to treat the same or different pests does not typically occur. Combining conservative exposure estimates with a conservative point of departure for an event that is itself improbable (co-occurrence of use of the same pesticide to control different pests) would unrealistically overstate exposure.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to etofenprox. Although etofenprox shares some structural characteristics with synthetic pyrethroids, it is not included in the pyrethroid cumulative assessment. Naturally occurring pyrethrins and the synthetic pyrethroids (collectively called 'pyrethroids') are grouped for purposes of cumulative risk assessed based on the following shared characteristics:

i. *Common structure.* Pyrethrins and pyrethroids share a common structure; acid and alcohol moieties joined through an ether linkage;

ii. *Sodium channel disruption. In vitro* studies demonstrate the ability of pyrethroids to modify mammalian sodium channel kinetics, leading to alterations in membrane excitability and firing potentials;

iii. *Neurotoxic effects.* Pyrethroid toxicity is manifested through neurological syndromes described as either T (fine tremors), CS (choreoathetosis and salivation), or some combination thereof, depending on the structure. Open literature supports a correlation between the modification in sodium channel kinetics and the resulting syndrome.

Etofenprox is not included in the pyrethroid common mechanism grouping or included in the cumulative risk assessment because etofenprox does not exhibit these key characteristics. Etofenprox is an ether compound; pyrethroids are esters. Etofenprox exposure does not result in the neurotoxic syndromes typical of pyrethroids and no available data suggest the molecular target for etofenprox is the sodium channel.

For the purposes of this tolerance action, therefore, EPA has not assumed that etofenprox has a common mechanism of toxicity with other pyrethroids. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's Web site at *http://www.epa.gov/pesticides/cumulative/.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* There is no indication of increased quantitative or qualitative susceptibility of the developing offspring in toxicology database for etofenprox. Developmental effects were seen at doses that caused maternal toxicity. No developmental effects were seen in the rat 1-generation/developmental study. In the 2-generation reproduction toxicity study, toxicity in the offspring occurred at the level of parental toxicity (increased organs weights and associated pathological changes occurred in both the pups and parents). In the developmental neurotoxicity study in rats, the observed eye abnormalities associated with body injuries could not be disassociated from possible altered, treatment-related maternal behavior.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1x. That decision is based on the following findings:

i. The toxicity database for etofenprox is complete.

ii. An acute neurotoxicity study in the adult rat revealed no treatment-related effects. The subchronic neurotoxicity study in the rat showed decreased body weight gains, increased liver weights in all dose groups, and increased incidence of rearing behavior and abnormal gait, all in the absence of histopathological changes. The developmental neurotoxicity study in rats showed increased rearing behavior in mothers. In offspring, eye lesions (including sclera and lens hemorrhage), which are sometimes associated with aggressive maternal behavior, were observed prior to weaning at the highest dose tested. Effects on motor/locomotor activity and auditory startle response were also observed in the high-dose treatment groups on PND 58. These latter isolated, post-ontogenic effects of treatment are not presumed to occur following a single dose.

Evidence of neurotoxicity was also observed in other studies. In a subchronic mouse study piloerection, hunched posture, lethargy, body tremors, and an unsteady gait were noted in both sexes above the limit dose. The rat developmental study showed increased salivation in all treatment groups of the F_0 generation and decreased (non-statistically significant) mobility (both sexes) and rearing behavior (males) in the F_1 generation. In the 2-generation reproduction study F_1 pups exhibited clinical signs of body tremors, lethargy, unsteady gait, and abnormal movements during most of the lactation period at the high dose.

However, residual concern for neurotoxicity is low based on the following:

a. Signs of neurotoxicity in the database occur only at the high dose level in each study;

b. The studies show clear and well-defined NOAELs;

c. The signs of neurotoxicity are well-characterized in terms of their effects in offspring; and

d. The PODs used for risk assessment are protective of neurotoxicity seen in the database.

No systemic toxicity was observed in the 28-day dermal study in rabbits up to 1,000 mg/kg/day. In this study, clinical signs were evaluated and signs such as piloerection, hunched posture, lethargy, body tremors, an unsteady gait and salivation, seen in the oral repeated dose studies discussed in this unit, were not observed. With neurotoxic signs occurring only at high doses in the oral studies and a dermal absorption factor (DAF) of 7% for etofenprox, neurotoxic manifestations via the dermal route are not expected below the limit dose. Therefore, concern for neurotoxicity following dermal exposure is low.

iii. As discussed in this unit, there is no indication of increased quantitative or qualitative susceptibility of the developing offspring in the toxicology database for etofenprox.

iv. There are no residual uncertainties identified in the exposure databases. The chronic dietary exposure assessment utilizes tolerance residue levels for all commodities based on conservative modeled estimates. The residue level of 5 ppm is considered an upper bound estimate for both ground and aerial applications that assume the conservative deposition onto surrounding crops following a ULV mosquito adulticide application. The dietary assessment also assumes conservative, upper-bound PCT estimates for the proposed uses. By using these screening level assessments, actual exposures/risks are not expected to be underestimated. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to etofenprox in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by etofenprox.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, etofenprox is not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to etofenprox from food and water will utilize 32% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure.

There is potential chronic/long-term exposure to etofenprox via dietary (which is considered background exposure) and residential (which is considered primary) exposure pathways for children 1 to < 2 years old. Chronic/long-term exposure to etofenprox for adults is expected via the dietary (background exposure) and residential (primary) exposure pathways; however, there is no dermal hazard identified for etofenprox, incidental oral exposure is not expected for adults, and inhalation exposure is not expected for adults from treating pets; therefore, chronic/long-term risk is best represented by the risk from dietary exposure described in this unit.

The aggregate long-term MOE for children 1 to < 2 years old, including dietary exposure (food and water) and incidental oral exposures from contact with treated pets is 180. Because EPA's level of concern for etofenprox is a MOE of 100 or below, this MOE is not of concern.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account short- and intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Etofenprox is currently registered for uses that could result in short- and intermediate-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short- and intermediate-term residential exposures to etofenprox.

As noted in Unit III.C.3., because the short- and intermediate-term endpoints and PODs for inhalation and oral routes are the same, the short-term exposure and risk estimates are considered to be protective of potential intermediate-term exposure and risk.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 420 for children 1- < 2 years old, and 1,700 for adults. Because EPA's level of concern for etofenprox is a MOE of 100 or below, these MOEs are not of concern.

4. *Aggregate cancer risk for U.S. population.* Based on the data summarized in Units III.A. and III.C.1.iii., EPA has concluded that etofenprox does not pose a cancer risk to humans.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population or to infants and children from aggregate exposure to etofenprox residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

For crop commodities, adequate enforcement methodology (liquid chromatography/mass spectrometry/mass spectrometry (LC/MS/MS)) is available to enforce the tolerance expression. For livestock commodities, adequate enforcement methodology (gas chromatography/mass spectrometry (GC/MS)) is available to enforce the tolerance expression.

The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov*.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

Codex has established etofenprox MRLs on several crop and livestock commodities at levels that range from 0.01–8.0 ppm. These MRLs are different than the tolerances established for etofenprox in the United States. Codex and U.S. MRLs/tolerances could not be harmonized due to differences in the use pattern used to derive the tolerances. Codex MRLs were based on field trial data from foliar and granular use of etofenprox to kill crop pests in agricultural fields whereas the U.S. tolerances were based on aerial application over crops to kill mosquitoes. Different application amounts, frequencies, and techniques are used for these different use patterns and thus harmonization with Codex cannot be achieved.

C. Revisions to Petitioned-For Tolerances

The proposed tolerance at 0.5 ppm was estimated using limited field trial data. These data were determined to be insufficient to support the proposed use pattern. Subsequently, the applicant submitted modeling results using the Terrestrial Residue Exposure Model (TREX) which estimated residues following repeated ULV applications and concluded residues were likely to peak at 1.5 ppm following repeated aerial applications to agricultural crops. EPA estimated an upper-bound crop residue estimate of 5.0 ppm following repeated ULV aerial and ground applications. In addition, based on the Agency review, it was determined that tolerances were required on livestock commodities as well.

V. Conclusion

Therefore, tolerances are established for residues of etofenprox, [2-(4-ethoxyphenyl)-2-methylpropyl 3-phenoxybenzyl ether], in or on food commodities at 5.0 ppm; feed commodities at 5.0 ppm; eggs at 0.40 ppm; hog fat at 4.0 ppm; hog meat at 0.20 ppm; hog, meat byproducts at 4.0 ppm; fat of cattle, goat, horse, and sheep at 10.0 ppm; meat of cattle, goat, horse, and sheep at 0.40 ppm; meat byproducts of cattle, goat, horse, and sheep at 10.0 ppm; milk at 0.60 ppm; poultry, fat at 1.0 ppm; poultry, meat at 0.01 ppm; and poultry, meat byproducts at 1.0 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 13, 2013.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.620, revise the table in paragraph (a) to read as follows:

§ 180.620 Etofenprox; tolerances for residues.

(a) * * *

Commodity	Parts per million
Cattle, fat	10.0
Cattle, meat	0.40
Cattle, meat byproducts	10.0
Egg	0.40
All food commodities (including feed commodities) not otherwise listed in this subsection	5.0
Goat, fat	10.0
Goat, meat	0.40
Goat, meat byproducts	10.0
Hog, fat	4.0
Hog, meat	0.20
Hog, meat byproducts	4.0
Horse, fat	10.0
Horse, meat	0.40
Horse, meat byproducts	10.0
Milk	0.60
Poultry, fat	1.0
Poultry, meat	0.01
Poultry, meat byproducts	1.0
Rice, grain	0.01
Sheep, fat	10.0
Sheep, meat	0.40
Sheep, meat byproducts	10.0

* * * * *

[FR Doc. 2013–28517 Filed 11–26–13; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2013–0526; FRL–9903–18]

Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester With 2-Methyloxirane Polymer With Oxirane Monobutyl Ether; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether (CAS Reg. No. 1373125–59–7) when used as an inert ingredient in a pesticide formulation. Huntsman Corp. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether on food or feed commodities.

DATES: This regulation is effective November 27, 2013. Objections and requests for hearings must be received on or before January 27, 2014, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2013–0526, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Lois Rossi, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7090 email address: *RDFR Notices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. Can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2013–0526 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before January 27, 2014. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2013–0526, by one of the following methods.

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Background and Statutory Findings

In the **Federal Register** of September 12, 2013 (78 FR 56185) (FRL–9399–7), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the receipt of a pesticide petition (IN–10606) filed by Huntsman Corp., 8600 Gosling Road. The Woodlands, TX 77381. The petition requested that 40 CFR 180.960 be amended by establishing an exemption from the requirement of a tolerance for residues of Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether; CAS Reg. No. 1373125–59–7). That document included a summary of the petition prepared by the petitioner and solicited comments on the petitioner's request. The Agency received no comments in response to the notice of filing.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and use in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing an exemption from the requirement of a

tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . .'' and specifies factors EPA is to consider in establishing an exemption.

III. Risk Assessment and Statutory Findings

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be shown that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. In the case of certain chemical substances that are defined as polymers, the Agency has established a set of criteria to identify categories of polymers expected to present minimal or no risk. The definition of a polymer is given in 40 CFR 723.250(b) and the exclusion criteria for identifying these low-risk polymers are described in 40 CFR 723.250(d). Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether conforms to the definition of a polymer given in 40 CFR 723.250(b) and meets the following criteria that are used to identify low-risk polymers.

1. The polymer is not a cationic polymer nor is it reasonably anticipated to become a cationic polymer in a natural aquatic environment.

2. The polymer does contain as an integral part of its composition the atomic elements carbon, hydrogen, and oxygen.

3. The polymer does not contain as an integral part of its composition, except as impurities, any element other than those listed in 40 CFR 723.250(d)(2)(ii).

4. The polymer is neither designed nor can it be reasonably anticipated to substantially degrade, decompose, or depolymerize.

5. The polymer is manufactured or imported from monomers and/or reactants that are already included on the TSCA Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.

6. The polymer is not a water absorbing polymer with a number average molecular weight (MW) greater than or equal to 10,000 daltons.

7. The polymer does not contain certain perfluoroalkyl moieties consisting of a CF3- or longer chain length as specified in 40 CFR 723.250(d)(6).

Additionally, the polymer also meets as required the following exemption criteria specified in 40 CFR 723.250(e).

8. The polymer's number average MW of 4,500 is greater than 1,000 and less than 10,000 daltons. The polymer contains less than 10% oligomeric material below MW 500 and less than 25% oligomeric material below MW 1,000, and the polymer does not contain any reactive functional groups.

Thus, Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether meets the criteria for a polymer to be considered low risk under 40 CFR 723.250. Based on its conformance to the criteria in this unit, no mammalian toxicity is anticipated from dietary, inhalation, or dermal exposure to Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether.

IV. Aggregate Exposures

For the purposes of assessing potential exposure under this exemption, EPA considered that Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether could be present in all raw and processed agricultural commodities and drinking water, and that non-occupational non-dietary exposure was possible. The number average MW of Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether is 4,500 daltons. Generally, a polymer of this size would be poorly absorbed through the intact gastrointestinal tract or through intact human skin. Since Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether conform to the criteria that identify a low-risk polymer, there are no concerns for risks associated with any potential exposure scenarios that are reasonably foreseeable. The Agency has determined that a tolerance is not necessary to protect the public health.

V. Cumulative Effects From Substances With a Common Mechanism of Toxicity

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether to share a common mechanism of toxicity with any other substances, and Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

VI. Additional Safety Factor for the Protection of Infants and Children

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base unless EPA concludes that a different margin of safety will be safe for infants and children. Due to the expected low toxicity of Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether, EPA has not used a safety factor analysis to assess the risk. For the same reasons the additional tenfold safety factor is unnecessary.

VII. Determination of Safety

Based on the conformance to the criteria used to identify a low-risk polymer, EPA concludes that there is a reasonable certainty of no harm to the U.S. population, including infants and children, from aggregate exposure to residues of Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether.

VIII. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether.

IX. Conclusion

Accordingly, EPA finds that exempting residues of Octadecanoic Acid, 12-Hydroxy-, Homopolymer, Ester with 2-Methyloxirane Polymer with Oxirane Monobutyl Ether from the requirement of a tolerance will be safe.

X. Statutory and Executive Order Reviews

This final rule establishes a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these rules from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes, or otherwise have any unique impacts on local governments. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

Although this action does not require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994), EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. As such, to the extent that information is publicly available or was submitted in comments to EPA, the Agency considered whether groups or segments of the population, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide discussed in this document, compared to the general population.

XI. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 19, 2013.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.960, alphabetically add the following polymer to the table to read as follows:

§ 180.960 Polymers; exemptions from the requirement of a tolerance.

* * * * *

Polymer	CAS No.
* * * * * * *	
Octadecanoic Acid, 12-Hydroxy-, Homopolymer Ester with 2-Methylloxirane Polymer with Oxirane monobutyl Ether, minimum number average molecular weight (in amu), 4,500	1373125–59–7
* * * * * * *	

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[FR Doc. 2013–28364 Filed 11–26–13; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket Nos. 10–90; DA 13–2115]

Connect America Fund

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission specifies service obligations of price cap carriers that accept Connect America Phase II model-based support through the state-level commitment process, and addressed how to determine what areas are considered as served by an unsubsidized competitor. Specifically, the Commission sets out how a price cap carrier satisfies the latency, usage allowance, and pricing requirements for Connect America Phase II. This document also addresses how these metrics will apply in determining what areas will be considered as served by an unsubsidized competitor.

DATES: Effective December 27, 2013, except for § 54.313(a)(11), which contain new or modified information collection requirements that will not be effective until approved by the Office of Management and Budget. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date for that section.

FOR FURTHER INFORMATION CONTACT: Ryan Yates, Wireline Competition Bureau, (202) 418–0886 or TTY: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Wireline Competition Bureau's Report and Order in WC Docket No. 10–90, and DA 13–2115, released on October 31, 2013. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. These documents may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via the Internet at *http://www.bcpiweb.com*. It is also available on the Commission's Web site at *http://www.fcc.gov*. Or at the following Internet address: *http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1031/DA-13-2115A1.pdf*.

I. Introduction

1. In the *USF/ICC Transformation Order,* 78 FR 38227, June 26, 2013, the Federal Communications Commission (Commission) comprehensively reformed and modernized the universal service and intercarrier compensation systems to maintain voice service and extend broadband-capable infrastructure to millions of Americans. As part of the reform, the Commission adopted a framework for providing support to areas served by price cap carriers, known as the Connect America Fund, through ''a combination of competitive bidding and a new forward-looking model of the cost of constructing modern multi-purpose networks.'' In particular, the Commission will offer each price cap carrier monthly model-based support for a period of five years in exchange for a state-level commitment to serve specified areas within the state that are not served by an unsubsidized competitor, and if that offer is not accepted, will determine support through a competitive process.

2. In this Report and Order (Order), the Wireline Competition Bureau (Bureau) takes further action to implement the Commission's direction that price cap carriers may elect to receive model-based support in certain areas in exchange for making a state-level commitment to meet the Commission's service obligations. The Bureau specifies the service obligations of price cap carriers that accept Phase II model-based support through the state-level commitment process. Specifically, the Bureau provides two options for a price cap carrier accepting model-based support to meet the Commission's requirements for reasonably comparable pricing of voice and broadband services. In addition, the Bureau specifies a 100 gigabyte (GB) minimum usage allowance that will initially apply to a price cap carrier accepting model-based support for Phase II-funded locations, to the extent the carrier chooses to set usage allowances in such areas. The Bureau also specifies latency requirements—specifically, that price cap carriers must have a provider round trip latency of 100 milliseconds (ms) or less, and provide two options for how they may test and report compliance with this requirement. Finally, the Bureau addresses how we will apply these metrics to determine what areas we will consider as served by an unsubsidized competitor.

II. Discussion

A. Price Cap Carrier Obligations

3. In this section, the Bureau discusses the specific metrics that will be used to determine compliance of recipients of model-based Phase II support with the Commission's service obligations. By setting these standards, the Bureau provides clarity to price cap carriers contemplating accepting Phase II support through the state-level commitment process. The Bureau details how compliance with the Commission's requirements will be evaluated, while creating a straightforward framework for oversight and accountability in Phase II. Price cap carriers should use the standards in this Order when making their annual certifications. The Commission will review these annual reports to ensure the standards set forth in this Order are being met and to evaluate price cap carriers' continuing eligibility for Phase II support.

4. *Price.* The *USF/ICC Transformation Order* calls for rates for both voice and broadband between urban and rural areas to be reasonably comparable. The Bureau has adopted a survey instrument to conduct a rate survey, and the Bureau is working to conduct this survey in the near future. The Bureau anticipates that the rate survey data will be available, and the benchmarks set, prior to the deadline for Phase II state-level

commitment elections. Once these benchmarks are adopted, a price cap carrier accepting model-based support can certify that its rates conform to the reasonable comparability benchmark.

5. Consistent with the Commission's approach when it adopted rules for the second round of Connect America Phase I incremental support, the Commission also adopted an alternative means for showing reasonable rate comparability: A carrier's rate for both voice and broadband will be presumed reasonably comparable if the carrier certifies that it is offering fixed services meeting our voice and broadband requirements for the same or lower prices in rural areas as urban areas. To qualify for this presumption, the qualifying service plan must have substantially similar terms and conditions in both urban and rural areas. This approach recognizes that if rates in rural areas are the same as urban areas, that by definition complies with the reasonable comparability principles set forth in section 254(b). In order to certify that rates are reasonably comparable under this presumption, the rates in Phase II-funded areas must be the same or lower than rates for fixed wireline services in urban areas. The Bureau does not require the carrier to offer a particular rate nationwide; rather, it is sufficient if the carrier offers the same rate in an urban area in the state where it accepts Phase II funding.

6. The Bureau recognizes that, in comparing urban and rural offerings, carriers may not offer service plans that exactly match the minimum service obligations for Connect America. Therefore, in certifying that rural rates are at or below urban rates, the basis for comparison should be the lowest cost non-promotional rate for an urban service offering that meets or exceeds each dimension of the service obligations set in this Order.

7. In adopting this presumption, the Bureau concludes that the relevant comparison for a price cap carrier accepting model-based support is to rates and usage allowances for fixed *wireline* services in urban areas. Some carriers eligible for Phase II funding offer a fixed wireless product in urban areas that may meet all of the service obligations described herein, but such offerings are typically offered at a higher price for a given amount of data usage than typical wireline offerings. Given the Commission's reference in its discussion of capacity to the typical data allowances of wireline broadband offerings, the Bureau does not believe it would be consistent with the Commission's framework for a price cap carrier accepting model-based support to meet its reasonable comparability obligations by relying on uniform pricing for fixed wireless offerings. Rather, a price cap carrier making a reasonable comparability certification for model-based support must look to the prices and usage allowances of its fixed wireline offerings in urban areas.

8. This presumption may be overcome in extreme circumstances where other evidence strongly suggests that the price cap carrier is relying on the existence of a rate plan in urban areas to which few consumers subscribe. For example, it would not be reasonable for a price cap carrier to rely on the offering of the same service at the same rate in urban and rural areas when only a de minimus number of customers subscribe to the service offering in the urban area. Similarly, the presumption may be overcome if a carrier is only offering the service plan in a very small portion of the urban area.

9. As proposed in the *Phase II Service Obligations Public Notice,* 78 FR 16456, March 15, 2013, an urban area is defined as any ''urban area'' or ''urban cluster'' that sits within a Metropolitan Statistical Area, as defined by the Census Bureau. A carrier need only make the offering in part of the ''urban area'' or ''urban cluster'' to qualify. The presumption of reasonable comparability under this alternative provides carriers needed certainty in making their elections and is supported by parties in the record.

10. The rate survey benchmarks, once adopted, will serve as a safe harbor. To the extent the rates in question for funded locations are at or below the benchmarks established through the rate survey, that will be sufficient to meet the Commission's reasonable comparability requirements.

11. *Usage Allowance.* Under the *USF/ICC Transformation Order,* Phase II recipients must provide broadband with usage allowances reasonably comparable to those available through comparable offerings in urban areas. The Commission set some guide posts as to what would be deemed reasonably comparable, noting that a 250 GB per month usage allowance would likely be reasonably comparable, while a 10 GB per month usage allowance would not. The Commission delegated to the Bureau the task of setting a specific minimum usage allowance and specified that minimum should be adjusted over time.

12. In the *Service Obligations Public Notice,* the Bureau sought comment on two methods of setting the minimum usage allowance: The first method was based on what activities could be undertaken with a particular data allowance, and the second method was based on current consumer data usage patterns. The Bureau also inquired as to whether the minimum usage allowance should be a fixed standard, or whether it should grow during the term of Phase II.

13. The Commission envisioned that price cap carriers accepting model-based support would build ''robust, scalable networks.'' As such, the Bureau does not expect those carriers accepting model-based support would impose the kind of usage allowances that typically exist today for many wireless and satellite offerings. Indeed, such usage allowances would be incompatible with the fiber-based forward looking cost model approach that the Bureau has adopted. To provide clarity in the event a price cap carrier sets any usage allowance for the service offering that it relies upon to meet its universal service obligations for acceptance of model-based support, however, we specify an initial minimum allowed usage limit of 100 GB per month, with the opportunity to obtain additional data usage at a reasonable price to the extent the price cap carrier chooses to offer a plan providing the minimum specified amount. The Bureau concludes that 100 GB is a reasonable initial usage allowance for price cap carriers making a state-level commitment. According to the Commission's most recent data, 80 percent of cable/fiber users—most of which are likely to be in urban areas—currently use less than 100 GB per month. As discussed in the *Phase II Service Obligations Public Notice* and shown in the chart below, this would provide for a mid-level basket of video related activities, including viewing over 20 hours of video per week and the ability to load hundreds of Web sites each day. And, the Bureau emphasizes that the 100 GB per month is the *minimum* usage—price cap carriers are free to offer plans with additional usage and indeed the Bureau encourages price cap carriers to offer a variety of plans in rural areas as they do in urban areas.

BROADBAND APPLICATIONS POSSIBLE WITH 100 GB OF USAGE

Video Applications (Education (including digital learning), Healthcare, Business, Community Engagement and Other Activities Such As Video Conferencing with Family).	95 Hours.
plus E-mails Sent/Received for Personal and Professional Correspondence	5,000 E-mails.
plus Websites Loaded (Activities Such As Job Searching, Education, Banking, Health, and Government Services)	14,500 Websites.

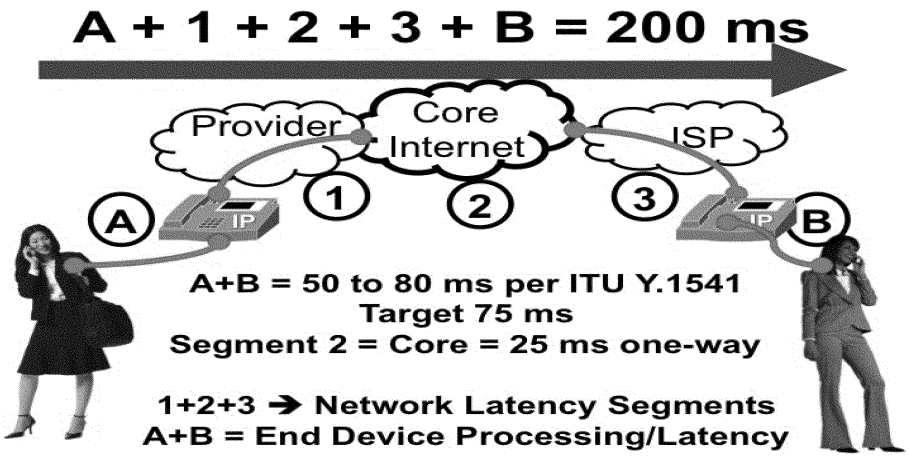
14. Other parties have called for a lower minimum usage limit, with some advocating for limits at or below 20 GB per month and others suggesting 60 GB. However, a 20 GB limit would fall well short of existing fixed broadband usage levels—over two-thirds of cable and fiber subscribers currently consume in excess of 20 GB of data per month. Nor is the Bureau convinced we should establish a minimum usage allowance of 60 GB for price cap carriers accepting model-based support. Over 30 percent of current fiber and cable subscribers consumed in excess of 60 GB of data per month, and consumers are likely to consume more, not less, over time. The Bureau is guided by the Commission's statement that ''Americans should have access to broadband that is capable of enabling the kinds of key applications that drive our efforts to achieve universal broadband, including education (e.g., distance/online learning), health care (e.g., remote health monitoring), and person-to-person communications (e.g., VoIP or online video chat with loved ones serving overseas).'' While the Commission recognized that service obligations may need to be relaxed in some fashion for extremely high cost areas, the Bureau concludes that a usage limit of 20 GB, or 60 GB, for price cap carriers accepting model-based support is not consistent with the robust, scalable networks that the Commission expects such providers to deploy.

15. The Bureau requires price cap carriers accepting model-based Phase II support to offer a minimum usage allowance over the course of Phase II's five-year term that remains consistent with trends in usage for 80 percent of consumers using cable or fiber-based fixed broadband services. As an alternative to any national data set (such as Measuring Broadband America) that demonstrates trends in usage over time, the Bureau will deem a price cap carrier to be in compliance with this usage allowance requirement in future years if its minimum usage allowance for Connect America funded locations is at least 100 GB and is at or above the usage level for 80 percent of all of its broadband subscribers, including those subscribers that live outside of Phase II funded areas. Given the size and scale of most price cap carriers, it is reasonable to presume that their individual data would be consistent with national data, and this alternative will enable price cap carriers to anticipate how their usage allowances may change in the future.

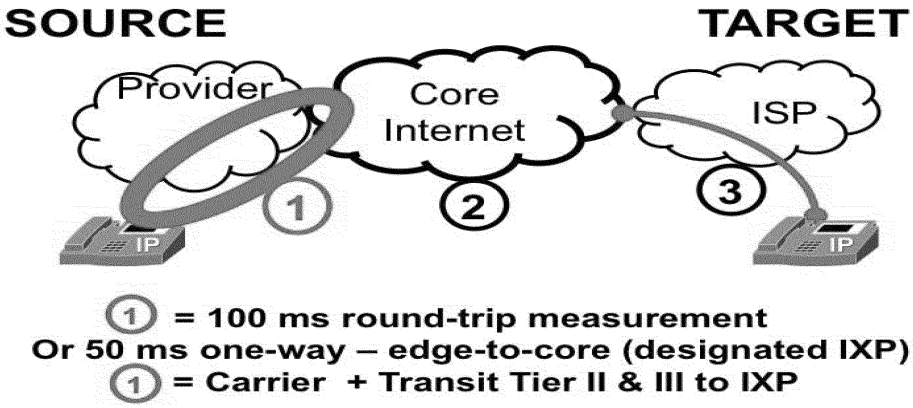
16. *Latency.* In the *USF/ICC Transformation Order,* the Commission required Phase II recipients to provide latency sufficient for real-time applications, such as VoIP. In this section, the Bureau describes how they will implement this requirement for price cap carriers that accept Phase II model-based support.

17. The Bureau agrees with WISPA that because latency can be defined and measured in many ways, ''a clear, workable, measureable definition of 'latency''' is necessary. The Bureau also agrees with commenters that argue the Commission should base its performance metrics on ''empirical data.'' After consideration of the record, the Bureau therefore bases our standard on the International Telecommunication Union (ITU) G.114 design objectives. ITU Standard G.114 provides that consumers are ''very satisfied'' with the quality of VoIP calls up to a mouth-to-ear latency of approximately 200 ms. The ITU has determined that consumers become less satisfied with the quality of VoIP calls when total mouth-to-ear latency is above 200 ms. Therefore, the Bureau concludes that a reasonable approach is a framework that should result in mouth-to-ear latency of 200 ms or less.

18. The Bureau recognizes that price cap carriers accepting model-based support may not presently have a way to measure end-to-end latency, and therefore adopt an approach that allows them to certify they are meeting the Commission's requirements based on a provider round-trip latency measure. The ITU latency calculations are ''mouth-to-ear'' one-way path measurements which include: The signal conversion at the input (the conversion of the speaker's voice to digital packets); the broadband provider's network path from the input device to the Internet core; the path through the Internet core; the broadband provider's network path from the Internet core over the provider's network to the output device; and the signal conversion at the output device (the conversion of the digital packets back to voice for the listener). ITU Standard Y.1541 calculates input and output terminal conversion delays together to be between 50 and 80 ms. Based on these ITU calculations and other research, we use 75 ms for purposes of calculating conversion delays. An assumed conversion delay of 75 ms means that the total latency for the network path to the Internet core, the Internet core, and the network path from the Internet core to the output device would need to be no greater than 125 ms if 200 ms mouth-to-ear latency limit is to be maintained.



19. Based on ITU calculations and reported core latencies in the contiguous United States, the Bureau assumes 50 ms as the roundtrip (25 ms one way) core Internet latency in our calculations. The assumed 75 ms for conversion delay and assumed 50 ms (25 ms one way) for the Internet core path means that the provider network path from the input device to the Internet core and from the Internet core to the output device must be no more than 100 ms (50 for each provider segment) in order to maintain an overall mouth-to-ear latency limit of 200 ms. Because existing network management systems, ping tests, or other commonly available network measurement tools typically calculate latency as a round-trip measurement, we adopt a 100 ms provider latency round-trip limit, which is consistent with the 50 ms one-way latency assumption for the path from the input device to the Internet core.



20. To show that it is meeting this standard, a price cap carrier accepting model-based support will need to certify that 95 percent or more of all peak period measurements (also referred to as observations) of network round trip latency are at or below 100 ms. As suggested in the *Phase II Service Obligations Public Notice,* measurements should be taken during peak period (defined as weeknights between 7:00 p.m. to 11:00 p.m. local time) between the customer premises and the closest designated Internet core peering interconnection point (often referred to as an Internet Exchange Point—IXP). The measurements should be conducted over a minimum of two consecutive weeks during peak hours for at least 50 randomly-selected customer locations within the census blocks of each state for which the provider is receiving model-based support using existing network management systems, ping tests, or other commonly available network measurement tools.

21. The Bureau acknowledges that measuring latency is a complex task that requires detailed testing protocols. To minimize the cost of testing and ensure that it can be done relatively quickly, the Bureau will allow providers to rely on existing network management systems, ping tests, or other commonly available network measurement tools. Although the Bureau recognizes that these types of tests have drawbacks, such as a possible low priority handling/response times at target servers, low quality of service (QoS) handling/packet drops in intermediate nodes, and generally small packet sizes, the Bureau concludes that this approach strikes the appropriate balance of implementing Phase II quickly, with some assurance that Phase II funded locations will have the service that the Commission expects, without requiring carriers accepting model-based support to make a significant investment in testing infrastructure.

22. As an alternative to conducting ping-like tests, carriers participating in the MBA program may use the results from that testing to support certification that they meet the latency requirement. To use MBA results, carriers will need to deploy at least 50 white boxes to customers within the Phase II-funded areas within each state, i.e. at least 50 white boxes per state distributed throughout the Phase II-funded areas within that state. The white box costs and any associated administrative costs imposed by the MBA program would be the carrier's responsibility. Because white boxes take measurements on a continuous basis, a carrier would prove

compliance with the latency limit by certifying that 95 percent or more of the measurements taken during peak periods for a period of two weeks were at or below 100 ms.

23. The Bureau is not persuaded by AT&T's argument that the Commission should not set a specific numerical latency standard and should instead ''assume that wireline networks capable of delivering speeds of 4/1 and greater will meet the latency requirements for real-time applications such as VoIP.'' Although results from the most recent MBA testing show that providers using fiber, cable, or DSL technology are generally able to meet or exceed 100 ms provider-round trip latency 95 percent limit, MBA testing is currently limited to only large providers. Not all of the price cap carriers eligible for Phase II support are participating in this program and, in any event, we have no assurance that the measurements taken in MBA are taken at Phase II-funded locations. Moreover, MBA testing results show that there can be a great disparity in latency among different locations served by a single provider. The Bureau concludes it is necessary for carriers to test latency in the census blocks where they will be receiving Phase II funding, and not rely on MBA data that may be derived from other locations.

24. The Bureau also disagrees with ViaSat's argument that ''network latency need not impact the end-user experience'' and that adoption of a numerical latency standard could ''violate the Commission's policy of technological neutrality.'' To the contrary, the ITU's extensive VoIP calculations show that consumer satisfaction is improved by lower latency. Further, adoption of a numerical standard designed to meet reasonable regulatory objectives does not violate technological neutrality simply because some technologies or service providers cannot meet that standard. Failing to specify how the Commission's requirements will be enforced in practical terms that can be incorporated into business planning would be a disservice both to price cap carriers accepting Phase II support and to consumers that stand to benefit from Phase II deployments. Quantifiable metrics provide certainty to these price cap carriers at the time they accept funding: they are aware of the specific performance standards they must meet in order to satisfy their obligations. These metrics also give federal and state regulators a bright line standard against which to hold these Phase II recipients accountable, ensuring that they perform in line with expectations. Failing to provide such clarity would result in obligations that are difficult to anticipate, difficult to measure, and difficult to enforce.

25. The Bureau notes that they are adopting a more lenient approach than the 60 ms average latency standard they originally proposed in the Public Notice. The Bureau does so after consideration of the ITU conclusion that consumers are ''very satisfied'' with the quality of VoIP calls up to an ear-to-mouth latency of approximately 200 ms and the record received in this proceeding. The Bureau agrees that the ITU data for a VoIP call are an appropriate basis for determining latency sufficient for this aspect of Phase II, and we believe the 100 ms limit adopted herein is consistent with ITU data.

26. The Bureau disagrees with ACS that ''[i]t is particularly important to develop testing solutions not dependent on customer usage, as there is an expected increase in latency over Internet Protocol networks as customer usage nears the peak capacity of the service.'' Although the Bureau agrees that latency is affected by customer usage, this does not lead to a conclusion that testing should be done at times of low customer usage. Latency sufficient for real-time applications such as VoIP must be available to consumers during the time they use the Internet. A network with low latency does not benefit most consumers if the low latency is only available when few customers are using the Internet. Therefore, the Bureau has adopted testing specifications that require testing to be conducted during the peak hours, weeknights between 7:00 p.m. to 11:00 p.m. local time. The Bureau believes that measurements conducted during the peak period will demonstrate the latency experienced by the majority of customers.

27. The Bureau does not believe that the testing methodology they have adopted will impose an undue burden on providers, as there are readily available hardware and software solutions for conducting such testing. The latency testing requires only 50 Phase II-funded locations in a state to be measured over a two-week period per quarter using existing or readily acquired network management or performance management systems. Many providers already perform network management tests to monitor network performance. Network devices commonly support ICMP and SNMP, as well as other vendor-specific tests such as Cisco's IP service level agreement (SLA) command line. In addition, for those carriers that either currently participate in or join the MBA program, the Bureau will allow the use of MBA test results from Phase II-funded locations as an alternative basis for certifying compliance with our requirements. Therefore, even if a provider does not already have a testing mechanism in use for its network, the means to conduct such testing are readily available.

28. The Bureau is not persuaded by USTelecom's claims that testing should be ''between the customer premises to the provider's transit or peering interconnection point, at least in cases where there is a transit or peering interconnection point located in the same state as the customer premises being measured.'' The Commission determined that latency should be sufficient to allow consumers to make use of real-time applications such as VoIP. Testing latency on only a portion of the network connecting a consumer to the Internet core will not show whether that customer is able to enjoy high-quality real-time applications because it is network performance from the customer's location to the destination that determines the quality of the service from the customer's perspective.

29. Further, while a price cap carrier accepting Phase II model-based support may not have direct control over any middle-mile or transit providers with which it connects, it does have influence over its transit providers. For example, a last-mile provider can compare the quality of service offered by transit providers and select one with a higher quality of service. In addition, the last-mile provider can improve its latency by purchasing additional capacity from the transit provider or by negotiating a SLA. Last-mile providers can also implement dual homing to more than one transit provider to ensure a higher quality of service. Measuring latency from the customer location to designated Internet exchange points will show if customers are being provided with service that allows use of real-time applications by giving price cap carriers accepting Phase II model-based support strong incentives to maintain a high-quality network and to use sufficient, high-quality transit providers.

30. The Bureau concludes that the metrics adopted today provide sufficient flexibility that price cap carriers serving markets with unique conditions, such as Alaska, will be able to make the necessary certifications. ACS argues that when measuring broadband latency in Alaska, the Commission must take into account the long transmission facilities in Alaska, which often include point-to-point microwave, satellite transport, and

undersea cable, as well as the remote location of Internet exchange points. The Bureau does not believe that that the use of point-to-point microwave links will adversely affect the latency of broadband services in most cases. ITU planning values for delays of different technologies indicate that coaxial fiber has a higher delay time at 5 microseconds per kilometer whereas microwave transmissions (radio-relay) are at 4 microseconds per kilometer. Indeed, there has recently been renewed interest in microwave technology to support low-latency applications.

31. Conversely, the use of geostationary satellite technologies would substantially affect a price cap carrier's ability to meet the 200 ms end-to-end latency standard we adopt herein. Although satellite transmissions travel at rates faster than copper, cable, or fiber transmissions, the satellite's distance from Earth makes achievement of the 200 ms end-to-end transmission (100 ms limit for the round-trip carrier portion) impossible. Therefore, the Bureau presumes that ACS would not include customers served by satellite technologies in the 50 measurement locations required for latency testing. ACS has not alleged that a majority, or even a substantial number, of its customers are served by satellite technologies, so elimination of satellite customers from testing calculations should resolve this concern.

32. ACS also alleges that the use of undersea cable in its network and the distance between customers and Internet exchange points could affect ACS's ability to meet the latency standard. It is possible that the use of undersea cable, depending upon the type and length of cable, could affect latency determinations for providers serving Alaska. Therefore, providers in noncontiguous areas of the United States should conduct their latency network testing from the customer location to a point at which traffic is consolidated for transport to an Internet exchange point in the continental United States. For example, speedtest.net has five servers located in Anchorage, Alaska, and one in Fairbanks, Alaska, that could be used for network testing. Although the Bureau allows providers in noncontiguous areas of the United States to conduct their latency network testing from the customer location to a point at which traffic is consolidated for undersea cable transport to an IXP in the continental United States, the Bureau may not extend this exception to other circumstances without additional evidence that such an exception is warranted. The Bureau notes that MBA 2013 data results show that the 25 Time Warner Cable-based customer locations in Hawaii were able to meet the 100 ms limit 95 percent or more of the time. Hawaii, at approximately 2,500 miles from the continental United States, is over double the undersea cable distance from a continental United States-based IXP as Anchorage, Alaska.

33. ACS notes that with peering points ''over a thousand miles away in Oregon and Washington,'' its ability to conduct testing and improve results is limited. The Bureau's decision that testing for noncontiguous parts of the United States should be conducted between the customer location and the point at which traffic is aggregated for transport to the continental United States via undersea cable should resolve this issue. Moreover, for remote points within Alaska, MBA testing data shows that although there is a correlation between distance and latency, the 200 ms end-to-end standard (100 ms roundtrip limit 95 percent or more of the time for the carrier portion) is reasonable for distances of 700 or more miles, as data from Measuring Broadband America testing in Hawaii shows. The MBA February 2013 Report shows that the mean latency for measurements 700 miles from the test server was 44.7 ms roundtrip. Thus, even for customer locations in Alaska located a substantial distance from a point used for aggregating traffic for transport to the continental United States, an Alaska provider should be able to meet the 200 ms end-to-end standard (100 ms roundtrip limit for the carrier portion).

34. *Buildout Measurement.* In order to satisfy their state-level commitment, Phase II recipients must deploy voice and broadband-capable networks and offer services meeting the above performance metrics to a specified number of locations. The Bureau expects to release a Public Notice specifying the number of locations that recipients of model-based support will be required to serve, based on the Connect America Cost Model, state by state, so that carriers are aware at the time of acceptance the required number of locations. Three years after making a state-level commitment, a carrier must have deployed voice and broadband-capable networks to 85 percent of the specified number of locations in the given state. Five years after making a state-level commitment, a carrier must have deployed voice and broadband-capable networks to the total number of locations as specified by the Bureau.

35. Generally, all deployment must occur in census blocks funded under the Connect America Cost Model. However, the *USF/ICC Transformation Order* states that ''[i]n meeting its obligation to serve a particular number of locations in a state, an incumbent that has accepted the state-level commitment may choose to serve some census blocks with costs above the highest cost threshold instead of eligible census blocks (i.e., census blocks with lower costs), provided that it meets the public interest obligations in those census blocks, and provided that the total number of unserved locations and the total number of locations covered is greater than or equal to the number of locations in the eligible census blocks.'' Thus, a carrier could build to one of these higher-cost locations in lieu of building to a location in one of its eligible census blocks as originally planned.

B. Unsubsidized Competitors

36. In adopting the *USF/ICC Transformation Order,* the Commission directed that Phase II support should not go to any ''areas where an unsubsidized competitor offers broadband service that meets the broadband performance requirements'' of Phase II. An unsubsidized competitor is defined as a facilities-based provider of residential terrestrial fixed voice and broadband service that does not receive high-cost support. The Commission delegated to the Bureau the task of implementing the specific requirements of the unsubsidized competitor rule and determining what areas should be considered as served by an unsubsidized competitor. In the *Phase II Challenge Process Order,* 78 FR 32991, June 3, 2013, the Bureau determined that an area would be presumed as served by an unsubsidized competitor if the area was shown on the National Broadband Map as served by a provider with speeds of 3 Mbps/768 kbps, and that provider was shown on Form 477 data as providing voice service in that state. Thus, a potential unsubsidized provider need only make a showing regarding the metrics discussed in this Order in two circumstances: first, if it challenges an area initially designated as unserved, claiming that the area should instead be treated as served; or second, if it is responding to a challenger's claim that one of the census blocks shown as served by the provider is in fact unserved.

37. Consistent with the Commission's direction in the *USF/ICC Transformation Order,* the Bureau concludes that unsubsidized competitors should meet the same standards we require of Phase II price cap carrier recipients. To exclude an area from Phase II support, an unsubsidized competitor must be

offering broadband and voice service that would meet the Commission's requirements for price cap carriers receiving model-based support. However, certain adjustments are necessary, not only to make an administrable system for determining what areas should be excluded from support, but also to account for the diversity of circumstances that potential unsubsidized competitors face.

38. *Unsubsidized competitor.* The Commission directed the Bureau to exclude areas with unsubsidized competitors from Phase II funding. The codified rule states that an unsubsidized competitor is one that ''does not receive high-cost support.'' The Commission's intent in adopting this rule was to preclude support to areas where voice and broadband is available without burdening the federal support mechanisms. The Bureau will presume that any recipient of high-cost support at the time the challenge process is conducted does not meet the literal terms of the definition, but will entertain challenges to that presumption from any competitive eligible telecommunications carrier that otherwise meets or exceeds the performance obligations established herein and whose high-cost support is scheduled to be eliminated during the five-year term of Phase II. This will provide an opportunity for the Commission to consider whether to waive application of the ''unsubsidized'' element of the unsubsidized competitor definition in situations that would result in Phase II support being used to overbuild an existing broadband-capable network.

39. *Speed.* In the *Phase II Service Obligations Public Notice,* the Bureau sought comment on what proxy we should use for the requirement that an unsubsidized competitor provides 4 Mbps/1 Mbps service. Providers meeting this proxy would be presumed to meet the speed requirement of an unsubsidized competitor. The Bureau concludes that the proxy for 4 Mbps/1 Mbps broadband should be set at 3 Mbps/768 kbps, as data on 3 Mbps/768 kbps deployment are available on the National Broadband Map. This is consistent with the precedent established by the Commission in the *USF/ICC Transformation Order,* as well as its conclusions in the *Phase I Order,* 78 FR 38227, June 26, 2013. Commenters note that areas served by an unsubsidized competitor with speeds of 3 Mbps/768 kbps are often already served by speeds of 4 Mbps/1 Mbps. If the Bureau were to use a 6 Mbps/1.5 Mbps proxy, areas served by speeds of only 4 Mbps/1 Mbps would be presumed unserved. This would have the effect of burdening potential unsubsidized competitors, many of which are small businesses, requiring them to come forward in the challenge process discussed in the *Phase II Challenge Process Order* and show that they are actually providing 4 Mbps/1 Mbps service.

40. *Pricing.* Under the presumptions the Bureau adopted in the *Phase II Challenge Process Order,* a provider would be initially presumed to meet the reasonably comparable pricing requirement, so long as it was shown on the National Broadband Map as offering 3 Mbps/768 kbps service and shown on Form 477 data as offering voice service in the relevant state. The Bureau now adopts a conclusive presumption that a potential unsubsidized competitor is offering reasonably comparable prices if it offers the same or lower rates in rural markets as it does for fixed wireline offerings meeting the requisite standards in urban markets. In such circumstances, the Commission's policy objective of ensuring consumers have access to reasonably comparable services at reasonably comparable rates should be achieved.

41. The Bureau also adopts a conclusive presumption that if a potential unsubsidized competitor is competing in a particular census block with the incumbent price cap carrier, and both are offering services that offer at least 4 Mbps downstream, and at least 1 Mbps upstream, and at least 100 GB of data, the pricing of the competitor will be deemed reasonable, and not subject to challenge. Given the finite $1.8 billion budget for Phase II, the Bureau did not find it efficient to target funding to such areas that already have two providers offering service meeting the Phase II standards for price cap carriers, when there are likely to be other census blocks where the average cost exceeds the funding threshold that have no providers at all.

42. The Bureau now turns to situations where the potential competitor does not offer fixed wireline service in urban areas, or does not serve an area where the incumbent itself offers broadband. Once the Bureau adopts the urban rate benchmark, the pricing of such a potential competitor will not be subject to challenge if it at or below the urban rate benchmark. Stated differently, there will be a conclusive presumption that the pricing of any operator with non-promotional rates below the urban rate benchmark is reasonable. In the event the challenge process is underway prior to the publication of the urban rate benchmark resulting from the urban rate survey, however, the Bureau will need a simple, administratively workable method of determining whether the price cap carrier has made a prima facie case regarding pricing that shifts the burden to the other provider to respond. In the *Phase II Service Obligations Public Notice,* the Bureau sought comment on whether to adopt on an interim basis reasonable comparability benchmarks of $37 for voice service and $60 for broadband service. The Bureau now adopts such an approach on an interim basis, which will enable the Bureau to quickly and efficiently adjudicate challenges to the extent that process occurs before the adoption of the urban rate benchmark.

43. In order to make a prima facie case to proceed with a challenge in situations where the conclusive presumptions discussed above do not apply, a price cap carrier seeking to overturn the classification of a particular block as served based on a lack of reasonably comparable pricing would need to demonstrate that the provider's advertised non-promotional price for the lowest cost broadband service offering is above $60 and/or the provider's advertised non-promotional price for the lowest cost voice service offering is above $37. If the price cap carrier successfully makes such a showing, the burden then would shift to the other provider to submit evidence that its rates are in fact reasonably comparable. The provider can defeat the challenge by demonstrating either that: (1) It does in fact offer a qualifying broadband offering at a price at or below $60 and a voice offering at or below $37; (2) its rates nonetheless should be deemed reasonably comparable because it offers a more robust broadband service than the minimum requirements established for price cap carriers accepting Phase II support; or (3) its rates are the same as those of other providers in nearby urban markets where there are two or more providers offering fixed services meeting the Commission's standards.

44. The Bureau now addresses what showing is necessary when a provider is challenging the initial designation of a census block as unserved, arguing that instead the block should be treated as served by the provider. Prior to adoption of the urban rate benchmark, the provider may demonstrate that (1) it offers a qualifying broadband offering at a price at or below $60 and a voice offering at or below $37; (2) its rates nonetheless should be deemed reasonably comparable because it offers a more robust broadband service than the minimum requirements established for price cap carriers accepting Phase II

support; (3) it offers service meeting or exceeding the specified performance requirements for the same or lower rates in rural areas as it does for fixed wireline offerings in urban areas; or (4) both it and the price cap carrier are serving that census block and therefore its rates should be presumed reasonably comparable. After the adoption of the urban rate benchmark, the provider may present evidence that its rates are lower than the benchmark. If it successfully makes any of these showings, and the price cap carrier fails to offer sufficient contrary evidence, the provider will be deemed to be offering reasonably comparable rates. In responding to an unserved-to-served challenge, price cap carriers may contest the factual assertions made by the provider.

III. Procedural Matters

A. Paperwork Reduction Act

45. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, the Bureau notes that pursuant to the Small Business Paperwork Relief Act of 2002, they previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

46. In this present document, the Bureau has assessed the effects of requiring price cap carriers to report certain information related to their Phase II service obligations. As all price cap carriers employ more than 25 employees, these changes will have no impact on businesses with fewer than 25 employees. Some changes adopted in this Order affect how unsubsidized competitors report information related to the challenge process. Unsubsidized competitors may be businesses with fewer than 25 employees. However, the changes adopted herein fall under previous OMB approval for the Phase II challenge process.

B. Final Regulatory Flexibility Certification

47. The Regulatory Flexibility Act of 1980, as amended (RFA) requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that ''the rule will not have a significant economic impact on a substantial number of small entities.'' The RFA generally defines ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

48. The metrics and standards for determining compliance with the Commission's service requirements contained in the ''Price Cap Carrier Obligations'' section of this Order do not have a significant economic impact on a substantial number of small entities. The requirements in that section only directly affect price cap carriers that ultimately elect to accept Phase II support through the state-level commitment. The vast majority of these affected carriers are not small businesses. As separate and independent grounds, we also conclude that articulating objective quantitative metrics for demonstrating compliance with the standards adopted by the Commission creates only a de minimis economic impact. The metrics and standards adopted in the ''Unsubsidized Competitors'' section of this Order could affect a substantial number of small entities, depending on how many such entities participate in the challenge process. However, in setting the proxy by which we will determine whether an unsubsidized competitor offers 4 Mbps/1 Mbps service and stating a how an unsubsidized competitor can make a showing that its rates are reasonably comparable, we create only a de minimis economic impact. Therefore, we certify that the requirements of this Order will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the order including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. 801(a)(1)(A). In addition, the order and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the **Federal Register**. *See* 5 U.S.C. 605(b).

C. Congressional Review Act

49. The Commission will send a copy of this order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

IV. Ordering Clauses

50. Accordingly, *it is ordered* that, pursuant to sections 1, 4(i), 5(c), 201(b), 214, and 254 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 151, 154(i), 155(c), 201(b), 214, 254, 1302, sections 0.91 and 0.291 of the Commission's rules, 47 CFR 0.91, 0.291, and the delegations of authority in paragraphs 112, 170, and 171 of the *USF/ICC Transformation Order,* FCC 11–161, this Report and Order *is adopted,* effective thirty (30) days after publication of the text or summary thereof in the **Federal Register,** except for the provisions subject to the PRA, which will become effective upon announcement in the **Federal Register** of OMB approval of the subject information collection requirements.

Federal Comunications Commission.

Kimberly A. Scardino,

Chief, Telecommunications Access Policy Division, Wireline Competition Bureau.

[FR Doc. 2013–28341 Filed 11–26–13; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 236

[Docket No. FRA–2001–10160, Notice No. 5]

Need for Agency Approval of a Railroad's Use of Certain Technology That Has Been Previously Approved for Use by a Different Railroad

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Interim statement of agency interpretation, with request for public comment.

SUMMARY: FRA is providing interim guidance on a railroad's use of processor-based signal or train control technology subject to the requirements of 49 CFR part 236, subpart H, in the situation where the railroad has not previously obtained FRA's approval to use the technology, but a different railroad has already received FRA's approval to do so. Under these regulations, any railroad seeking to use signal or train control technology subject to the regulations must first adopt both a Railroad Safety Program

Plan and a Product Safety Plan covering the technology that have been approved by FRA. If FRA has already approved the use of a certain processor-based signal or train control technology by one railroad pursuant to that railroad's plans, a different railroad (a third-party railroad) may use as a model the Railroad Safety Program Plan and Product Safety Plan of the railroad that has FRA's approval for use of the technology, and the third-party railroad must submit its own plans and obtain FRA's approval before using the technology. FRA anticipates that there will be some railroad-by-railroad variances that will not be safety-critical, and such variances are required to be specified and are also subject to FRA approval.

DATES: This document is effective on November 27, 2013. Public comments on the interim interpretation are due by January 27, 2014. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments on the interim interpretation set forth in this document, identified as Docket No. FRA–2001–10160, Notice No. 5,[1] by any of the following methods:

- *Web site:* The Federal eRulemaking Portal, *http://www.regulations.gov.* Follow the Web site's online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number for this interim statement of agency policy and interpretation. Note that all submissions received will be posted without change to *http://www.regulations.gov* including any personal information.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

[1] Prior to publication of the interim interpretation, FRA published a total of four documents in the **Federal Register** under Docket No. FRA–2001–10160.

FOR FURTHER INFORMATION CONTACT: Dr. Mark Hartong, PE., Senior Scientific/Technical Advisor, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: (202) 493–1332), email (*mark.hartong@dot.gov*); Mr. Jason Schlosberg, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: (202) 493–6032), email (*jason.schlosberg@dot.gov*); or Mr. Matthew Prince, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: (202) 493–6146), email (*matthew.prince@dot.gov*).

SUPPLEMENTARY INFORMATION: FRA's regulations at Subpart H of 49 CFR part 236 (Subpart H), most of which FRA issued in 2005, set forth minimum performance standards for the development and use of certain technologies, namely safety-critical processor-based signal or train control systems, including subsystems and components thereof, developed under the terms and conditions of that subpart. See 70 FR 11095 (Mar. 7, 2005); 49 CFR 236.0(h), 236.901. The term ''processor-based'' means dependent on a digital processor in order to function properly. See 49 CFR 236.903. The subpart does not apply to a processor-based signal or train control system (including a subsystem or component thereof) that was in service as of June 6, 2005. See 49 CFR 236.911(a). For brevity, the subpart defines the term ''product'' to mean ''a processor-based signal or train control system, subsystem, or component.'' See 49 CFR 236.903.

Under Subpart H, a railroad that wishes to develop and use a safety-critical product or products covered by Subpart H must develop a Railroad Safety Program Plan (RSPP). The RSPP is intended to serve as the railroad's principal safety document for all of the railroad's safety-critical products subject to Subpart H. The railroad's RSPP must outline its methods of evaluation, risk assessment, safety assessment, system verification and validation, human factors analysis, and configuration management practices for all of its products subject to Subpart H. Using the methods described in its RSPP, the railroad then must develop a Product Safety Plan (PSP), for each product, which is intended to describe in detail all of the safety aspects of each particular product. Then the railroad must submit its RSPP and PSP(s) to FRA for approval. See 49 CFR 236.905(c) and 236.913.

FRA recognizes that Subpart H does not explicitly discuss how a third party may use the same processor-based signal or train control technology after FRA has approved it for use on the basis of a different railroad's PSP. However, FRA did discuss the potential for ''portable'' PSPs to be used by multiple railroads. *See* 70 FR 11080. This Interim Statement of Agency Interpretation describes the process by which a railroad may most readily receive FRA's approval for the railroad's implementation and use of a technology subject to Subpart H, where the technology has previously been approved for use by another railroad. This Interim Statement of Agency Interpretation does not amend Subpart H, but rather provides public notice of the standards that FRA will use to evaluate a PSP submitted under Subpart H by a third-party railroad. As indicated above, this interpretation becomes effective upon publication. RSPPs and PSPs that were acceptable prior to the effective date of this document will not be rendered unacceptable by this document; therefore, prior notice of the interpretation is not necessary.

Any third-party railroad seeking to implement a product subject to Subpart H must first develop and adopt its own RSPP in accordance with 49 CFR 236.905. This holds true even where a railroad will only be using technologies subject to an FRA-approved PSP developed by a different railroad. The third-party railroad must then submit an informational filing or petition for approval of a PSP in accordance with 49 CFR 236.913. An RSPP and PSP are necessary in order for a railroad to establish the performance requirements to which it will be held by FRA, and an RSPP and PSP are, therefore, required even for the use of previously-approved technologies. If a railroad submits an RSPP that includes only minor, non-safety-critical changes from an RSPP previously-approved by FRA and if the railroad indicates both the source of the RSPP and the variances from the FRA-approved version, FRA anticipates few difficulties in the RSPP-approval process. If a railroad does not plan to develop a PSP independently, the most important element of the RSPP is the ''configuration management control plan'' required by 49 CFR 236.905(b)(4).

Similarly, if a third-party railroad submits a PSP for a product based upon a PSP for the same product that was previously approved by FRA and if the third-party railroad identifies all variances in the product and its use from the approved version, FRA expects that the review process will focus only on those areas where variances exist in the product design or intended use. Where a PSP makes reference to a

previously-approved PSP, it is not necessary for a railroad to resubmit design information to demonstrate that the development of the technology complies with Subpart H, except where development changes were made from the approved version of the technology. Accordingly, in such cases the elements of the PSP defined in 49 CFR 236.907(a)(1)–(a)(11) are satisfied if the applicant makes explicit reference to an FRA-approved PSP; [2] the content of the original PSP relating to those paragraphs need not be repeated in the third-party PSP filings. However, because paragraphs (a)(12)–(a)(20) of 49 CFR 236.907 address a railroad's use of the technology, including training, installation, maintenance, security, and other elements, information called for by these paragraphs must be included within the third-party's PSP expressly. A railroad may choose to copy these elements from an approved PSP, and FRA encourages this practice, but it is necessary for railroads to explicitly adopt the practices required for the use of the technology. This reiteration of the description of these required practices will ensure that a railroad has adequate notice of its obligations under its PSP, which are subject to enforcement under Subpart H. If variances exist in the third-party railroad's PSP information responsive to paragraphs (a)(12)–(a)(20) of 49 CFR 236.907, then those variances must be supported by the safety analysis of the original railroad or the third-party railroad contained within the RSPP and material in the PSP responsive to paragraphs (a)(1)–(a)(11) of 49 CFR 236.907.

Once FRA approves a railroad's PSP (submitted through either an informational filing or a petition for approval), the submitting railroad becomes subject to Subpart H in its entirety, including the requirement set forth in 49 CFR 236.915 that the railroad comply with the terms of its FRA-approved PSP.

Authority: 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20157, 20301–20303, 20306, 20701–20703, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.89.

Issued in Washington, DC, on November 21, 2013.

Melissa L. Porter,

Chief Counsel, Federal Railroad Administration.

[FR Doc. 2013–28406 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–06–P

[2] Note that FRA approvals of PSPs are published on regulations.gov. Generally, railroads would know of the approved PSP for a product from the supplier of the product.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 111220786–1781–01]

RIN 0648–XC998

Fisheries of the Northeastern United States; Summer Flounder Fishery; Commercial Quota Harvested for the State of New Jersey

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces that the 2013 summer flounder commercial quota allocated to the State of New Jersey has been harvested. Vessels issued a commercial Federal fisheries permit for the summer flounder fishery may not land summer flounder in New Jersey for the remainder of calendar year 2013, unless additional quota becomes available through a transfer from another state. Regulations governing the summer flounder fishery require publication of this notification to advise New Jersey that the quota has been harvested and to advise vessel permit holders and dealer permit holders that no Federal commercial quota is available for landing summer flounder in New Jersey.

DATES: Effective 1801 hours, November 27, 2013, through December 31, 2013.

FOR FURTHER INFORMATION CONTACT: Carly Bari, (978) 281–9224, or *Carly.Bari@noaa.gov.*

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned on a percentage basis among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.102.

The initial total commercial quota for summer flounder for the 2013 fishing year is 11,793,596 lb (5,349,575 kg) (77 FR 76942, December 31, 2012). The percent allocated to vessels landing summer flounder in New Jersey is 16.72499 percent, resulting in a commercial quota of 1,972,478 lb (894,716 kg). The 2013 allocation was adjusted to 1,972,066 lb (894,514 kg) after deduction of research set-aside, adjustment for 2012 quota overages, and adjustments for quota transfers between states.

The Administrator, Northeast Region, NMFS (Regional Administrator), monitors the state commercial landings and determines when a state's commercial quota has been harvested. NMFS is required to publish notification in the **Federal Register** advising and notifying commercial vessels and dealer permit holders that, effective upon a specific date, the state's commercial quota has been harvested and no commercial quota is available for landing summer flounder in that state. The Regional Administrator has determined, based upon dealer reports and other available information that, New Jersey has harvested its quota for 2013.

Section 648.4(b) provides that Federal permit holders agree, as a condition of the permit, not to land summer flounder in any state that the Regional Administrator has determined no longer has commercial quota available. Therefore, effective 1801 hours, November 27, 2013, landings of summer flounder in New Jersey by vessels holding summer flounder commercial Federal fisheries permits are prohibited for the remainder of the 2013 calendar year, unless additional quota becomes available through a transfer and is announced in the **Federal Register**. Effective 1801 hours, November 27, 2013, federally permitted dealers are also notified that they may not purchase summer flounder from federally permitted vessels that land in New Jersey for the remainder of the calendar year, or until additional quota becomes available through a transfer from another state.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be contrary to the public interest. This action closes the summer flounder fishery for New Jersey until January 1, 2014, under current regulations. The regulations at § 648.103(b) require such action to ensure that summer flounder vessels do not exceed quotas allocated to the states. If implementation of this closure was delayed to solicit prior public comment, the quota for this fishing year will be exceeded, thereby undermining the conservation objectives of the Summer Flounder Fishery Management Plan. The AA further finds, pursuant to 5 U.S.C.

553(d)(3), good cause to waive the 30-day delayed effectiveness period for the reason stated above.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 22, 2013.

Sean F. Corson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–28484 Filed 11–22–13; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 78, No. 229

Wednesday, November 27, 2013

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0975; Directorate Identifier 2013–NM–082–AD]

RIN 2120–AA64

Airworthiness Directives; ATR—GIE Avions de Transport Régional Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede airworthiness directive (AD) 2009–18–18, which applies to certain ATR—GIE Avions de Transport Régional Model ATR42 and ATR72 airplanes. AD 2009–18–18 requires repetitive inspections for damage and absence of repair of the cockpit forward side windows, and replacement if necessary. Since we issued that AD, we received reports of a cockpit forward right-hand side blow out during flight. This proposed AD would require repetitive detailed inspections of the cockpit forward side window for damage and discrepancies; replacement if necessary. Replacing both cockpit forward side windows with approved windows would terminate the repetitive detailed inspections. This proposed AD would also expand the applicability of AD 2009–18–18. The actions required by AD 2009–18–18 are not required by this AD. We are proposing this AD to detect and correct air/water leakage of the cockpit forward side window, which could lead to rapid cabin decompression, resulting in loss of control of the airplane.

DATES: We must receive comments on this proposed AD by January 13, 2014.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact PPG Aerospace, 12780 San Fernando Road, Sylmar, California 91342; telephone 818–362–6711; fax 818–362–0603; Internet *http://corporateportal.ppg.com/na/aerospace*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0975; Directorate Identifier 2013–NM–082–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On August 26, 2009, we issued AD 2009–18–18, Amendment 39–16014 (74 FR 46336, September 9, 2009). That AD required actions intended to address an unsafe condition on certain ATR Model ATR42 and ATR72 airplanes.

Since we issued AD 2009–18–18, Amendment 39–16014 (74 FR 46336, September 9, 2009), we received reports of a cockpit forward right-hand side blow out during flight. We also received reports of an air/water leak, which is an indication that structural components within the window have begun to deteriorate. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2013–0087, dated April 9, 2013 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> In 2009, a Left-Hand (LH) forward side glass window of an ATR 72–212 aeroplane blew out while performing a ground pressure test. The investigation results revealed some anomalies on the forward side window at the level of the z-bar on the windows external side and at the level of the inner retainer on the windows internal side. Such anomalies are considered as precursors of this kind of failure. Air or water leakages between the z-bar and the outer glass ply, or between the inner retainer and inner glass ply indicate the presence of deteriorating structural components in the window.
>
> Neither ATR nor PPG Aerospace have authorized repairs on the window z-bar or z-bar sealant. Any attempted repairs on these forward side window z-bars and/or z-bar sealants could lead to a similar event as described above.
>
> In-flight loss of a forward side window would cause rapid cabin decompression, possibly resulting in flight crew incapacitation and consequent reduced control, or loss of control of the aeroplane, and cause the risk of injury to persons on the ground. The loss of a forward side window while the aeroplane is on the ground, due to

differential cabin pressure, could result in injury to aeroplane occupants or to persons outside the aeroplane.

To address this potential unsafe condition, EASA issued AD 2009–0159–E [dated July 20, 2009] [(*http://ad.easa.europa.eu/blob/easa_ad_2009_0159E_superseded.pdf/EAD_2009-0159-E_1*)] [which corresponds to FAA AD 2009–18–18, Amendment 39–116014 (74 FR 46336, September 9, 2009)] to require repetitive inspections of the affected LH and right-hand (RH) cockpit forward side glass windows and, in case discrepancies are found as defined in PPG Aerospace Service Bulletin (SB) NP–158862–001, the replacement of the window(s).

Since that [EASA] AD was issued, a cockpit forward RH-side window blew out during flight on an ATR72–212 aeroplane. Degradation of the window is considered to have been the cause for this failure.

* * * [T]his [EASA] AD * * * requires to accomplish the [detailed] inspections in accordance with the instructions of Revision 1 of PPG Aerospace SB NP–158862–001, which provides more information on examples of [damaged and] discrepant conditions.

This [EASA] AD also requires the removal from service of the affected Part Number (P/N) NP158862–1 and P/N NP158862–2 cockpit forward side windows, which constitutes terminating action for the repetitive inspections required by this AD.

The corrective action is replacing windows, if damage and discrepancies are found. Damage and discrepancies to detect during the inspection include z-bar existing sealant repair, z-bar deformation, separation or gap in the sealant bond between the retainer and inner glass ply, z-bar deformation and retainer gap at same location, or z-bar deformation and retainer gap in window corner.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating it in Docket No. FAA–2013–0975.

Relevant Service Information

PPG Aerospace has issued Service Bulletin NP–158862–001, Revision 1, dated January 10, 2013. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

Although EASA AD 2013–0087, dated April 9, 2013, specifies to replace affected window(s) in accordance with the instructions of ATR42/72 Job Instruction Card airplane maintenance manual (AMM) JIC 56–12–00 RAI 10000, this proposed AD would require replacement of affected window(s) using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA (or its delegated agent, or the Design Approval Holder with EASA design organization approval).

While paragraph (6) of EASA AD 2013–0087, dated April 9, 2013, specifies to replace each PPG Aerospace P/N NP–158862–1 LH and P/N NP–158862–2 RH cockpit forward side window with another approved cockpit forward side window, this proposed AD would require that replacement windows and procedures for their installation be approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA (or its delegated agent, or the Design Approval Holder with EASA design organization approval).

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 43 products of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Detailed Inspection	1 work-hour × $85 per hour = $85 per inspection cycle.	$0	$85 per inspection cycle	$3,655 per inspection cycle.

We estimate the following costs to do any necessary replacements that would be required based on the results of the proposed inspection. We have no way of determining the number of aircraft that might need this replacement.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement	4 work-hours × $85 per hour = $340	$18,546	$18,886

Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB control number. The control number for the collection of information required by this AD is 2120–0056. The paperwork cost associated with this AD has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and

reviewing the collection of information. Therefore, all reporting associated with this AD is mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at 800 Independence Ave., SW., Washington, DC 20591. ATTN: Information Collection Clearance Officer, AES–200.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This proposed regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2009–18–18, Amendment 39–16014 (74 FR 46336, September 9, 2009), and adding the following new AD:

ATR—GIE Avions de Transport Régional: Docket No. FAA–2013–0975; Directorate Identifier 2013–NM–082–AD.

(a) Comments Due Date

We must receive comments by January 13, 2014.

(b) Affected ADs

This AD supersedes AD 2009–18–18, Amendment 39–16014 (74 FR 46336, September 9, 2009).

(c) Applicability

This AD applies to all ATR—GIE Avions de Transport Régional Model ATR42–200, –300, –320, and –500 airplanes; and Model ATR72–101, –201, –102, –202, –211, –212, and –212A airplanes; certificated in any category; all manufacturer serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 56, Windows.

(e) Reason

This AD was prompted by reports of a cockpit forward right-hand side blow out during flight. We are issuing this AD to detect and correct air/water leakage of the cockpit forward side window, which could lead to rapid cabin decompression, resulting in loss of control of the airplane.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Inspections

For airplanes that are equipped with any PPG Aerospace cockpit forward side glass window having part number (P/N) NP158862–1 or P/N NP158862–2: At the applicable time specified in paragraph (g)(1) or (g)(2) of this AD, do a detailed inspection of the cockpit forward side window to detect any damage and discrepancies (z-bar existing sealant repair, z-bar deformation, separation or gap in the sealant bond between the retainer and inner glass ply, z-bar deformation and retainer gap at same location, or z-bar deformation and retainer gap in window corner), in accordance with the Accomplishment Instructions of PPG Aerospace Service Bulletin NP–158862–001 Revision 1, dated January 10, 2013. Repeat the inspection thereafter at intervals not to exceed 550 flight hours or 750 flight cycles, whichever occurs first, except as required by paragraph (h) of this AD.

(1) For windows for which the total flight cycles can be established, inspect within 2,000 flight cycles since first installation of the cockpit forward side window, or within 10 days after the effective date of this AD, whichever occurs later.

(2) For windows for which the total flight cycles cannot be established, inspect before the accumulation of 2,000 total flight cycles on the airplane, or within 10 days after the effective date of this AD, whichever occurs later.

(h) Conditions for Reduced Interval

If any of the conditions specified in paragraphs (h)(1), (h)(2), and (h)(3) of this AD is found during any inspection required by paragraph (g) of this AD, reduce the interval of each subsequent inspection as required by paragraph (g) of this AD to 50 flight cycles or 7 days, whichever occurs later.

(1) Sealant separation between the Z-bar and the outer glass ply, with depth less than 4 millimeter (mm) (0.160 inches (in)).

(2) Sealant separation between the inboard retainer and inner glass ply, with depth less than 7.5 mm (0.300 in) and cumulative length less than 300 mm (12.000 in).

(3) Window showing both sealant separation between the Z-bar and the outer ply, and separation between inboard retainer and inner glass ply, common to the same hole location with a length less than 225 mm (8.860 in), and not covering the entire arc of a window corner.

(i) Replacement

If, during any inspection required by this AD, any damage or discrepant condition as defined in PPG Aerospace Service Bulletin NP–158862–001 Revision 1, dated January 10, 2013 (z-bar existing sealant repair, z-bar deformation, separation or gap in the sealant bond between the retainer and inner glass ply, z-bar deformation and retainer gap at same location, or z-bar deformation and retainer gap in window corner) is found, except for the conditions specified in paragraph (h)(1), (h)(2), or (h)(3) of this AD, before further pressurized flight or within 10 days after the inspection, whichever occurs first, replace the affected window(s) using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA) (or its delegated agent, or the Design Approval Holder with EASA design organization approval). For a replacement method to be approved, the repair must specifically refer to this AD.

Note 1 to paragraph (i) of this AD: Guidance for unpressurized flight conditions and limitations can be found in ATR Master Minimum Equipment List (MMEL) item 21–30–1 and Dispatch Deviation Guide (DDG) item 21–30–1.(4).

Note 2 to paragraph (i) of this AD: Guidance for the replacement required by

paragraph (i) of this AD can be found in ATR42/72 Job Instruction Card airplane maintenance manual (AMM) JIC 56–12–00 RAI 10000.

(j) Reporting Requirement

Submit a report of the findings of the inspection required by paragraph (g) of this AD to ATR techdesk, 1 ALLEE PIERRE NADOT, 31712 BLAGNAC CEDEX, France, phone: +33 (0)5 62 21 62 21; fax: +33 (0)5 62 21 67 18; email: *techdesk@atr.fr;* and PPG Aerospace, ATTN: Andrew Troller, P.O. Box 2200, Huntsville, AL 35811 USA, phone: 1–256–859–2500 ext. 2544; fax 1–256–859–8155; email: *atroller@ppg.com;* at the applicable time specified in paragraph (j)(1) or (j)(2) of this AD. The report must include the information specified in PPG Aerospace Service Bulletin NP–158862–001, Revision 1, dated January 10, 2013.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(k) Window Replacement Provisions

Replacing only the affected window, as required by paragraph (i) of this AD, with a cockpit forward side window having P/N NP158862–1 left-hand (LH) or P/N NP158862–2 right-hand (RH), as applicable, is not terminating action for the repetitive inspections required by this AD.

(l) Terminating Action

Within 72 months after the effective date of this AD, replace each PPG Aerospace P/N NP–158862–1 LH and P/N NP–158862–2 RH cockpit forward side window with an approved cockpit forward side window. Replacing both PPG Aerospace P/N NP158862–1 LH and P/N NP158862–2 RH cockpit forward side windows with approved windows is a terminating action for the repetitive inspections required by this AD. Replacement windows and procedures for their installation must be approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA (or its delegated agent, by the Design Approval Holder with EASA design organization approval).

(m) Parts Installation Prohibition

As of 72 months after the effective date of this AD, no person may install any PPG Aerospace cockpit forward side window having P/N NP158862–1 LH or P/N NP158862–2 RH on any airplane.

(n) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they were approved by the State of Design Authority (or its delegated agent, or the Design Approval Holder with a State of Design Authority's design organization approval). For a repair method to be approved, the repair approval must specifically refer to this AD. You are required to ensure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(o) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information EASA Airworthiness Directive 2013–0087, dated April 9, 2013, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov.*

(2) For service information identified in this AD, contact PPG Aerospace, 12780 San Fernando Road, Sylmar, California 91342; telephone 818–362–6711; fax 818–362–0603; Internet *http://corporateportal.ppg.com/na/aerospace.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on November 15, 2013.

John P. Piccola,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–28445 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2013–0860; Airspace Docket No. 12–ASO–36]

RIN 2120–AA66

Proposed Establishment and Modification of Area Navigation (RNAV) Routes; Atlanta, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish 14 RNAV Q-routes and modify 4 Q-routes in support of the Optimization of Airspace and Procedures in a Metroplex (OAPM) project. This proposed action is intended to enhance air traffic flow in the vicinity of the Atlanta, GA (ATL) and Charlotte, NC (CLT) Metroplex areas.

DATES: Comments must be received on or before January 13, 2014.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2013–0860 and Airspace Docket No. 12–ASO–36 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace Policy and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–

2013–0860 and Airspace Docket No. 12–ASO–36) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2013–0860 and Airspace Docket No. 12–ASO–36.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Ave., College Park, GA 30337.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish 14 RNAV Q-routes and modify 4 Q-routes in support of the OAPM project. OAPM is intended to improve air traffic flows within an entire region resulting in increased capacity and fuel efficiency and reduced track distances. The proposed changes are described below.

Q–22: Q–22 now extends between the GUSTI, LA, fix and the CATLN, AL, fix. This action would modify Q–22 by extending the route approximately 582 nautical miles (NM) to the northeast of its current termination point, to the BEARI, VA, waypoint (WP). The modification would be used to segregate aircraft landing at various airports in the northeast U.S.

Q–39: Q–39 is a proposed new route that would extend between the CLAWD, NC, WP and the TARCI, WV, fix. The route would be used by aircraft landing at Port Columbus, OH, Cleveland, OH and Detroit, MI airports.

Q–40: Q–40 now extends between the Alexandria, LA, VORTAC (AEX) and the MISLE, AL, WP. The route would be modified by extending it approximately 548 NM to the northeast terminating at the FANPO, VA, WP. Q–22 would provide an RNAV alternative for southwest-bound traffic that normally files via jet route J–22. The amended Q–40 would be a shorter route and would also reduce conflictions with departures from the Atlanta, GA, area.

Q–50: Q–50 is a proposed new route that would extend between the Louisville, KY, VORTAC (IIU) and the CUBIM, KY, WP. The route is intended to help segregate Charlotte, NC, departures from conflicting high altitude flows headed towards the Louisville, KY area.

Q–52: Q–52 is a proposed new route that would extend between the CHOPZ, GA, WP and the COLZI, NC, fix. This route would provide an RNAV alternative to jet route J–37 for southwest-bound overflights joining traffic departing from the CLT area and overflying ATL. The route would parallel J–37 between COLZI and CHOPZ thereby segregating the southwest-bound flights from ATL departure flows that are in opposite direction proceeding northeast-bound.

Q–54: Q–54 would be a new route extending between the Greenwood, SC, VORTAC (GRD) and the NUTZE, NC, WP. The route would serve ATL departures destined to the Norfolk, VA, area.

Q–56: Q–56 would be a new route that would extend between the CATLN, AL, Fix and the KIWII, VA, WP. The route would diverge northeasterly from the proposed Q–22 (see above) to serve aircraft landing at Ronald Reagan Washington National Airport (DCA) and Joint Base Andrews (ADW).

Q–58: Q–58 would be a new route that would extend between the KELLN, SC, WP and the PEETT, NC, WP. It would be used by ATL departures headed to Baltimore/Washington International Thurgood Marshall Airport (BWI).

Q–60: The proposed Q–60 would extend between the Spartanburg, SC, VORTAC (SPA) and the JAXSN, VA, fix. The route would serve aircraft landing at Washington Dulles International (IAD), Richmond International (RIC) and LaGuardia (LGA) airports.

Q–63: Q–63 is a proposed new route that would extend between the DOOGE, VA, WP and the HEVAN, IN, WP. The route would facilitate CLT departures traveling northwest-bound and overflying the Cincinnati, OH, area.

Q–64: Q–64 is proposed to extend between the CATLN, AL, fix and the Tar River, NC, VORTAC (TYI). Q–64 would provide routing for aircraft destined to airports in the New York City area.

Q–65: Q–65 would be a new route extending between the JEFOI, GA, WP and Rosewood, OH, VORTAC (ROD). The route would serve northbound traffic from Florida and to the east of ATL.

Q–66: Q–66 would extend between the Little Rock, AR, VORTAC (LIT) and the ALEAN, VA, WP. The route would transfer RNAV aircraft off conventional jet routes and away from the Volunteer, TN (VXV) and Pulaski, VA (PSK) VORTACs, which are high traffic volume crossing fixes. Shifting aircraft to Q–66 would facilitate climbs for northbound aircraft departing ATL and provide a more direct route to Little Rock.

Q–67: Q–67 would extend between the SMITH, TN, WP and Henderson, WV, VORTAC (HNN). It would provide RNAV routing for ATL departures. Q–67, along with the proposed Q–71 (see below), would enable two segregated north departure flows from ATL.

Q–69: Q–69 would extend between the BLAAN, SC, WP and Elkins, WV, VORTAC (EKN). The route would provide better opportunity for unrestricted climbs for CLT departures headed toward Pittsburg International (PIT), Buffalo Niagara International (BUF) and Toronto Pearson International (TOR) airports. Additionally, Q–69 could be used as an RNAV alternative to jet route J–53.

Q–71: Q–71 would extend between the BOBBD, TN, WP and the GEFFS, WV, fix. This route, in conjunction with Q–67 (above), would facilitate the segregation of ATL departures prior to the aircraft entering the adjacent Air Route Traffic Control Center's (ARTCC) airspace.

Q–110: Q–110 now extends between the THNDR, FL, fix and the FEONA, GA, WP. This action would modify Q–110 by extending the route an additional 404 NM to the northwest, terminating at the BLANS, IL, WP. The amended route would serve traffic overflying Atlanta

ARTCC airspace from Florida airports en route to the Minneapolis-St. Paul International/World-Chamberlain Airport (MSP).

Q–118: Q–118 now extends between the KPASA, FL, WP and the LENIE, GA, WP. This proposed amendment would eliminate the LENIE WP from the Q–118 description and instead, realign Q–118 to the west of LENIE through the JOHNN, GA, Fix. From JOHNN, GA, Fix, Q–118 would be extended approximately 544 NM to the north to terminate at the Marion, IN, VOR/DME (MZZ). This route extension would support a preferred arrival route into Chicago O'Hare International Airport (ORD).

High altitude RNAV routes are published in paragraph 2006 of FAA Order 7400.9X dated August 7, 2013, and effective September 15, 2013, which is incorporated by reference in 14 CFR 71.1. The RNAV routes listed in this document would be subsequently published in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would modify the route structure as required to enhance the safe and efficient flow of air traffic in the eastern United States.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9W, Airspace Designations and Reporting Points, Dated August 8, 2012, and effective September 15, 2012, is amended as follows:

Paragraph 2006 United States Area Navigation Routes.

* * * * *

Q–22 GUSTI, LA to BEARI, VA [Amended]

GUSTI, LA	FIX	(Lat. 29°58′15″ N., long. 92°54′35″ W.)
OYSTY, LA	FIX	(Lat. 30°28′15″ N., long. 90°11′49″ W.)
ACMES, AL	WP	(Lat. 30°55′27″ N., long. 88°22′11″ W.)
CATLN, AL	FIX	(Lat. 31°18′26″ N., long. 87°34′48″ W.)
TWOUP, GA	WP	(Lat. 33°53′45″ N., long. 83°49′08″ W.)
Spartanburg (SPA), SC	VORTAC	(Lat. 35°02′01″ N., long. 81°55′37″ W.)
NYBLK, NC	WP	(Lat. 35°34′35″ N., long. 81°02′34″ W.)
MASHI, NC	WP	(Lat. 35°58′18″ N., long. 80°23′05″ W.)
KIDDO, NC	WP	(Lat. 36°10′35″ N., long. 80°02′24″ W.)
OMENS, VA	WP	(Lat. 36°49′29″ N., long. 78°55′30″ W.)
BEARI, VA	WP	(Lat. 37°12′02″ N., long. 78°15′24″ W.)

Q–39 CLAWD, NC to TARCI, WV [New]

CLAWD, NC	WP	(Lat. 36°25′09″ N., long. 81°08′50″ W.)
TARCI, WV	FIX	(Lat. 38°16′36″ N., long. 81°18′34″ W.)

Q–40 Alexandria, LA (AEX) to FANPO, VA [Amended]

Alexandria, LA (AEX)	VORTAC	(Lat. 31°15′24″ N., long. 92°30′04″ W.)
DOOMS, MS	WP	(Lat. 31°53′08″ N., long. 91°09′56″ W.)
WINAP, MS	WP	(Lat. 32°38′00″ N., long. 89°21′56″ W.)
MISLE, AL	WP	(Lat. 33°24′00″ N., long. 87°38′00″ W.)
BFOLO, AL	WP	(Lat. 34°03′34″ N., long. 86°31′30″ W.)
NIOLA, GA	WP	(Lat. 34°47′00″ N., long. 85°16′14″ W.)
JAARE, TN	WP	(Lat. 35°44′20″ N., long. 83°32′30″ W.)
OJESS, TN	WP	(Lat. 35°55′00″ N., long. 83°10′54″ W.)
ALEAN, VA	WP	(Lat. 36°43′55″ N., long. 81°37′26″ W.)
FEEDS, VA	WP	(Lat. 37°16′29″ N., long. 80°30′33″ W.)
MAULS, VA	WP	(Lat. 37°52′49″ N., long. 79°19′49″ W.)
FANPO, VA	WP	(Lat. 38°25′25″ N., long. 78°13′51″ W.)

Q–50 Louisville, KY (IIU) to CUBIM, KY [New]

Louisville, KY (IIU)	VORTAC	(Lat. 38°06′12″ N., long. 85°34′39″ W.)
HELUB, KY	WP	(Lat. 37°42′55″ N., long. 84°44′28″ W.)
ENGRA, KY	WP	(Lat. 37°29′02″ N., long. 84°15′02″ W.)
IBATE, KY	WP	(Lat. 36°59′12″ N., long. 83°13′40″ W.)
CUBIM, KY	WP	(Lat. 36°52′37″ N., long. 83°00′21″ W.)

Q–52 CHOPZ, GA to COLZI, NC [New]

CHOPZ, GA	WP	(Lat. 33°51′24″ N., long. 83°41′18″ W.)
IPTAY, GA	WP	(Lat. 34°20′57″ N., long. 82°50′23″ W.)
AWYAT, SC	WP	(Lat. 35°02′21″ N., long. 81°36′45″ W.)
COLZI, NC	FIX	(Lat. 36°13′39″ N., long. 80°30″32″ W.)

Q–54 Greenwood, SC (GRD) to NUTZE, NC [New]

Greenwood, SC (GRD)	VORTAC	(Lat. 34°15′06″ N., long. 82°09′15″ W.)
NYLLA, SC	WP	(Lat. 34°34′39″ N., long. 81°17′00″ W.)
CHYPS, NC	WP	(Lat. 34°53′18″ N., long. 80°25′57″ W.)
AHOEY, NC	WP	(Lat. 35°00′36″ N., long. 80°05′56″ W.)
RAANE, NC	WP	(Lat. 35°09′22″ N., long. 79°41′34″ W.)
NUTZE, NC	WP	(Lat. 35°50′40″ N., long. 77°40′57″ W.)

Q–56 CATLN, AL to KIWII, VA [New]

CATLN, AL	FIX	(Lat. 31°18′26″ N., long. 87°34′48″ W.)
KBLER, GA	WP	(Lat. 33°43′21″ N., long. 83°43′14″ W.)
KELLN, SC	WP	(Lat. 34°31′33″ N., long. 82°10′17″ W.)
KTOWN, NC	WP	(Lat. 35°11′49″ N., long. 81°03′18″ W.)
BYSCO, NC	WP	(Lat. 35°46′09″ N., long. 80°04′34″ W.)
JOOLI, NC	WP	(Lat. 35°54′55″ N., long. 79°49′16″ W.)
NUUMN, NC	WP	(Lat. 36°09′54″ N., long. 79°23′39″ W.)
ORACL, NC	WP	(Lat. 36°28′02″ N., long. 78°52′15″ W.)
KIWII, VA	WP	(Lat. 36°34′57″ N., long. 78°40′04″ W.)

Q–58 KELLN, SC to PEETT, NC [New]

KELLN, SC	WP	(Lat. 34°31′33″ N., long. 82°10′17″ W.)
GLOVR, NC	FIX	(Lat. 35°30′24″ N., long. 80°14′51″ W.)
LUMAY, NC	WP	(Lat. 35°44′47″ N., long. 79°49′40″ W.)
STUKI, NC	WP	(Lat. 36°09′08″ N., long. 79°06′14″ W.)
PEETT, NC	WP	(Lat. 36°26′45″ N., long. 78°34′16″ W.)

Q–60 Spartanburg, SC (SPA) to JAXSN, VA [New]

Spartanburg, SC (SPA)	VORTAC	(Lat. 35°02′01″ N., long. 81°55′37″ W.)
BYJAC, NC	FIX	(Lat. 35°57′27″ N., long. 80°09′03″ W.)
EVING, NC	WP	(Lat. 36°05′22″ N., long. 79°53′56″ W.)
LOOEY, VA	WP	(Lat. 36°35′05″ N., long. 79°01′09″ W.)
JAXSN, VA	FIX	(Lat. 36°42′38″ N., long. 78°47′23″ W.)

Q–63 DOOGE, VA to HEVAN, IN [New]

DOOGE, VA	WP	(Lat. 36°48′39″ N., long. 82°35′14″ W.)
HAPKI, KY	WP	(Lat. 37°04′56″ N., long. 82°51′03″ W.)
TONIO, KY	FIX	(Lat. 37°15′15″ N., long. 83°01′48″ W.)
OCASE, KY	WP	(Lat. 38°23′59″ N., long. 84°11′05″ W.)
HEVAN, IN	WP	(Lat. 39°21′09″ N., long. 85°07′47″ W.)

Q–64 CATLN, AL to Tar River, NC (TYI) [New]

CATLN, AL	FIX	(Lat. 31°18′26″ N., long. 87°34′48″ W.)
FIGEY, GA	WP	(Lat. 33°52′27″ N., long. 82°52′23″ W.)
Greenwood, SC (GRD)	VORTAC	(Lat. 34°15′06″ N., long. 82°09′15″ W.)
DARRL, SC	FIX	(Lat. 34°47′49″ N., long. 81°03′22″ W.)
IDDAA, NC	WP	(Lat. 35°11′05″ N., long. 79°59′31″ W.)
Tar River, NC (TYI)	VORTAC	(Lat. 35°58′36″ N., long. 77°42′13″ W.)

Q–65 JEFOI, GA to Rosewood, OH (ROD) [New]

JEFOI, GA	WP	(Lat. 31°35′37″ N., long. 82°31′18″ W.)
CESKI, GA	WP	(Lat. 32°16′21″ N., long. 82°40′39″ W.)
DAREE, GA	WP	(Lat. 34°37′36″ N., long. 83°51′35″ W.)
LORNN, TN	WP	(Lat. 35°21′16″ N., long. 84°14′19″ W.)
SOGEE, TN	WP	(Lat. 36°31′51″ N., long. 84°11′35″ W.)
ENGRA, KY	WP	(Lat. 37°29′02″ N., long. 84°15′02″ W.)

OCASE, KY	WP	(Lat. 38°23′59″ N., long. 84°11′05″ W.)
Rosewood, OH (ROD)	VORTAC	(Lat. 40°17′16″ N., long. 84°02′35″ W.)

Q–66 Little Rock, AR (LIT) to ALEAN, VA [New]

Little Rock, AR (LIT)	VORTAC	(Lat. 34°40′40″ N., long. 92°10′50″ W.)
CIVKI, AR	WP	(Lat. 34°48′15″ N., long. 91°36′01″ W.)
RICKX, AR	WP	(Lat. 35°06′30″ N., long. 90°14′16″ W.)
TROVE, TN	WP	(Lat. 35°23′16″ N., long. 88°54′39″ W.)
BAZOO, TN	WP	(Lat. 35°58′32″ N., long. 85°52′12″ W.)
METWO, TN	WP	(Lat. 36°04′22″ N., long. 85°18′38″ W.)
MXEEN, TN	WP	(Lat. 36°28′06″ N., long. 83°11′08″ W.)
ALEAN, VA	WP	(Lat. 36°43′55″ N., long. 81°37′26″ W.)

Q–67 SMTTH, TN to Henderson, WV (HNN) [New]

SMTTH, TN	WP	(Lat. 35°54′42″ N., long. 84°00′20″ W.)
CEMEX, KY	WP	(Lat. 36°45′45″ N., long. 83°23′34″ W.)
IBATE, KY	WP	(Lat. 36°59′12″ N., long. 83°13′40″ W.)
TONIO, KY	FIX	(Lat. 37°15′15″ N., long. 83°01′48″ W.)
Henderson, WV (HNN)	VORTAC	(Lat. 38°45′15″ N., long. 82°01′34″ W.)

Q–69 BLAAN, SC to Elkins, WV (EKN) [New]

BLAAN, SC	WP	(Lat. 33°51′09″ N., long. 80°53′33″ W.)
RYCKI, NC	WP	(Lat. 36°24′43″ N., long. 80°25′08″ W.)
LUNDD, VA	WP	(Lat. 36°44′22″ N., long. 80°21′07″ W.)
ILLSA, VA	WP	(Lat. 37°38′56″ N., long. 80°13′18″ W.)
EWESS, WV	WP	(Lat. 38°21′50″ N., long. 80°06′52″ W.)
Elkins, WV (EKN)	VORTAC	(Lat. 38°54′52″ N., long. 80°05′57″ W.)

Q–71 BOBBD, TN to GEFFS, WV [New]

BOBBD, TN	WP	(Lat. 35°47′58″ N., long. 83°51′34″ W.)
ATUME, KY	WP	(Lat. 36°57′14″ N., long. 83°03′24″ W.)
HAPKI, KY	WP	(Lat. 37°04′56″ N., long. 82°51′03″ W.)
KONGO, KY	FIX.	(Lat. 37°30′19″ N., long. 82°08′13″ W.)
WISTA, WV	WP	(Lat. 38°17′01″ N., long. 81°27′47″ W.)
GEFFS, WV	FIX	(Lat. 39°00′50″ N., long. 80°48′50″ W.)

Q–110 THNDR, FL to BLANS, IL [Amended]

THNDR, FL	FIX	(Lat. 26°37′38″ N., long. 80°52′00″ W.)
JAYMC, FL	WP	(Lat. 26°58′51″ N., long. 81°22′08″ W.)
RVERO, FL	WP	(Lat. 27°24′35″ N., long. 81°35′57″ W.)
KPASA, FL	WP	(Lat. 28°10′34″ N., long. 81°54′27″ W.)
BRUTS, FL	WP	(Lat. 29°30′58″ N., long. 82°58′57″ W.)
GULFR, FL	WP	(Lat. 30°12′23″ N., long. 83°33′08″ W.)
FEONA, GA	WP	(Lat. 31°36′22″ N., long. 84°43′08″ W.)
JYROD, AL	WP	(Lat. 33°10′53″ N., long. 85°51′55″ W.)
BFOLO, AL	WP	(Lat. 34°03′34″ N., long. 86°31′30″ W.)
SKIDO, AL	WP	(Lat. 34°31′49″ N., long. 86°53′11″ W.)
BETIE, TN	WP	(Lat. 36°07′30″ N., long. 87°54′01″ W.)
BLANS, IL	WP	(Lat. 37°28′09″ N., long. 88°44′01″ W.)

Q–118 KPASA, FL to Marion, IN (MZZ) [Amended]

KPASA, FL	WP	(Lat. 28°10′34″ N., long. 81°54′27″ W.)
BRUTS, FL	WP	(Lat. 29°30′58″ N., long. 82°58′57″ W.)
JOHNN, GA	FIX	(Lat. 31°31′23″ N., long. 83°57′27″ W.)
KAILL, GA	WP	(Lat. 34°01′47″ N., long. 84°31′24″ W.)
GLAZR, TN	WP	(Lat. 36°25′21″ N., long. 84°46′49″ W.)
JEDER, KY	WP	(Lat. 37°19′31″ N., long. 84°45′14″ W.)
HELUB, KY	WP	(Lat. 37°42′55″ N., long. 84°44′28″ W.)
VOSTK, KY	WP	(Lat. 38°28′16″ N., long. 84°43′04″ W.)
HEVAN, IN	WP	(Lat. 39°21′09″ N., long. 85°07′47″ W.)
Marion, IN (MZZ)	VOR/DME	(Lat. 40°29′36″ N., long. 85°40′45″ W.)

Issued in Washington, DC, on November 21, 2013.

Gary A. Norek,

Manager, Airspace Policy and ATC Procedures Group.

[FR Doc. 2013–28480 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2013–0951; Airspace Docket No. 13–ASW–22]

RIN 2120–AA66

Proposed Modification of Area Navigation (RNAV) Route Q–20, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify RNAV route Q–20 in support of the Houston Optimization of Airspace and Procedures in a Metroplex (OAPM) project. This proposed action re-aligns Q–20 to incorporate the FUSCO waypoint (WP) being relocated .48 nautical miles southwest to match the intersection of Jet routes J–15 and J–183.

DATES: Comments must be received on or before January 13, 2014.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2013–0951 and Airspace Docket No. 13–ASW–22 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace Policy and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2013–0951 and Airspace Docket No. 13–ASW–22) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2013–0951 and Airspace Docket No. 13–ASW–22.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, Operations Support Group, Federal Aviation Administration, 2601 Meacham Blvd., Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to modify Q–20 in support of the Houston OAPM project. OAPM is intended to improve air traffic flows within an entire region resulting in increased capacity and fuel efficiency and reduced track distances. Q–20 extends between the Corona, NM, VHF Omnidirectional Range/Tactical Air Navigation (VORTAC) navigation aid and the Junction, TX, VORTAC navigation aid. This action would amend Q–20 by relocating the FUSCO WP to match the intersection of Jet routes J–15 and J–183, and re-designating FUSCO as a fix. The modification would enable aircraft filed eastbound via J–15, J–183, or Q–20, to file, after FUSCO, direct to a published transition to a Houston Standard Terminal Arrival Route. This would simplify flight plan filing and Flight Management Computer entries; thus, reducing the potential for routing errors.

High altitude RNAV routes are published in paragraph 2006 of FAA Order 7400.9X dated August 7, 2013, and effective September 15, 2013, which is incorporated by reference in 14 CFR 71.1. The RNAV route listed in this document would be subsequently published in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that

authority as it would modify the route structure as required to enhance the safe and efficient flow of air traffic in the United States.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9X, Airspace Designations and Reporting Points, dated August 7, 2013, and effective September 15, 2013, is amended as follows:

Paragraph 2006 United States Area Navigation Routes.

* * * * *

Q–20 CNX, NM to JCT, TX [Amended]

Corona (CNX), NM	VORTAC	(Lat. 34°22′01″ N., long. 105°40′41″ W.)
HONDS, NM	FIX	(Lat. 33°34′00″ N., long. 104°51′12″ W.)
UNNOS, NM	WP	(Lat. 32°57′00″ N., long. 103°56′00″ W.)
FUSCO, TX	FIX	(Lat. 31°10′38″ N., long. 101°19′47″ W.)
Junction (JCT), TX	VORTAC	(Lat. 30°35′53″ N., long. 99°49′03″ W.)

* * * * * * *

Issued in Washington, DC, on November 19, 2013.

Gary A. Norek,

Manager, Airspace Policy and ATC Procedures Group.

[FR Doc. 2013–28503 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–111753–12]

RIN 1545–BL24

Debt That Is a Position in Personal Property That Is Part of a Straddle; Hearing Cancellation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of a notice of public hearing on proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: This document cancels a public hearing on proposed regulations relating to the application of the straddle rules to a debt instrument.

DATES: The public hearing originally scheduled for January 15, 2014 at 10 a.m. is cancelled.

FOR FURTHER INFORMATION CONTACT: Oluwafunmilayo Taylor of the Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration) at (202) 317–6901 (not a toll-free number).

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking and by cross-reference to temporary regulations and a notice of public hearing that appeared in the **Federal Register** on September 5, 2013 (78 FR 54598) announced that a public hearing was scheduled for January 15, 2013, at 10 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. The subject of the public hearing is under section 1092(d) of the Internal Revenue Code.

The public comment period for these regulations expired on November 4, 2013. The notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing 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, November 20, 2013, no one has requested to speak. Therefore, the public hearing scheduled for January 15, 2013, is cancelled.

Martin V. Franks,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2013–28413 Filed 11–26–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2013–0905]

RIN 1625–AA00

Safety Zone; Bone Island Triathlon, Atlantic Ocean; Key West, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone on the waters of the Atlantic Ocean in Key West, Florida, during the Bone Island Triathlon on Saturday, January 25, 2014. The safety zone is necessary to provide for the safety of life on navigable waters during the event. Persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the safety zone unless authorized by the Captain of the Port Key West or a designated representative.

DATES: Comments and related material must be received by the Coast Guard on or before December 27, 2013.

ADDRESSES: You may submit comments identified by docket number using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140,

1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this Notice of Proposed Rulemaking, call or email Marine Science Technician First Class Ian G. Bowes, Sector Key West Prevention Department, Coast Guard; telephone (305) 292–8823, email *Ian.G.Bowes@uscg.mil.* If you have questions on viewing the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking

A. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov,* or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type the docket number USCG–2013–0322 in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number USCG–2013–0905 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

3. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

4. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one, using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the Federal Register.

B. Basis and Purpose

The legal basis for the rule is the Coast Guard's authority to establish regulated navigation areas and other limited access areas: 33 U.S.C. 1231; 46 U.S.C. Chapter 701; 46 U.S.C. 3306; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1; Department of Homeland Security Delegation No. 0170.1.

The purpose of the proposed rule is to protect race participants, participant vessels, spectators, and the general public from the hazards associated with the event.

C. Discussion of Proposed Rule

On January 25, 2014, Questor Multisport, LLC. is hosting the Bone Island Triathlon. The event will be held on the waters of the Atlantic Ocean located south of Key West, Florida. Approximately 700 swimmers will be participating in the swim portion of the race.

The proposed rule would establish a safety zone that encompasses certain waters of the Atlantic Ocean located south of Key West, Florida. The safety zone will be enforced from 7 a.m. until 10 a.m. on January 25, 2014. All persons and vessels, except those persons and vessels participating in the event, are prohibited from entering, transiting, anchoring, or remaining the safety zone. Persons and vessels may request authorization to enter, transit through, anchor in, or remain within the race area by contacting the Captain of the Port Key West by telephone at 305–292–8727, or a designated representative via VHF radio on channel 16. If authorization to enter, transit through, anchor in, or remain within the race area is granted by the Captain of the Port Key West or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Key West or a designated representative. The Coast Guard will provide notice of the regulated area by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

D. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 14 of these statutes or executive orders.

1. Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and

Budget has not reviewed it under those Orders.

The economic impact of this proposed rule is not significant for the following reasons: (1) The safety zone will only be enforced for three hours; (2) vessel traffic in the area is expected to be minimal during the enforcement period; (3) although persons and vessels will not be able to enter, transit through, anchor in, or remain within the safety zone without authorization from the Captain of the Port Key West or a designated representative, they may operate in the surrounding area during the enforcement period; (4) persons and vessels may still enter, transit through, anchor in, or remain within the safety zone if authorized by the Captain of the Port Key West or a designated representative; and (5) the Coast Guard will provide advance notification of the safety zone to the local maritime community by Local Notice to Mariners and Broadcast Notice to Mariners.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities. This proposed rule may affect the following entities, some of which may be small entities: the owners or operators of vessels intending to enter, transit through, anchor in, or remain within that portion of the Atlantic Ocean encompassed within the safety zone from 7:00 a.m. until 10:00 a.m. on January 25, 2014. For the reasons discussed in the Regulatory Planning and Review section above, this proposed rule will not have a significant economic impact on a substantial number of small entities.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this proposed rule would economically affect it.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

4. Collection of Information

This proposed rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A proposed rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

This proposed rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

9. Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

10. Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

11. Indian Tribal Governments

This proposed rule does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

13. Technical Standards

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

14. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a

category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule is categorically excluded, under Figure 2–1, paragraph (34)(g), of the Instruction. This proposed rule involves establishing a temporary safety zone that will be enforced for a total of five hours. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701; 46 U.S.C. 3306; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add a temporary § 165.T07–0905 to read as follows:

§ 165.T07–0905 Safety Zone; Bone Island Triathlon, Atlantic Ocean, Key West, FL.

(a) *Regulated area.* All waters of the Atlantic Ocean located south of Key West encompassed within an imaginary line connecting the following points: starting at Point 1 in position 24°32′49″ N, 81°47′19″ W; thence south to Point 2 in position 24°32′33″ N, 81°47′09″ W; thence northeast to Point 3 in position 24°33′00″ N, 81°45′44″ W; thence north to Point 4 in position 24°33′08″ N, 81°45′44″ W; thence southwest following the shoreline back to origin. All persons and vessels, except those persons and vessels participating in the event, are prohibited from entering, transiting through, anchoring in, or remaining within the race area. All coordinates are North American Datum.

(b) *Definition.* The term ''designated representative'' means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, state, and local officers designated by or assisting the Captain of the Port Key West in the enforcement of the regulated area.

(c) *Regulations.* (1) All persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area unless authorized by the Captain of the Port Key West or a designated representative.

(2) Persons and vessels desiring to enter, transit through, anchor in, or remain within the regulated area may contact the Captain of the Port Key West by telephone at (305) 292–8727, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, anchor in, or remain within the regulated area is granted by the Captain of the Port Key West or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Key West or a designated representative.

(3) The Coast Guard will provide notice of the regulated area by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

(d) *Effective date.* This rule is effective from 7:00 a.m. until 10:00 a.m. on January 25, 2014.

Dated: November 6, 2013.

A.S. Young Sr.,

Captain, U.S. Coast Guard, Captain of the Port Key West.

[FR Doc. 2013–28360 Filed 11–26–13; 8:45 am]

BILLING CODE 9110–04–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3050

[Docket No. RM2014–2; Order No. 1891]

Periodic Reporting

AGENCY: Postal Regulatory Commission.

ACTION: Proposed rulemaking.

SUMMARY: The Commission is establishing a rulemaking docket to consider eliminating a requirement that the Postal Service prepare the cost and revenue analysis report in an alternative format for the annual compliance review process. The Postal Service also seeks waiver of this requirement for the upcoming annual review process if the Commission cannot complete consideration of the request for permanent elimination before that process begins. The Commission provides public notice of the establishment of this docket, describes the Postal Service's request, and invites public comment on both the requested reporting change and the application for waiver.

DATES: *Responses to waiver request are due:* December 3, 2013. *Comments are due:* January 9, 2014. *Reply comments are due:* January 23, 2014.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Petition
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I. Introduction

On November 15, 2013, the Postal Service filed a petition requesting that the Commission initiate a rulemaking proceeding to eliminate the requirement for the production and submission, as part of the Annual Compliance Report (ACR) process, of the ''Alternate CRA (Cost and Revenue Analysis Report)'' required by Commission rule 3050.14. 39 CFR 3050.14. The Postal Service proposes the Commission remove the requirement to prepare the Alternate CRA by striking the second sentence of Commission rule 3050.14.[1] Petition at 1.

Additionally, the Postal Service requests that if the Commission anticipates that it might not be able to complete the requested rulemaking prior to the time at which preparation of this year's ACR must be finalized, the Postal Service contingently requests that the requirement be waived for fiscal year 2013. *Id.*

II. Petition

A. Request for Amendment of Rule 3050.14

The Postal Service explains that Commission rule 3050.14 establishes the format for the Cost and Revenue Analysis Report (CRA), which reports costs, revenues, volumes, contribution, and other information ''reflecting the classification structure in the Mail Classification Schedule.'' The same rule also calls for ''an alternative, more disaggregated format capable of reflecting the classification structure in effect prior to the adoption of the Postal Accountability and Enhancement Act.'' *Id.*

Initially, the Postal Service was able to file both public and non-public

[1] Petition of the United States Postal Service for the Initiation of a Proceeding to Eliminate the Requirement for an Alternative Format CRA Report, November 15, 2013 (Petition).

versions of the Alternate CRA. The Alternative CRA folders presented the best approximation that the Postal Service could provide of the costs, revenues, volumes, and contributions for the pre-Postal Accountability and Enhancement Act (PAEA) classifications. In recent years, however, as more products or more parts of products have been shifted to Competitive products, the Postal Service has provided only a non-public version of the Alternate CRA. *Id.* at 2. The resulting non-public folder presented the alternative format materials for market dominant and competitive mail while attempting to revert back to their pre-PAEA mail categories the revenues, volumes, costs, and weights of mail, including those that had subsequently been moved to the Competitive product list. *Id.* Because the data systems cannot always track the information by pre-PAEA categories, other methods of estimating the data required for the Alternate CRA were developed, with the result that the methodologies used to attempt to populate this chart vary. *Id.*

In order to reassemble the pre-PAEA classifications, the estimation approaches vary, such that the aggregation of cost data from underlying categories of mail from one report or estimation methodology may not always match those developed via a different estimation technique, and data for some categories may not exist at all. *Id.* at 3–4.

The Postal Service points out that the Alternate CRA provided a bridge from the pre-PAEA era to the post-PAEA era as a way of maintaining trend data based on the pre-PAEA categories to ensure no categories of postal products were inadvertently omitted, and to ensure the integrity of the data reporting. Citing changed circumstances, *e.g.,* the shifting of products and parts thereof from market dominant to competitive, the Postal Service questions the usefulness of maintaining the report in a necessarily non-public format, when the information reported is increasingly the result of ratio analyses, estimates, and splits tied to shares from seven years ago. *Id.* at 4. The Postal Service believes that any possible use of the report is now overshadowed by the weakness of the information contained therein, and that it is no longer relevant. *Id.*

The Postal Service also claims that the burden to produce this alternative format report is substantial when Postal Service resources are already most fully taxed by preparation of the other components of the ACR. By necessity, the Alternate CRA cannot be produced until all other ACR work has been completed, as it requires inputs from the CRA itself, the cost avoidance studies, and other analyses, which means that the Alternate CRA is the last part of the ACR production process and requires last-minute attention *Id.* at 4–5.

Therefore, the Postal Service requests the Commission delete the second sentence of Commission rule 3050.14 establishing the requirement for production and submission of the alternative format CRA with the ACR. *Id.* at 6.

B. Request for Waiver of Reporting Alternate Format CRA for FY 2013

The Postal Service recognizes that it may not be possible for the Commission to accomplish a permanent change in its rules in the next month prior to the Postal Service's preparation of the ACR. *Id.* at 5. As such, the Postal Service requests that the Commission waive application of the Alternative format CRA portion of rule 3050.14 for FY 2013. *Id.* at 5–6.

III. Notice and Comment

The Commission establishes Docket No. RM2014–2 for consideration of matters raised by the Petition. For specific details on the request, interested persons are encouraged to review the Petition which is available via the Commission's Web site at *http://www.prc.gov.* Information concerning access to these non-public materials is located in 39 CFR part 3007.

Interested persons may submit comments on the Petition to amend rule 3050.14 relating to the Alternative format CRA no later than January 9, 2014. Reply comments are due no later than January 23, 2014.

Responses to the Postal Service's request for a waiver of the Alternate CRA reporting requirement for FY 2013 are due no later than December 3, 2013.

Pursuant to 39 U.S.C. 505, Cassie D'Souza is designated as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. RM2014–2 for consideration of the matters raised by the Petition of the United States Postal Service for the Initiation of a Proceeding to eliminate the requirement for an Alternative format CRA Report.

2. Responses to the request for waiver of application of the Alternative format CRA portion of rule 3050.14 for FY 2013 are due no later than December 3, 2013.

3. Comments by interested persons in this proceeding on the request to eliminate the second sentence of rule 3050.14 relating to the Alternative format CRA are due no later than January 9, 2014. Reply comments are due no later than January 23, 2014.

4. Pursuant to 39 U.S.C. 505, the Commission appoints Cassie D'Souza to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

5. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–28485 Filed 11–26–13; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[EPA–HQ–OW–2010–0606; FRL–9903–54–OW]

Extension of Comment Period for the Water Quality Standards Regulatory Clarifications Proposed Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Environmental Protection Agency (EPA) is extending the comment period for the proposed rule ''Water Quality Standards Regulatory Clarifications''. EPA is extending the comment period in response to stakeholder requests for a 30-day extension.

DATES: Comments must be received on or before January 2, 2014. The comment period was originally scheduled to end on December 3, 2013.

ADDRESSES: Submit your comments, identified by Docket identification (ID) No. EPA–HQ–OW–2010–0606, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Email: ow-docket@epa.gov.*
- *Mail:* Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460. Attention: Docket ID No. EPA–HQ–OW–2010–0606.
- *Hand Delivery:* EPA Docket Center, EPA West Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004, Attention: Docket ID No. EPA–HQ–OW–2010–0606. Such deliveries

are only accepted during the Docket Center's normal hours of operation. Special arrangements should be made for deliveries of boxed information by calling 202–566–2426.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2010–0606. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through www.regulations.gov your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disc you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket visit the Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available (e.g., CBI or other information whose disclosure is restricted by statute). Certain other materials, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Office of Water Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744; the telephone number for the Office of Water Docket Center is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: Janita Aguirre, EPA Headquarters, Office of Water, Office of Science and Technology, at 202–566–1860 or email address: *WQSRegulatoryClarifications@epa.gov.*

SUPPLEMENTARY INFORMATION: On September 4, 2013, EPA published the proposed rule ''Water Quality Standards Regulatory Clarifications'' in the **Federal Register** (78 FR 54517). In the proposed rulemaking, EPA is proposing changes to the federal water quality standards (WQS) regulation at 40 CFR Part 131 which helps implement the Clean Water Act in order to improve effectiveness in restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. The proposed rule addresses the following key program areas: Administrator's determinations that new or revised WQS are necessary, designated uses, triennial reviews, antidegradation, variances to WQS, and compliance schedule authorizing provisions. Once final, the proposed rule will lead to improved water quality standard development, implementation and compliance as well as improving the ability of water systems to adapt and respond to the impacts of climate change.

The original comment deadline was December 3, 2013. This action extends the comment period for 30 days. Written comments must now be received by the January 2, 2014.

Dated: November 22, 2013.

Nancy K. Stoner,

Acting Assistant Administrator, Office of Water.

[FR Doc. 2013–28522 Filed 11–26–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2012–0638; FRL–9902–87]

Receipt of a Pesticide Petition Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of filing of petition and request for comment.

SUMMARY: This document announces the Agency's receipt of a revision to an initial filing of a pesticide petition requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before December 27, 2013.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2012–0638, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Olga Odiott, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–9369; email address: *odiott.olga@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that

you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments. When submitting comments, remember to:*

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is the agency taking?

EPA is announcing receipt of a *revised* pesticide petition filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), (21 U.S.C. 346a), requesting the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. The Agency is taking public comment on the request before responding to the petitioner. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petition described in this document contains data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the pesticide petition. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on this pesticide petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition that is the subject of this document, prepared by the petitioner, is included in a docket EPA has created for this rulemaking. The docket for this petition is available online at *http://www.regulations.gov.*

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities.

PP 2F8053 (Revised) (EPA–HQ–OPP–2012–0638). BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709–3528 submitted revisions to their initial pesticide petition 2F8053 to establish tolerances in 40 CFR part 180 for residues of the fungicide fluxapyroxad, (BAS 700 F); 1*H*-Pyrazole-4-carboxamide,3-(difluoromethyl)-1-methyl-*N*-(3',4',5'-trifluoro 1,1'-biphenyl-2-yl)-, its metabolites, and degradates, in or on various commodities. Based on EPA's evaluation of the data supporting the original petition, BASF Corporation revised the petition by proposing tolerances for fish-freshwater finfish; fish-shellfish, crustacean; and hog, meat byproducts at 0.01 parts per million (ppm); and by decreasing, increasing, or deleting previously proposed tolerances for various commodities.

Further information on the revised petition may be obtained through the petition summary referenced in this unit.

List of Subjects in 40 CFR Part 180

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 14, 2013.

G. Jeffery Herndon,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2013–28239 Filed 11–26–13; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 76

[MB Docket No. 11–93; FCC 13–141]

Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission proposes minor rule changes to incorporate by reference into the Commission's rules and make mandatory the Advanced Television Systems Committee's (ATSC) March 12, 2013 A/85:2013 Recommended Practice (Successor RP), replacing the July 25, 2011 A/85:2011 RP (Current RP), incorporated into the Commission's rules in 2011. The Commercial Advertisement Loudness Mitigation (CALM) Act directs the Commission to incorporate by reference and make mandatory ''any successor'' to the ATSC's A/85 Recommended Practice (RP). This document also seeks comment on the appropriate timing for the 2013 Successor RP to replace the 2011 Current RP, and proposes an effective date of one year from the release date of the Report and Order resulting from this proceeding. The 2013 Successor RP applies an improved loudness measurement algorithm to conform to the International Telecommunication Union's (ITU) updated BS.1770 measurement algorithm, ''BS.1770–3.''

DATES: Comments are due on or before December 27, 2013; reply comments are due on or before January 13, 2014.

ADDRESSES: You may submit comments, identified by MB Docket No. 11–93, by any of the following methods:

• *Federal Communications Commission (FCC) Electronic Comment*

Filing System (ECFS) Web site: http://fjallfoss.fcc.gov/ecfs2/. Follow the instructions for submitting comments.

• *Mail:* U.S. Postal Service first-class, Express, and Priority mail must be addressed to the FCC Secretary, Office of the Secretary, Federal Communications Commission, 445 12th Street SW., Washington, DC 20554. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

• *Hand or Messenger Delivery:* All hand-delivered or messenger-delivered paper filings for the FCC Secretary must be delivered to FCC Headquarters at 445 12th Street SW., Room TW–A325, Washington, DC 20554.

• *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530; or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the section IV. ''PROCEDURAL MATTERS'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Evan Baranoff, Evan.Baranoff@fcc.gov, of the Media Bureau, Policy Division, (202) 418–2120 or Shabnam Javid, *Shabnam.Javid@fcc.gov,* of the Engineering Division, Media Bureau at (202) 418–7000.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Further Notice of Proposed Rulemaking* (FNPRM), FCC 13–141, adopted on October 31, 2013, and released on November 1, 2013. The full text of this document is available electronically via the FCC's Electronic Comment Filing System (ECFS) Web site at *http://fjallfoss.fcc.gov/ecfs2/*or via the FCC's Electronic Document Management System (EDOCS) Web site at *http://fjallfoss.fcc.gov/edocs_public/.* (Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.) This document is also available for public inspection and copying during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC, 20554. The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Document Summary

I. Introduction

1. In this Further Notice of Proposed Rulemaking (FNPRM), we propose minor rule changes to incorporate into our rules the Advanced Television Systems Committee's (ATSC) [1] recently published successor document to its July 25, 2011 A/85:2011 Recommended Practice (Current RP).[2] The Commercial Advertisement Loudness Mitigation (CALM) Act directs the Commission to incorporate such successor documents by reference into the rules and make them mandatory.[3] While this proceeding is pending, the Current RP that the Commission incorporated into our rules in 2011 will continue to be mandatory until the proposed rule modifications incorporating the March 12, 2013 A/85:2013 Recommended Practice (Successor RP) take effect, except that we waive this rule as necessary to permit parties the alternative to follow the loudness measurement method contained in the Successor RP, rather than that in the Current RP, prior to the rule modifications taking effect.[4]

II. Background

2. On December 13, 2011, the Commission released a Report and Order adopting rules implementing the CALM Act.[5] As mandated by the statute,[6] the Commission incorporated into its rules by reference and made mandatory the 2011 ATSC A/85 RP,[7] which describes how the television industry can monitor and control the loudness level of digital TV programming. The rules took effect on December 13, 2012 and require digital TV broadcasters, digital cable operators, satellite TV providers, and other digital MVPDs to ensure that the commercials they transmit to viewers comply with the A/85 Recommended Practice (RP).[8]

3. Section 2(a) of the CALM Act mandates that the Commission's rules incorporate by reference and make mandatory ''any successor'' to the RP, affording the Commission no discretion in this regard.[9] On March 12, 2013, the ATSC published a successor document to its 2011 A/85 RP. As described by the ATSC, the Successor RP applies an improved loudness measurement algorithm to conform to the International Telecommunication Union's (ITU) [10] updated BS.1770 measurement algorithm, ''BS.1770–3.'' [11] BS.1770–3 employs ''gating'' that will exclude very quiet or silent passages of a commercial when

[1] According to its Web site, ATSC is an international, non-profit organization developing voluntary standards for digital television. The ATSC member organizations represent the broadcast, broadcast equipment, motion picture, consumer electronics, computer, cable, satellite, and semiconductor industries. ATSC creates and fosters implementation of voluntary Standards and Recommended Practices to advance digital television broadcasting and to facilitate interoperability with other media. *See http://www.atsc.org/aboutatsc.html.*

[2] *See* ATSC A/85:2013 ''ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television,'' (March 12, 2013) (Successor RP). The Successor RP, which replaces A/85:2011''ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television,'' (July 25, 2011) (Current RP), is available on the ATSC Web site at: *http://www.atsc.org/cms/standards/A_85–2013.pdf.*

[3] See 47 U.S.C. 621(a); *see also Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act,* MB Docket No. 11–93, Report and Order, FCC 11–182, 77 FR 40276, July 9, 2012 (*CALM Act Report and Order*).

[4] *See infra* para. 7.

[5] *See generally CALM Act Report and Order.*

[6] 47 U.S.C. 621(a).

[7] *See* Current RP, which was incorporated as it existed on the date of its approval by the Director of the Federal Register (*i.e.,* Dec. 13, 2012). *See* 47 CFR 73.8000(a), (b)(5) and 76.602(a), (b)(2); 1 CFR 51.1(f) (''Incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included.''). The Current RP is available at the ATSC Web site: *http://www.atsc.org/cms/standards/a_85–2011a.pdf.*

[8] *See* 47 CFR 73.682(e) and 76.607.

[9] 47 U.S.C. 621(a). *See CALM Act Report and Order,* para. 20 (observing that ''Section 2(a) mandates that the required regulation incorporate by reference and make mandatory ''any successor'' to the RP, affording the Commission no discretion in this regard.'').

[10] The ITU is a specialized agency of the United Nations whose goal is to promote international cooperation in the efficient use of telecommunications, including the use of the radio frequency spectrum. The ITU publishes technical recommendations concerning various aspects of radio communication technology. These recommendations are subject to an international peer review and approval process in which the Commission participates.

[11] *See* Letter from Mark S. Richer, ATSC President, to Alison Neplokh, Chief Engineer, Media Bureau, FCC, at 1 (dated April 5, 2013) (*ATSC April 5 Letter*) (stating that ''the revised version of A/85 includes an update of the reference to the [ITU] recommendation for 'Algorithms to measure audio programme loudness and true-peak audio level.' The revised A/85 now references ITU–R BS.1770–3.''). As explained in the *CALM Act Report and Order,* the ITU–R BS.1770 measurement algorithm provides a numerical value that indicates the perceived loudness of the content (measured in units of LKFS—loudness, K-weighted, relative to full scale) by averaging the loudness of audio signals in all channels over the duration of the content. *See CALM Act Report and Order,* para. 5.

calculating the average loudness of that commercial.[12] Use of the new algorithm may result in some reduction in commercial loudness in certain circumstances. The successor RP also contains other minor changes that do not affect our rules.[13]

III. Discussion

4. As an initial matter, we address a procedural issue. In the *CALM Act Report and Order,* the Commission concluded that ''although the 'good cause' exception [to the Administrative Procedure Act] excuses compliance with notice and comment requirements under these circumstances, the public interest [would] be better served by an opportunity for comment in most cases.'' [14] The *CALM Act Report and Order* further stated that ''if, however, a successor is not sufficiently substantive to require interpretation or public comment, [the Commission would] simply adopt the successor by public notice.'' [15] Although we find that the ''good cause'' exception arguably would allow us to forgo notice and comment requirements in the instant circumstances because the successor RP's changes do not require substantive interpretation on our part, we conclude that it is appropriate for us to seek comment on an appropriate timeline for implementation, as described below.

5. We tentatively conclude that the only substantive change raised by the Successor RP as it relates to our rules is the change to the measurement algorithm to conform to BS.1770–3, and seek comment on this tentative conclusion. As a practical matter, this change seems to be designed to prevent advertisers from using silent passages to offset excessively loud passages when calculating the average loudness of program material. Thus, once this Successor RP is implemented, consumers may notice a modest decrease in the perceived loudness of certain commercials. This change is consistent with the type of updates that we believe Congress intended the Commission to incorporate in its rules by specifying in the CALM Act that the Commission shall make mandatory successor versions of the RP. Accordingly, we propose to adopt the Successor RP and incorporate it by reference into our rules.[16]

6. We recognize that, as a result of the proposed changes, parties [17] may need a software or device upgrade for their equipment. Accordingly, we believe that it is appropriate to afford a reasonable amount of time for affected parties to implement the Successor RP. We are mindful of the fact that many such parties have recently purchased new equipment to comply with the Commission's rules implementing the statute, which took effect on December 13, 2012. Therefore, we seek comment about the costs and timing associated with upgrading existing equipment to comply with the Successor RP. Based on the limited scope of the rule changes raised by the Successor RP, we believe an effective date of one year from the release date of the Report and Order in the instant proceeding would provide enough time to implement any necessary equipment upgrades. We seek comment on this proposal, including the costs and benefits of this proposed implementation deadline. In particular, we seek specific comment from affected parties who have already purchased equipment that is not easily upgradable or for which implementation of the Successor RP would be significantly burdensome for some other reason. We also seek comment on whether small TV stations and MVPDs, as a class, may need more time to implement the Successor RP.[18] In setting an effective date, we seek to ensure that consumers can benefit in a timely fashion from the improved method of controlling loudness,[19] while avoiding imposing unreasonable burdens on affected parties. If a commenter suggests that any party should have more time to implement the Successor RP, then we ask that commenter to explain in detail the reasons for needing the additional time and why that need outweighs the effect that the longer implementation timeline would have on consumers.

7. Although stations and MVPDs must continue to comply with the 2011 A/85 RP that is currently incorporated by reference in the rules, we waive our rules to permit stations and MVPDs to implement the Successor RP early. We expect that some stations and MVPDs may be able and willing to implement the Successor RP in less than the year we propose to allow for compliance with the new standard. Therefore, to the extent it may be necessary to expressly permit such early adoption of the Successor RP, and in light of the fact that the CALM Act makes mandatory the revision of our rules proposed herein, we hereby waive our rules to allow stations and MVPDs to comply with our existing rules by following either the BS.1770–1 measurement method in the Current RP or the BS.1770–3 updated measurement method in the Successor RP. Although the change in the measurement method is minor, we believe that consumers may benefit from early implementation of the improved loudness measurement technique incorporated into the Successor RP, and allowing stations and MVPDs to demonstrate compliance at this time based on the new standard is accordingly in the public interest. Finally, we invite comment on whether the Successor RP raises any other issues that should be addressed in this proceeding.[20]

[12] *Id.* (''Version 3 of BS.1770, adds 'gating' (excluding low level passages from the measured value) to the measurement algorithm.'').

[13] *See ATSC April 5 Letter* at 1. ATSC explains that version 3 of BS.1770 also ''includes some minor editorial updates to the loudness measurement text and a minor correction to the true-peak measurement algorithm.'' *Id.* ATSC also explains that ''[b]eyond the reference change, A/85 now includes improved guidance for measuring the loudness of surround programming in both its multichannel format and in its 2-channel downmix.* * * In addition, A/85 is now specific about the differences between loudness and dynamic range.'' *Id.*

[14] *Id.* (citing 5 U.S.C. 553(b)(B) (providing that Administrative Procedure Act's notice and comment requirements do not apply ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest'').

[15] *Id.*

[16] *See* Proposed rules.

[17] In addition to broadcasters and MVPDs, parties affected by these rules may include programmers and other third parties that may be performing the loudness measurements on which stations and MVPDs rely.

[18] The *CALM Act Report and Order* defines a ''small broadcast station'' and a ''small MVPD system'' for purposes of a streamlined financial hardship waiver to obtain a one-year waiver of the effective date of the rules. *See CALM Act Report and Order,* paras. 53–54. A ''small broadcast station'' is defined as a TV station with $14.0 million or less in annual receipts or that is located in television markets 150 to 210. A ''small MVPD system'' is defined as an MVPD with fewer than 15,000 subscribers (as of December 31, 2011) and that is not affiliated with a larger operator serving more than 10 percent of all MVPD subscribers. *Id.* We note that some small stations and MVPDs have obtained financial hardship waivers for a one-year waiver of the effective date of the rules (until December 13, 2013) and are eligible for a second one-year waiver (until December 13, 2014).

[19] We note that the potential benefit that may occur for consumers is limited to situations where a commercial has a significant amount of silent or very quiet passages. The new algorithm's use of ''gating'' is intended to more accurately reflect consumer perceptions in situations in which the commercial contains both very loud and very quiet passages. In this circumstance, the new algorithm would result in a greater perceived loudness measurement than the old algorithm, therefore requiring the commercial to be adjusted using one of the methods in the RP. Thus, the new algorithm may result in somewhat reduced loudness problems perceived by consumers in this circumstance, but is otherwise substantially the same as the existing algorithm.

[20] We note, however, that the scope of this proceeding is limited to the incorporation into our rules of the Successor RP and we will not revisit issues already decided by the Commission. Any comments or reply comments that raise such issues will not be substantively considered.

IV. Procedural Matters

8. *Initial Regulatory Flexibility Act Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA)[21] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) concerning the possible significant economic impact on small entities of the rule changes proposed in this *Order and Further Notice of Proposed Rulemaking* (*FNPRM*). Written public comments are requested on this IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *FNPRM* and they must have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the *FNPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[22] In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the **Federal Register.**[23]

1. Need for, and Objectives of, the Proposed Rule Changes

9. This FNPRM proposes minor rule changes to incorporate by reference into the Commission's rules and make mandatory the Advanced Television Systems Committee's (ATSC) March 12, 2013 A/85:2013 Recommended Practice (RP) (Successor RP).[24] The Commercial Advertisement Loudness Mitigation (CALM) Act directs the Commission to incorporate by reference and make mandatory ''any successor'' to the ATSC's A/85 Recommended Practice (RP), affording the Commission no discretion in this regard.[25] Accordingly, this FNPRM proposes to replace the July 25, 2011 A/85:2011 RP (Current RP), incorporated into our rules in 2011, with the Successor RP published in 2013.[26] This FNPRM also seeks comment on the appropriate timing for the 2013 Successor RP to replace the 2011 Current RP. As mandated by the statute, the proposed rule changes will apply to television station broadcasters and multichannel video programming distributors (MVPDs).[27]

2. Legal Basis

10. The proposed action is authorized pursuant to the Commercial Advertisement Loudness Mitigation Act of 2010, Public Law 111–311, 124 Stat. 3294, and Sections 1, 2(a), 4(i) and (j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), and 303 and 621.

3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

11. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[28] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[29] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[30] A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[31] The rule changes proposed herein will directly affect small television broadcast stations and small MVPD systems, which include cable operators and satellite video providers. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

12. *Television Broadcasting.* This economic census category ''comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.''[32] The SBA has created the following small business size standard for Television Broadcasting businesses: those having $35.5 million or less in annual receipts.[33] The Commission has estimated the number of licensed commercial television stations to be 1,386.[34] In addition, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on June 10, 2013, about 1,245 (or about 90 percent) the estimated 1,386 commercial television stations had revenues of $35.5 million or less. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.[35] NCE stations are non-profit, and therefore considered to be small entities.[36] Therefore, we estimate that the majority of television broadcast stations are small entities.

13. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[37] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

14. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined as

[21] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601 *et. seq.,* has been amended by the Contract With America Advancement Act of 1996, Pub. L. 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[22] *See* 5 U.S.C. 603(a).

[23] *See id.*

[24] ATSC A/85:2013 ''ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television,'' (March 12, 2013) (Successor RP).

[25] See 47 U.S.C. 621(a); *see also CALM Act Report and Order.*

[26] The Successor RP, which replaces A/85:2011''ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television,'' (July 25, 2011) (Current RP), is available on the ATSC Web site at: *http://www.atsc.org/cms/standards/A_85-2013.pdf.*

[27] We refer herein to covered entities collectively as ''stations/MVPDs'' or ''regulated parties.''

[28] 5 U.S.C. 603(b)(3).

[29] 5 U.S.C. 601(6).

[30] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.'' 5 U.S.C. 601(3).

[31] 15 U.S.C. 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[32] U.S. Census Bureau, 2012 NAICS Definitions, ''515120 Television Broadcasting,'' at *http://www.census.gov/cgi-bin/sssd/naics/naicsrch.*

[33] 13 CFR 121.201; 2012 NAICS code 515120.

[34] *See Broadcast Station Totals as of June 30, 2013,* Press Release (MB rel. July 10, 2013) (*Broadcast Station Totals Press Release)* at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-322079A1.pdf.*

[35] *See Broadcast Station Totals, supra.*

[36] *See generally* 5 U.S.C. 601(4), (6).

[37] ''[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.'' 13 CFR 21.103(a)(1).

follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.'' [38] The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.[39] Census data for 2007 shows that there were 31,996 establishments that operated that year.[40] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[41] Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

15. *Cable Companies and Systems.* The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers nationwide.[42] Industry data shows that there were 1,141 cable companies at the end of June 2012.[43] Of this total, all but 10 incumbent cable companies are small under this size standard.[44] In addition, under the Commission's rate regulation rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers.[45] Current Commission records show 4,945 cable systems nationwide.[46] Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

16. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' [47] There are approximately 56.4 million incumbent cable video subscribers in the United States today.[48] Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[49] Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.[50] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[51] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

17. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic ''dish'' antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, Wired Telecommunications Carriers,[52] which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[53] Census data for 2007 shows that there were 31,996 establishments that operated that year.[54]

[38] U.S. Census Bureau, 2012 NAICS Definitions, ''517110 Wired Telecommunications Carriers'' (partial definition) at *http://www.census.gov/cgi-bin/sssd/naics/naicsrch.* Examples of this category are: broadband Internet service providers (*e.g.,* cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (CCTV) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

[39] 13 CFR 121.201; 2012 NAICS code 517110.

[40] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United States: 2007—2007 Economic Census,'' NAICS code 517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[41] *Id.*

[42] 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection And Competition Act of 1992: Rate Regulation,* MM Docket No. 92–266, MM Docket No. 93–215, Sixth Report and Order and Eleventh Order on Reconsideration, FCC 95–196, 60 FR 35854, July 12, 1995.

[43] NCTA, Industry Data, Number of Cable Operating Companies (June 2012), *http://www.ncta.com/Statistics.aspx* (visited Sept. 28, 2012). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming,* MB Docket No. 12–203, Fifteenth Report, FCC 13–99 at para. 24 (rel. July 22, 2013) (*15th Annual Competition Report).*

[44] *See* SNL Kagan, ''Top Cable MSOs—12/12 Q''; available at *http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc.* We note that, when applied to an MVPD operator, under this size standard (*i.e.,* 400,000 or fewer subscribers) all but 14 MVPD operators would be considered small. *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), *http://www.ncta.com/industry-data* (visited Aug. 30, 2013). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. *See CALM Act Report and Order,* para. 37 (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

[45] 47 CFR 76.901(c).

[46] The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on Aug. 28, 2013. A cable system is a physical system integrated to a principal headend.

[47] 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3.

[48] *See* NCTA, Industry Data, Cable Video Customers (2012), *http://www.ncta.com/industry-data* (visited Aug. 30, 2013).

[49] 47 CFR 76.901(f); *see* Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, DA 01–158 (Cable Services Bureau, Jan. 24, 2001).

[50] *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), *http://www.ncta.com/industry-data* (visited Aug. 30, 2013).

[51] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to Section 76.901(f) of the Commission's rules. *See* 47 CFR 76.901(f).

[52] *See* 13 CFR 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. *By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.''* (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, ''517110 Wired Telecommunications Carriers'' at *http://www.census.gov/cgi-bin/sssd/naics/naicsrch.*

[53] 13 CFR 121.201; 2012 NAICS code 517110.

[54] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United

Continued

Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[55] Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled ''Cable and Other Program Distribution.'' The definition of Cable and Other Program Distribution provided that a small entity is one with $12.5 million or less in annual receipts.[56] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.[57] Each currently offer subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

18. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, Wired Telecommunications Carriers,[58] which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[59] Census data for 2007 shows that there were 31,996 establishments that operated that year.[60] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[61] Therefore, under this size standard, the majority of such businesses can be considered small.

19. *Open Video Services.* The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[62] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[63] OVS falls within the SBA small business size standard covering cable services, which is ''Wired Telecommunications Carriers.''[64] The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.[65] Census data for 2007 shows that there were 31,996 establishments that operated that year.[66] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[67] Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[68] Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises.[69] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

20. As stated above, the *FNPRM* proposes to incorporate by reference into our rules and make mandatory the Successor RP published in 2013, thereby replacing the Current RP incorporated into our rules in 2011. As discussed in the *FNPRM,* the only substantive change raised by the Successor RP appears to be the change in the measurement algorithm to be used when calculating the average loudness of a commercial.[70] Under the Current RP, television stations and MVPDs use the BS.1770–1 measurement method, whereas, under the Successor RP, stations and MVPDs will use the BS.1770–3 method. The primary difference is that BS.1770–3 employs ''gating'' that will exclude very quiet or silent passages of a commercial when calculating the average loudness of that commercial. As a result, stations and MVPDs may need a software or device upgrade for their equipment in order to perform the new loudness measurement

States: 2007—2007 Economic Census,'' NAICS code 517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[55] *Id.*

[56] 13 CFR 121.201, NAICS code 517510 (2002).

[57] *See 15th Annual Competition Report,* at para. 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at paras. 27, 110–11.

[58] *See* 13 CFR 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. *By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.''* (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, ''517110 Wired Telecommunications Carriers'' at *http://www.census.gov/cgi-bin/sssd/naics/naicsrch.*

[59] 13 CFR 121.201; 2012 NAICS code 517110.

[60] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United States: 2007—2007 Economic Census,'' NAICS code 517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[61] *Id.*

[62] 47 U.S.C. 571(a)(3) through (4). *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* MB Docket No. 06–189, Thirteenth Annual Report, FCC 07–206, 74 FR 11102, March 16, 2009 (*Thirteenth Annual Cable Competition Report*).

[63] *See* 47 U.S.C. 573.

[64] *See* 13 CFR 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined in part as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.'' U.S. Census Bureau, 2012 NAICS Definitions, ''517110 Wired Telecommunications Carriers'' at *http://www.census.gov/cgi-bin/sssd/naics/naicsrch.*

[65] 13 CFR 121.201; 2012 NAICS code 517110.

[66] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, ''Information: Subject Series—Estab and Firm Size: Employment Size of Establishments for the United States: 2007—2007 Economic Census,'' NAICS code 517110, Table EC0751SSSZ2; available at *http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.*

[67] *Id.*

[68] A list of OVS certifications may be found at *http://www.fcc.gov/mb/ovs/csovscer.html.*

[69] *See Thirteenth Annual Cable Competition Report.* BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[70] *See* FNPRM paras. 4–5.

technique. The *FNPRM* seeks comment about the costs and timing associated with upgrading existing equipment to comply with the Successor RP. The *FNPRM* does not otherwise propose any new reporting, recordkeeping or other compliance requirements.[71]

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

21. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[72]

22. The CALM Act requires that the new technical loudness standard (*i.e.,* the 2011 ATSC A/85 RP) be made mandatory for all stations and MVPDs, regardless of size.[73] The statute also requires that the Commission make mandatory ''any successor'' to the ATSC A/85 RP, affording the Commission no discretion in this regard.[74] However, in this *FNPRM,* the Commission finds that it has some discretion to afford a reasonable amount of time for regulated parties to implement the Successor RP, and proposes to afford regulated parties with one year from the release date of the Report and Order in the instant proceeding to implement any necessary equipment upgrades. The *FNPRM* specifically considers (and seeks comment on) whether small TV stations and MVPDs, as a class, may need more time to implement the Successor RP.[75]

6. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

23. None.

24. *Initial Paperwork Reduction Act of 1995 Analysis.* This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA).[76] In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.[77]

25. *Ex Parte Rules.* This matter will be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules.[78] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed.[79] More than a one- or two-sentence description of the views and arguments presented is generally required.[80] Additional rules pertaining to oral and written presentations in ''permit-but-disclose'' proceedings are set forth in section 1.1206(b) of the rules.[81]

26. *Filing Requirements.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules,[82] interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. All comments are to reference MB Docket No. 11–93 and may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS) or (2) by filing paper copies.[83]

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554.

27. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

28. *Availability of Documents.* Comments and reply comments will be publically available online via ECFS.[84] These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in Room CY–A257 at FCC Headquarters, 445 12th Street SW., Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8:00 a.m. to 4:30

[71] For an overview of the existing compliance requirements pursuant to our implementation of the CALM Act, see Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act, MB Docket No. 11–93, Small Entity Compliance Guide, DA 13–1002 (MB rel. May 7, 2013); available at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-13-1002A1.docx.*

[72] 5 U.S.C. 603(c)(1) through (c)(4).

[73] *See* 47 U.S.C. 621(a).

[74] *Id.*

[75] *See* FNPRM paras. 6–7 (also seeking ''specific comment from affected parties who have already purchased equipment that is not easily upgradable or for which implementation of the Successor RP would be significantly burdensome for some other reason'').

[76] The Paperwork Reduction Act of 1995 (PRA), Pub. L. 104–13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

[77] The Small Business Paperwork Relief Act of 2002 (SBPRA), Pub. L. 107–198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. 3506(c)(4).

[78] *See* 47 CFR 1.1206 (''Permit-but-disclose'' proceedings''); *see also id.* 1.1200 through 1.1216.

[79] *See id.* 1.1206(b)(2).

[80] See id.

[81] *See id.* 1.1206(b). *See also Commission Emphasizes the Public's Responsibilities in Permit-But-Disclose Proceedings,* Public Notice, 15 FCC Rcd 19945 (2000). We note that the Commission has amended the rules governing the content of ex parte notices. *See Amendment of the Commission's Ex Parte Rules and Other Procedural Rules,* GC Docket No. 10–43, Report and Order and Further Notice of Proposed Rulemaking, FCC 11–11, 76 FR 24376, May 2, 2011.

[82] *See* 47 CFR 1.415, 1419.

[83] *See Electronic Filing of Documents in Rulemaking Proceedings,* GC Docket No. 97–113, Report and Order, FCC 98–56, 63 FR 24121, May 1, 1998.

[84] Documents will generally be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

p.m. and Friday from 8:00 a.m. to 11:30 a.m.

29. For additional information, contact Evan Baranoff, *Evan.Baranoff@fcc.gov*, of the Media Bureau, Policy Division, (202) 418–7142 or Shabnam Javid, *Shabnam.Javid@fcc.gov*, of the Engineering Division, Media Bureau at (202) 418–2672. Direct press inquiries to Janice Wise at (202) 418–8165.

V. Ordering Clauses

30. Accordingly, *it is ordered* that pursuant to the Commercial Advertisement Loudness Mitigation Act of 2010, Public Law 111–311, 124 Stat. 3294, and Sections 1, 2(a), 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), and 303(r), and 621, this Order and Further Notice of Proposed Rulemaking *is adopted* and *notice is hereby given* of the proposals and tentative conclusions described in this Further Notice of Proposed Rulemaking.

31. *It is further ordered* that, pursuant to the Commercial Advertisement Loudness Mitigation Act of 2010, Public Law 111–311, 124 Stat. 3294, and section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 621, and section 1.3 of the Commission's rules, 47 CFR 1.3, that sections 73.682(e) and 76.607 of the rules, 47 CFR 73.682(e) and 76.607, are waived to the extent described in paragraph 7 herein.

32. *It is further ordered* that the Reference Information Center, Consumer and Governmental Affairs Bureau, shall send a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Parts 73 and 76

Cable television, Digital television, Incorporation by reference, and Satellite television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 73 and 76 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

§ 73.800 [Amended]

■ 2. Section 73.8000 is amended in paragraph (b)(5) by removing ''ATSC A/85:2011'' and adding in its place ''ATSC A/85:2013'', and removing the date ''July 25, 2011'' and adding in its place ''March 12, 2013''.

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 3. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

§ 76.602 [Amended]

■ 4. Section 76.602 is amended in paragraph (b)(2) by removing ''ATSC A/85:2011'' and adding in its place ''ATSC A/85: 2013'', and removing the date ''July 25, 2011'' and adding in its place ''March 12, 2013''.

[FR Doc. 2013–28235 Filed 11–26–13; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 78, No. 229

Wednesday, November 27, 2013

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Notice of December 11 Advisory Committee on Voluntary Foreign Aid Meeting

AGENCY: United States Agency for International Development.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, notice is hereby given of a meeting of the Advisory Committee on Voluntary Foreign Aid (ACVFA).

Date: Wednesday, December 11, 2013.

Time: 2:30 p.m. to 4:00 p.m.

Location: Horizon Room, Ronald Reagan Building, 1300 Pennsylvania Ave. NW., Washington, DC 20523.

Agenda

USAID Administrator Rajiv Shah will make opening remarks, followed by a discussion of current issues facing USAID, and an opportunity for public comment. A draft agenda will be forthcoming on the ACVFA Web site at *http://www.usaid.gov/who-we-are/organization/advisory-committee.*

Stakeholders

The meeting is free and open to the public. Persons wishing to attend should register online at *http://www.usaid.gov/who-we-are/organization/advisory-committee/get-involved.*

FOR FURTHER INFORMATION CONTACT: Sandy Stonesifer, 202–712–4372

Dated: November 20, 2013.

Sandy Stonesifer,

Executive Director, Advisory Committee on Voluntary Foreign Aid (ACVFA), U.S. Agency for International Development.

[FR Doc. 2013–28456 Filed 11–26–13; 8:45 am]

BILLING CODE 6116–01–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Information Collection Activity; Comment Request

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), the Rural Utilities Service invites comments on this information collection for which the Agency intends to request approval from the Office of Management and Budget (OMB).

DATES: Comments on this notice must be received by January 27, 2014.

FOR FURTHER INFORMATION CONTACT: Michele L. Brooks, Director, Program Development & Regulatory Analysis, Rural Utilities Service, USDA, 1400 Independence Ave. SW., STOP 1522, Room 5159 South Building, Washington, DC 20250–1522. Email: *Michele.Brooks@wdc.usda.gov.* Telephone: (202) 690–1078. FAX: (202) 720–4120.

SUPPLEMENTARY INFORMATION:

Title: 7 CFR part 1753, Telecommunications System Construction Policies and Procedures.

OMB Control Number: 0572–0059.

Type of Request: Extension of a currently approved collection package.

Abstract: In order to facilitate the programmatic interest of the RE Act, and, in order to assure that loans made or guaranteed by the Agency are adequately secured, the Agency, as a secured lender, has established certain forms for materials, equipment and construction of electric and telecommunications systems. The use of standard forms, construction contracts, and procurement procedures helps assure the Agency that appropriate standards and specifications are maintained, the Agency's loan security is not adversely affected; and the loan and loan guarantee funds are used effectively and for the intended purposes.

Over the past six years, the Agency has undertaken a comprehensive review of its Telecommunications Program contracts. The purpose of this undertaking is to improve customer service to the Agency's rural borrowers with a more efficient and effective means to complete a contract transaction as well as improve the internal efficiency of processing contracts. The anticipated outcome when the contract revision process is completed is that the paperwork burden will not increase and may be reduced.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 2 hours per response.

Respondents: Business or other for-profit and non-profit institutions.

Estimated Number of Respondents: 513.

Estimated Number of Responses per Respondent: 10.

Estimate Total Annual Burden on Respondents: 10,592 hours.

Copies of this information collection can be requested from MaryPat Daskal, Program Development and Regulatory Analysis, Rural Utilities Service by telephone at (202) 720–7853 or email: *MaryPat.Daskdal@wdc.usda.gov.*

Comments are invited on (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumption used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques on other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: November 18, 2013.

John Charles Padalino,

Administrator, Rural Utilities Service.

[FR Doc. 2013–28446 Filed 11–26–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the

following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Economic Analysis (BEA).

Title: Institutional Remittances to Foreign Countries.

OMB Control Number: 0608–0002.

Form Number(s): BE–40.

Type of Request: Extension of a currently approved submission.

Burden Hours: 1,265.

Number of Respondents: 125 quarterly respondents and 343 annual respondents.

Average Hours per Response: 1 hour and 30 minutes per response.

Needs and Uses: The data are needed by The Bureau of Economic Analysis (BEA) to estimate the ''private remittances'' portion of the U.S. International Transactions Accounts (ITAs), which BEA publishes quarterly. The ITAs are used extensively by both government and private organizations for national and international economic policy formulation and for analytical purposes. Without this information, an integral component of the ITAs would be omitted. No other government agency collects comprehensive quarterly/annual data on institutional remittances to foreign countries.

Affected Public: Not-for-profit institutions.

Frequency: Annually/Quarterly.

Respondent's Obligation: Voluntary.

Legal Authority: Bretton Woods Agreement Act, Section 8, and E.O. 10033, as amended.

OMB Desk Officer: Paul Bugg, (202) 395–3093.

Copies of the above information collection proposal can be obtained by writing Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 or via email at *JJessup@doc.gov.*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Paul Bugg, OMB Desk Officer, via email at *pbugg@omb.eop.gov* or by FAX at 202–395–7245.

Dated: November 21, 2013

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–28380 Filed 11–26–13; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Regulations and Procedures Technical Advisory Committee; Notice of Partially Closed Meeting

The Regulations and Procedures Technical Advisory Committee (RPTAC) will meet December 10, 2013, 9:00 a.m., Room 3884, in the Herbert C. Hoover Building, 14th Street between Constitution and Pennsylvania Avenues NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on implementation of the Export Administration Regulations (EAR) and provides for continuing review to update the EAR as needed.

Agenda

Public Session

1. Opening remarks by the Chairman.
2. Opening remarks by Bureau of Industry and Security.
3. Export Enforcement update.
4. Regulations update.
5. Update on Export Control Reform Training for Customs and Border Protection Officers.
6. Working group reports.
7. Census Automated Export System update segment.
8. Presentation of papers or comments by the Public.

Closed Session

9. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 25 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov* no later than December 3, 2013.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via email.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on February 4, 2013, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § (10)(d)), that the portion of the meeting dealing with pre-decisional changes to the Commerce Control List and U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: November 20, 2013.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2013–28398 Filed 11–26–13; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

President's Export Council Subcommittee on Export Administration; Notice of Open Meeting—Teleconference

The President's Export Council Subcommittee on Export Administration (PECSEA) will meet via teleconference on December 13, 2013, from 1:00 p.m. to 3:00 p.m. The PECSEA provides advice on matters pertinent to those portions of the Export Administration Act, as amended, that deal with United States policies of encouraging trade with all countries with which the United States has diplomatic or trading relations and of controlling trade for national security and foreign policy reasons.

Agenda:

1. Opening remarks by the Chairman.
2. Opening remarks by the Bureau of Industry and Security.
3. Export Control Reform Update.
4. Presentation of papers or comments by the Public.
5. Subcommittee Updates.

The open session will be accessible via teleconference to 15 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov,* no later than, December 6, 2013.

To the extent time permits, members of the public may present oral statements to the PECSEA. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to PECSEA members, the PECSEA suggests that public presentation materials or comments be forwarded before the meeting to Ms. Yvette Springer.

For more information, contact Yvette Springer on 202–482–2813.

Dated: November 17, 2013.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2013–28396 Filed 11–26–13; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Emerging Technology and Research Advisory Committee; Notice of Open Meeting

The Emerging Technology and Research Advisory Committee (ETRAC) will meet on December 19, 2013, 8:30 a.m., Room 3884, at the Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on emerging technology and research activities, including those related to deemed exports.

Agenda

Thursday, December 19

Open Session

1. Opening Remarks and Comments
2. Discussion on status of the Export Control Reform Initiative
3. Emerging Technology Issues
   —Harmonization of definitions: ITAR and EAR
   —Massive On-Line Instruction
   —OY521 and Emerging Technology
   —Exceptions: GOV and Technology Software Unrestricted (TSU)
4. Guest Speaker—National Academies
5. Guest Speaker—National Institutes of Health—Export Controls and Medical Research
6. Public Comments, Suggestions

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov*, no later than December 12, 2013.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via email.

For more information, call Yvette Springer at (202) 482–2813.

Dated: November 20, 2013.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2013–28400 Filed 11–26–13; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–913]

Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Decision of the Court of International Trade Not in Harmony and Notice of Amended Final Determination

AGENCY: Enforcement and Compliance, formerly Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On October 30, 2013, the United States Court of International Trade (CIT) entered final judgment sustaining a remand redetermination of the Department of Commerce (Department) relating to the countervailing duty (CVD) investigation on certain new pneumatic off-the-road tires (OTR tires) from the People's Republic of China.[1] Consistent with the decision of the United States Court of Appeals for the Federal Circuit (CAFC) in *Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (*Timken*), as clarified by *Diamond Sawblades Mfrs. Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*), the Department is notifying the public that the final CIT judgment in this case is not in harmony with the Department's final affirmative determination in the CVD investigation of OTR tires from the PRC and is amending its final determination with respect to the total net countervailable subsidy rate calculated for Tianjin United Tire & Rubber International Co., Ltd. (TUTRIC).

DATES: *Effective Date:* November 9, 2013.

FOR FURTHER INFORMATION CONTACT: Jun Jack Zhao, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 482–1396.

SUPPLEMENTARY INFORMATION: In July 2008, the Department published a final determination in which it found that countervailable subsidies are being provided to producers/exporters of OTR tires from the PRC.[2] As part of the *Final Determination,* the Department calculated a CVD rate for TUTRIC of 6.85 percent.[3] A summary of that determination and resulting domestic litigation can be found in *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Decision of the Court of International Trade Not in Harmony,* 75 FR 62505 (October 12, 2010) (2010 *Timken* Notice).

In May 2012, the CAFC vacated and remanded the earlier final judgment of the CIT referenced in the 2010 *Timken* Notice.[4] The CIT subsequently ordered the Department to reconsider several methodological and calculation issues from the *Final Determination.*[5] On remand, the Department recalculated the subsidy rate for TUTRIC's debt forgiveness as well as its total countervailable subsidy rate.[6] The CIT sustained the Department's Remand Redetermination in *GPX VIII.*

Timken Notice

In its decision in *Timken,* as clarified by *Diamond Sawblades,* the CAFC held that, pursuant to section 516A(c) of the Tariff Act of 1930, as amended (the Act), the Department must publish a notice of a court decision that is not ''in harmony'' with a Department determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The CIT's October 30, 2013, judgment in *GPX VIII* constitutes a final decision of that court that is not in harmony with the Department's final determination. This notice is published in fulfillment of the publication requirements of *Timken.* Accordingly, the Department will continue the suspension of liquidation of the subject merchandise pending expiration of the period of appeal or, if appealed, pending a final and conclusive court decision. Since the *Final Determination,* the Department has established a new cash deposit rate

[1] *See GPX Int'l Tire Corp.* v. *United States,* Consol. Ct. No. 08–00285, Slip Op. 13–132 (Ct. Int'l Trade Oct. 30, 2013) (*GPX VIII*).

[2] *See Certain New Pneumatic Off-The-Road-Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances,* 73 FR 40480 (July 15, 2008) (*Final Determination*).

[3] *Id.,* 73 FR 40483.

[4] *See GPX Int'l Tire Corp.* v. *United States,* 678 F.3d 1308 (Fed. Cir. 2012).

[5] *See GPX Int'l Tire Corp.* v. *United States,* 893 F. Supp. 2d 1296 (Ct. Int'l Trade 2013).

[6] *See* Final Results of Redetermination Pursuant to Remand, CIT Consol. Court No. 08–00285 (April 16, 2013) (Remand Redetermination).

for TUTRIC.[7] Therefore, this amended final determination does not change TUTRIC's cash deposit rate.

Amended Final Determination

Because there is now a final CIT judgment with respect to the *Final Determination,* the revised total net countervailable subsidy rate for TUTRIC is 3.93 percent.[8]

This notice is issued and published in accordance with sections 516A(e)(1) and 777(i)(1) of the Act.

Dated: November 20, 2013.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2013–28552 Filed 11–26–13; 8:45 am]

BILLING CODE 3510–DS–P

[7] *See Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube From the People's Republic of China,* 77 FR 52683 (August 30, 2012).

[8] Total net countervailable subsidy rates for other respondents identified in the *Final Determination* remain unchanged. *See Final Determination,* 73 FR 40483.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–988]

Final Determination of Sales at Less Than Fair Value: Silica Bricks and Shapes From the People's Republic of China

AGENCY: Enforcement & Compliance, formerly Import Administration, International Trade Administration, Department of Commerce

DATES: *Effective Date:* November 27, 2013.

SUMMARY: On June 20, 2013, the Department of Commerce (''Department'') published its preliminary determination of sales at less than fair value (''LTFV'') in the antidumping duty investigation of silica bricks and shapes from the People's Republic of China (''PRC'').[1] The Department invited interested parties to comment on the *Preliminary Determination.* Based on the Department's analysis of the comments received, the Department made changes to the *Preliminary Determination.* The Department determines that silica bricks and shapes from the PRC are being, or are likely to be, sold in the United States at LTFV, as provided in section 735 of the Tariff Act of 1930, as amended (the ''Act''). The final weighted-average dumping margins for this investigation are listed in the ''Final Determination'' section below.

FOR FURTHER INFORMATION CONTACT: Jonathan Hill, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3518.

SUPPLEMENTARY INFORMATION:

Background

The Department published its *Preliminary Determination* on June 20, 2013.[2] Between June 24, 2013 and July 1, 2013, the Department conducted verification of the mandatory respondent Tianjin New Century Refractories Co., Ltd.; Tianjin New World Import & Export Trading Co., Ltd.; and XinYi American Advanced Material Co., Ltd. (collectively, ''New Century Group'') [3] and its unaffiliated producer, Dengfeng Yuzhong Refractories Co. Ltd. (''Dengfeng Yuzhong'').[4]

On July 15, 2013, Utah Refractories Corporation (''Petitioner'') requested that the Department reject as untimely the unsolicited submission of new factual information filed on July 5, 2013 by New Century Group.[5] The Department did not reject this submission as it was information requested by the Department during verification of New Century Group and which the Department asked that New Century Group submit to the record.

On July 30, 2013, New Century Group submitted surrogate value comments. On August 12, 2013, Utah Refractories Corporation (''Petitioner'') submitted rebuttal surrogate value comments.

On August 17, 2013 and August 19, 2013, the New Century Group and Fedmet Resources Corporation, respectively, submitted case briefs. On September 3, 2013, Petitioner submitted a rebuttal brief.

As explained in the memorandum from the Assistant Secretary for Enforcement and Compliance, the Department exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 1, through October 16, 2013.[6] Therefore, all deadlines in this proceeding have been extended by 16 days. If the new deadline falls on a non-business day, in accordance with the Department's practice, the deadline will become the next business day. Thus, the revised deadline for the final determination in this investigation is November 20, 2013.

Period of Investigation

The period of investigation (''POI'') is April 1, 2012, through September 30, 2012. This period corresponds to the two most recent fiscal quarters prior to the month of the filing of the petition, which was November 2012.[7]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this investigation are addressed in the Issues and Decision Memorandum.[8] A list of the issues which the parties raised and to which the Department responded in the Issues and Decision Memorandum is attached to this notice as an Appendix. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and it is available to all parties in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed Issues and Decision Memorandum and the electronic versions of the Issues and Decision Memorandum are identical in content.

[1] *See Preliminary Determination,* 78 FR 37203 (June 20, 2013) (''*Preliminary Determination*'').

[2] *See Preliminary Determination.*

[3] In the *Preliminary Determination,* the Department determined to treat these companies as a single entity and continues to do so. *See* the memorandum from Rebecca Pandolph, International Trade Analyst, AD/CVD Operations, Office 4 through Howard Smith, Program Manager, AD/CVD Operations, Office 4 to Abdelali Elouaradia, Office Director, AD/CVD Operations, Office 4, ''Silica Bricks and Shapes from the People's Republic of China: Affiliation and Single Entity Status,'' dated June 13, 2013.

[4] *See* the ''Verification'' section below.

[5] *See* Letter from Petitioner to the Secretary of Commerce, ''Silica Bricks and Shapes from the People 's Republic of China Request to Reject Untimely Additional Factual Information,'' dated July 15, 2013.

[6] *See* Memorandum for the Record from Paul Piquado, Assistant Secretary for Enforcement and Compliance, ''Deadlines Affected by the Shutdown of the Federal Government'' (October 18, 2013).

[7] *See* 19 CFR 351.204(b)(1).

[8] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, ''Issues and Decision Memorandum for the Final Determination of Sales at Less-Than-Fair-Value: Silica Bricks and Shapes from the People's Republic of China,'' dated concurrently with this notice (''Issues and Decision Memorandum'').

Changes Since the Preliminary Determination

Based on the Department's analysis of the comments received, the Department made changes to the following elements of the antidumping duty calculations since the *Preliminary Determination:*

- Direct and Indirect labor hours
- Iron Scale Consumption and Surrogate Value
- Electricity Consumption
- Freight Distances from Suppliers to Factory
- Packing Material Consumption
- Entered Value
- Brokerage and Handling
- Use of Partial Adverse Facts Available for Unreported U.S. Sales
- Value Added Tax Adjustment

For detailed information concerning all of the changes made, including those listed above, see New Century Group's analysis and surrogate value memoranda.[9]

Scope of the Investigation

The products covered by the scope of this investigation are refractory bricks and shapes, regardless of size, that contain at least 90 percent silica (SiO_2) where at least 50 percent of the silica content, by weight, is crystalline silica, regardless of other materials contained in the bricks and shapes. Refractory refers to nonmetallic materials having those chemical and physical properties that make them applicable for structures, or as components of systems, that are exposed to environments above 1000 degrees Fahrenheit (538 degrees Celsius). The products covered by the scope of this investigation are currently classified under Harmonized Tariff Schedule of the United States (''HTSUS'') numbers 6902.20.1020 and 6902.20.5020. Because the definition of ''refractory'' in the HTSUS differs from that in the scope of this investigation, products covered by the scope of this investigation may also enter under HTSUS number 6909.19.5095. Although the HTSUS numbers are provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.

The scope of this investigation does not cover refractory bricks and shapes, regardless of size, that are made, in part, from non-crystalline silica (commonly referred to as fused silica) where the silica content is less than 50 percent, by weight, crystalline silica.

Verification

As provided in section 782(i) of the Act, the Department verified the information submitted by New Century Group for use in the final determination. The Department used standard verification procedures, including examination of relevant accounting and production records and original source documents provided by New Century Group.

Surrogate Country

In the *Preliminary Determination,* the Department selected Ukraine as the appropriate surrogate country to use in this investigation pursuant to section 773(c)(4) of the Act based on the following: (1) it is at a level of economic development similar to the PRC; (2) it is a significant producer of comparable merchandise; and (3) we have reliable data from Ukraine that we can use to value the factors of production. No one commented on the selection of the surrogate country and the Department continues to find that Ukraine is the appropriate surrogate country for this final determination.

Use of Adverse Facts Available

We determined that New Century Group failed to report certain sales and thus withheld necessary information within the meaning of section 776(a) of the Act. Moreover, New Century Group failed to act to the best of its ability to comply with the Department's requests for information within the meaning of section 776(b) of the Act regarding unreported sales. We therefore applied adverse facts available (''AFA'') to New Century Group's unreported sales, pursuant to section 776(b) of the Act. As partial AFA, we applied the highest transaction specific margin calculated to the unreported sales.

Furthermore, because the PRC-wide entity did not provide the Department with requested information, pursuant to section 776 (a)(2)(A) of the Act, the Department continues to find it appropriate to base the PRC-wide rate on AFA. As was the case in the *Preliminary Determination,* we are unable to corroborate the dumping margins in the petition. Therefore, we have assigned the PRC-wide entity a dumping margin equal to the highest transaction-specific dumping margin calculated for the New Century Group.

Final Determination

The Department determines that the following weighted-average dumping margins exist for the period April 1, 2012, through September 30, 2012.

Exporter	Producer	Weighted-average dumping margin (percent)
Tianjin New Century Refractories Co., Ltd.; Tianjin New World Import & Export Trading Co., Ltd.; and XinYi American Advanced Material Co., Ltd.	Dengfeng Yuzhong Refractories Co. Ltd	63.81
PRC-wide Entity*		73.10

* The PRC-wide entity includes Shandong Daqiao Co., Ltd.

Disclosure

We intend to disclose to parties the calculations performed in this proceeding within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, the Department will instruct U.S. Customs and Border Protection (''CBP'') to continue to suspend liquidation of all appropriate entries of silica bricks and shapes from the PRC as described in the ''Scope of the Investigation'' section, which were entered, or withdrawn from warehouse, for consumption on or after June 20, 2013, the date of publication of the

[9] *See* Memorandum from Jonathan Hill, International Trade Analyst, AD/CVD Operations, Office IV, to Howard Smith, Program Manager, AD/CVD Operations, Office IV, ''Silica Bricks and Shapes from the People's Republic of China: Analysis of the Final Determination Margin Calculation for New Century Group,'' dated November 20, 2013; *see also* memorandum from Jonathan Hill, International Trade Analyst, AD/CVD Operations, Office IV, to Howard Smith, Program Manager, AD/CVD Operations, Office IV, ''Final Determination of the Antidumping Duty Investigation of Silica Bricks and Shapes from the People's Republic of China: Factor Valuation Memorandum,'' dated November 20, 2013.

Preliminary Determination in the **Federal Register**. Further, the Department will instruct CBP to require a cash deposit equal to the weighted-average amount by which the normal value exceeds U.S. price as follows: (1) For the exporter/producer combination listed in the table above, the cash deposit rate will be equal to the weighted-average dumping margin which the Department determined in this final determination; (2) for all combinations of PRC exporters/producers of merchandise under consideration which have not received their own separate rate above, the cash deposit rate will be equal to the weighted-average dumping margin established for the PRC-wide entity; and (3) for all non-PRC exporters of merchandise under consideration which have not received their own separate rate above, the cash deposit rate will be equal to the cash deposit rate applicable to the PRC exporter/producer combination that supplied that non-PRC exporter. These suspension-of-liquidation instructions will remain in effect until further notice.

ITC Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (''ITC'') of the final affirmative determination of sales at LTFV. As the Department's final determination is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will determine, within 45 days, whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of subject merchandise, or sales (or the likelihood of sales) for importation, of the subject merchandise. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

Notification Regarding APO

This notice also serves as a reminder to the parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of propriety information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation,

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: November 20, 2013.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix

Issues

Comment 1: Verification Corrections
Comment 2: Scope Exclusion for Fused Silica and Silicon Carbide Bricks and Shapes
Comment 3: Silica Sand Surrogate Value
Comment 4: Iron Scale Surrogate Value
Comment 5: Natural Gas Surrogate Value
Comment 6: Brokerage and Handling Surrogate Value
Comment 7: Facts Available for New Century Group's Unreported U.S. Sales
Comment 8: Value Added Tax

[FR Doc. 2013–28551 Filed 11–26–13; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD002

Marine Mammals; File No. 18182

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Marilyn Mazzoil, Harbor Branch Oceanographic Institute at Florida Atlantic University, 5600 US 1 North, Fort Pierce, Florida 34946, has applied in due form for a permit to conduct scientific research on bottlenose dolphins (*Tursiops truncatus*).

DATES: Written, telefaxed, or email comments must be received on or before December 27, 2013.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 18182 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)427–8401; fax (301)713–0376; and Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, FL 33701; phone (727)824–5312; fax (727)824–5309.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301)713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Carrie Hubard or Amy Hapeman, (301)427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant requests a permit to study bottlenose dolphins along the east coast of Florida, from Fernandina Beach to Jupiter. Dolphins would be photo-identified and biopsy sampled to study and determine: (1) Abundance estimation; (2) occurrence and distribution; (3) behavioral information; and (4) population structure and life history parameters. Vessel surveys would be conducted year-round. Annually, the applicant expects to encounter 10,000 animals from the Indian River Lagoon Estuarine System (IRLES) stock, 4000 from the Jacksonville Estuarine System (JES) stock, 12,000 from the Western North Atlantic Central Florida Coastal (WNACFC) stock, and 6000 from the Western North Atlantic Northern Florida Coastal (WNANFC) stock. Individual animals would likely be observed and photographed multiple times per year. A maximum of 350 biopsy samples could be collected annually (100 IRLES, 50 JES, 100 WNACFC, 100 WNANFC). Up to 20 animals from the IRLES stock may be sampled twice in the same year to examine seasonal changes in contaminant loads. Animals determined to be less than two years of age would not be sampled. The permit would be valid for five years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial

determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register,** NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: November 22, 2013.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–28437 Filed 11–26–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC986

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Rocky Intertidal Monitoring Surveys on the South Farallon Islands, California

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received an application from the National Ocean Service's Office of National Marine Sanctuaries Gulf of the Farallones National Marine Sanctuary (GFNMS) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to rocky intertidal monitoring work and searching for black abalone, components of the Sanctuary Ecosystem Assessment Surveys. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to GFNMS to incidentally take, by Level B harassment only, marine mammals during the specified activity.

DATES: Comments and information must be received no later than December 27, 2013.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *ITP.Nachman@noaa.gov.* NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 25-megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

An electronic copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Candace Nachman, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking, other means of effecting the least practicable impact on the species or stock and its habitat, and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: ''Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].''

Summary of Request

On September 12, 2013, NMFS received an application from GFNMS for the taking of marine mammals incidental to rocky intertidal monitoring work and searching for black abalone. NMFS determined that the application was adequate and complete on November 14, 2013.

GFNMS proposes to continue rocky intertidal monitoring work and the search for black abalone in areas previously unexplored for black abalone from January 25 through February 1, 2014. All work will be done only during daylight minus low tides. This is a long-term study that began in 1992. This IHA, if issued, though, would be effective from January 20 through February 8, 2014, to allow for a bit of flexibility in the sampling schedule. Twelve sites are proposed for sampling. The following specific aspects of the proposed activities are likely to result in the take of marine mammals: Presence of survey personnel near pinniped haulout sites and approach of survey personnel towards hauled out pinnipeds. Take, by Level B harassment only, of individuals of five species of marine mammals is anticipated to result from the specified activity.

NMFS previously issued an IHA to GFNMS for this activity on November 8, 2012. The IHA was effective from November 8, 2012, through November 7, 2013. However, GFNMS did not conduct any abalone sampling during

this time period. Therefore, no take occurred.

Description of the Specified Activity and Specified Geographic Region

Since the listing of black abalone as ''endangered'' under the U.S. Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*), NMFS has requested that GFNMS explore as much of the shoreline as possible, as well as document and map the location of quality habitat for black abalone and the location of known animals. This listing prompted the need to expand the search for black abalone into other areas on the South Farallon Islands (beyond those that have been studied since 1992) to gain a better understanding of the abundance and health of the black abalone population in this remote and isolated location. The monitoring is planned to remain ongoing, and efforts to assess the status and health of the black abalone population on the South Farallon Islands may take several years, and perhaps decades, because black abalone tend to be very cryptic and difficult to find, especially when they are sparse and infrequent in occurrence. In order for the assessment of black abalone to be more comprehensive, GFNMS needs to expand shore searches in areas beyond the proximity of their quantitative quadrat sampling areas and also into new areas on Southeast Farallon and Maintop (West End) Islands.

Rocky intertidal monitoring on the Farallon Islands is now a component of the GFNMS Sanctuary Ecosystem Assessment Surveys (SEAS) long-term monitoring program and is a necessity to the management and protection of the sanctuary. All GFNMS SEAS monitoring projects are designed to provide documentation on the density and biodiversity of sanctuary natural resources for condition analyses, particularly for a baseline in the event of a major natural or human-induced perturbation. This program has and continues to acquire information on seasonal and annual changes of intertidal species abundances in 1–3 visits per year. The monitoring data, decades from now, can also be used to assess trends and changes from global climate change and ocean acidification, based on range extensions, changes in biodiversity, and changes in density of calcium carbonate-containing organisms.

Routine shore activity will continue to involve the use of only non-destructive sampling methods to monitor rocky intertidal algal and invertebrate species abundances (see Figure 2 in GFNMS' application). At each sampling site, there are three to four permanent 30 x 50 cm (12 x 20 in) quadrat sites that occur in the low, middle, and upper elevation tidal zones (marked by white epoxy pads in the quadrat corners). Three to four random quadrats (unmarked) are also sampled at each site every survey, if time permits. Fifty randomly selected points within each permanent and random quadrat are sampled, using methods described by Foster *et al.* (1991) and Dethier *et al.* (1993). All algal and sessile macroinvertebrate species under each sampling point (loci) are recorded. A photograph is also taken of each labeled quadrat. When completed, a shore walk in the immediate proximity is done by the sampling team to search for select large invertebrates. The length of the shoreline searched in the shore walks is typically about 30 m (98 ft), but plans are to expand this search effort over larger areas for abalone and in more areas. The sampling, photographic documentation, and shore walks for the period of this IHA have been scheduled to occur from January 25 through February 1, 2014. Each survey will last for approximately 4 to 8 days. All work will be done only during daylight minus, low tides. Each location (as listed in Tables 2 and 3 in GFNMS' application) will be visited/sampled by five to six biologists, for a duration of 3–5 hours, one to two times each minus tide cycle.

Inaccessible shore areas will be surveyed by boat up to once each year, dependent on boat availability and weather conditions. This effort includes the Middle and North Farallon Islands. In this effort, the boat navigates to within 15–100 m (49–328 ft) of the shore, and intertidal species that can be seen through binoculars are recorded (presence/absence). Point Blue (formerly named PRBO Conservation Science) continues its year round pinniped and seabird research and monitoring efforts on the South Farallon Islands, which began in 1968, under MMPA scientific research permits and IHAs. GFNMS biologists will gain access to the sites via boats operated by Point Blue, with disturbance and incidental take authorized via IHAs issued to Point Blue. For this reason, GFNMS has not requested authorization for take from disturbance by boat, as incidental take from that activity is authorized in a separate IHA.

Specified Geographic Location and Activity Timeframe

The Farallon Islands consists of a chain of seven islands located approximately 48 km (30 mi) west of San Francisco, near the edge of the continental shelf and in the geographic center of the GFNMS (see Figure 1 in GFNMS' application). The land of the islands above the mean high tide mark is designated as the Farallon National Wildlife Refuge (managed by the U.S. Fish and Wildlife Service [USFWS]), while the shore and subtidal below are in GFNMS. The nearshore and offshore waters are foraging areas for pinniped species discussed in this document.

The two largest islands of the seven islands are the Southeast Farallon and Maintop (aka West End) Islands. These and several smaller rocks are collectively referred to as the South Farallon Islands and are the subject of this IHA request. The two largest islands are separated by only a 9 m (30 ft) wide surge channel. Together, these islands are approximately 49 hectares (120 acres) in size with an intertidal perimeter around both islands of 7.7 km (4.8 mi).

The areas proposed for sampling are: Blow Hole Peninsula; Mussel Flat; Dead Sea Lion Flat; Low Arch; Raven's Cliff; Drunk Uncle Islet; East Landing; North Landing; Fisherman's Bay; Weather Service Peninsula; Indian Head; and Shell Beach (see Figure 2 in GFNMS' application). Each sample site will be visited one to two times each minus tide cycle for 3–5 hours each visit.

The shorelines on these islands, including areas above the mean high tide elevation, have become more heavily used over time as haulout sites for pinnipeds to rest, give birth, and molt. The intertidal zones where GFNMS conducts intertidal monitoring area also areas where pinnipeds can be found hauled out on the shore. Accessing portions of the intertidal habitat may cause incidental Level B (behavioral) harassment of pinnipeds through some unavoidable approaches if pinnipeds are hauled out directly in the study plots or while biologists walk from one location to another. No motorized equipment is involved in conducting these surveys. The species for which Level B harassment is requested are: California sea lions (*Zalophus californianus californianus*); harbor seals (*Phoca vitulina richardii*); northern elephant seals (*Mirounga angustirostris*); Stellar sea lions (*Eumetopias jubatus*); and northern fur seals (*Callorhinus ursinus*).

Description of Marine Mammals in the Area of the Specified Activity

Many of the shores of the two South Farallon Islands provide resting, molting, and breeding habitat for pinniped species: Northern elephant seals; harbor seals; California sea lions; northern fur seals; and Steller sea lions.

California sea lion is the species anticipated to be encountered most frequently during the specified activity. The other four species are only anticipated to be encountered at some of the sites. Tables 2 and 3 in GFNMS' application outline the average and maximum expected occurrences of each species at each sampling location, respectively. Numbers in these tables are based on weekly surveys conducted by PRBO (now Point Blue) in February 2010 and 2011. Figures contained in Appendix I of GFNMS' application depict the overlap between pinniped haulouts and abalone sampling sites. None of the species noted here are listed as threatened and endangered under the ESA. On November 4, 2013, NMFS published a final rule delisting the eastern distinct population segment (DPS) of Steller sea lions (78 FR 66139). We have determined that this DPS has recovered and no longer meets the definition of an endangered or threatened species under the ESA. The Steller sea lions on the South Farallon Islands are part of the eastern DPS.

We refer the public to Carretta *et al.* (2013) and Allen and Angliss (2013) for general information on these species which are presented below this section. The publications are available on the internet at: *http://www.nmfs.noaa.gov/pr/sars/pdf/po2012.pdf* and *http://www.nmfs.noaa.gov/pr/sars/pdf/ak2012.pdf.* Additional information on the status, distribution, seasonal distribution, and life history can also be found in GFNMS' application.

Northern Elephant Seal

Northern elephant seals are not listed as threatened or endangered under the ESA, nor are they categorized as depleted under the MMPA. The estimated population of the California breeding stock is approximately 124,000 animals with a minimum estimate of 74,913 (Carretta *et. al.,* 2013).

Northern elephant seals range in the eastern and central North Pacific Ocean, from as far north as Alaska and as far south as Mexico. Northern elephant seals spend much of the year, generally about nine months, in the ocean. They are usually underwater, diving to depths of about 330–800 m (1,000–2,500 ft) for 20- to 30-minute intervals with only short breaks at the surface. They are rarely seen out at sea for this reason. While on land, they prefer sandy beaches.

Northern elephant seals breed and give birth in California (U.S.) and Baja California (Mexico), primarily on offshore islands (Stewart *et al.,* 1994), from December to March (Stewart and Huber, 1993). Males feed near the eastern Aleutian Islands and in the Gulf of Alaska, and females feed further south, south of 45° N (Stewart and Huber, 1993; Le Boeuf *et al.,* 1993). Adults return to land between March and August to molt, with males returning later than females. Adults return to their feeding areas again between their spring/summer molting and their winter breeding seasons.

The population on the Farallon Islands has declined by 3.4 percent per year since 1983, and in recent years numbers have fluctuated between 100 and 200 pups (PRBO, unpubl. data). At Southeast Farallon, the population consists of approximately 500 animals (GFNMS, 2012).

California Sea Lion

California sea lions are not listed as threatened or endangered under the ESA, nor are they categorized as depleted under the MMPA. The California sea lion is now a full species, separated from the Galapagos sea lion (*Z. wollebaeki*) and the extinct Japanese sea lion (*Z. japonicus*) (Brunner, 2003; Wolf *et al.,* 2007; Schramm *et al.,* 2009). The estimated population of the U.S. stock of California sea lion is approximately 296,750 animals, and the current maximum population growth rate is 12 percent (Carretta *et al.,* 2013). On the Farallon Islands, California sea lions haul out in many intertidal areas year round, fluctuating from several hundred to several thousand animals.

California sea lion breeding areas are on islands located in southern California, in western Baja California, Mexico, and the Gulf of California. During the breeding season, most California sea lions inhabit southern California and Mexico. Rookery sites in southern California are limited to the San Miguel Islands and the southerly Channel Islands of San Nicolas, Santa Barbara, and San Clemente (Carretta *et. al.,* 2013). Males establish breeding territories during May through July on both land and in the water. Females come ashore in mid-May and June where they give birth to a single pup approximately 4–5 days after arrival and will nurse pups for about a week before going on their first feeding trip. Females will alternate feeding trips with nursing bouts until the pup is weaned between 4 and 10 months of age (NMML, 2010). In central California, a small number of pups are born on Ano Nuevo Island, Southeast Farallon Island, and occasionally at a few other locations; otherwise, the central California population is composed of non-breeders. Breeding animals on the Farallon Islands are concentrated in areas where researchers generally do not visit (PRBO, unpub. data).

Pacific Harbor Seal

Pacific harbor seals are not listed as threatened or endangered under the ESA, nor are they categorized as depleted under the MMPA. The estimated population of the California stock of Pacific harbor seals is approximately 30,196 animals (Carretta *et. al.,* 2013).

The animals inhabit near-shore coastal and estuarine areas from Baja California, Mexico, to the Pribilof Islands in Alaska. Pacific harbor seals are divided into two subspecies: *P. v. stejnegeri* in the western North Pacific, near Japan, and *P. v. richardii* in the northeast Pacific Ocean. The latter subspecies, recognized as three separate stocks, inhabits the west coast of the continental U.S., including: The outer coastal waters of Oregon and Washington states; Washington state inland waters; and Alaska coastal and inland waters.

In California, over 500 harbor seal haulout sites are widely distributed along the mainland and offshore islands, and include rocky shores, beaches and intertidal sandbars (Lowry *et al.,* 2005). On the Farallon Islands, approximately 40 to 120 Pacific harbor seals haul out in the intertidal areas (PRBO, unpub. data). Harbor seals mate at sea, and females give birth during the spring and summer, although, the pupping season varies with latitude. Pups are nursed for an average of 24 days and are ready to swim minutes after being born. Harbor seal pupping takes place at many locations, and rookery size varies from a few pups to many hundreds of pups. Pupping generally occurs between March and June, and molting occurs between May and July (NCCOS, 2007).

Steller Sea Lion

Steller sea lions consist of two distinct population segments: The western and eastern DPSs divided at 144° West longitude (Cape Suckling, Alaska). The eastern DPS of the Steller sea lion was removed from the endangered species list in November 2013, and the western distinct population segment is endangered under the ESA. The eastern DPS is the one anticipated to occur in the proposed project area. The eastern segment includes sea lions living in southeast Alaska, British Columbia, California, and Oregon.

Steller sea lions range along the North Pacific Rim from northern Japan to California (Loughlin *et al.,* 1984), with centers of abundance and distribution in

the Gulf of Alaska and Aleutian Islands, respectively. The species is not known to migrate, but individuals disperse widely outside of the breeding season (late May through early July), thus potentially intermixing with animals from other areas.

In 2013, the estimated population of the eastern DPS ranged from 58,334 to 72,223 animals, and the maximum population growth rate is 12 percent (Allen and Angliss, 2013).

The eastern DPS of Steller sea lions breeds on rookeries located in southeast Alaska, British Columbia, Oregon, and California. There are no rookeries located in Washington State. Steller sea lions give birth in May through July, and breeding commences a couple of weeks after birth. Pups are weaned during the winter and spring of the following year.

Despite the wide-ranging movements of juveniles and adult males in particular, exchange between rookeries by breeding adult females and males (other than between adjoining rookeries) appears low, although males have a higher tendency to disperse than females (NMFS, 1995; Trujillo *et al.,* 2004; Hoffman *et al.,* 2006). A northward shift in the overall breeding distribution has occurred, with a contraction of the range in southern California and new rookeries established in southeastern Alaska (Pitcher *et al.,* 2007).

The current population of eastern Steller sea lions in the proposed research area is estimated to number between 50 and 750 animals. Overall, counts of non-pups at trend sites in California and Oregon have been relatively stable or increasing slowly since the 1980s (Angliss and Allen, 2011). PRBO estimates that between 50 and 150 Steller sea lions live on the Farallon Islands. On Southeast Farallon Island, the abundance of females declined an average of 3.6 percent per year from 1974 to 1997 (Sydeman and Allen, 1999). Pup counts on the Farallon Islands have generally varied from five to 15 (Hastings and Sydeman, 2002; PRBO unpub. data).

Northern Fur Seal

Northern fur seals are not listed as threatened or endangered under the ESA, nor are they categorized as depleted under the MMPA. Two stocks of northern fur seals are recognized in U.S. Pacific waters: Eastern Pacific stock and San Miguel Island stock. Adult females and juveniles migrate to the central California area (and Oregon and Washington) from rookeries on San Miguel Island in the Southern California Bight (Carretta *et al.,* 2006) and from the Pribilof Islands in the Bering Sea (NCCOS, 2007).

The most recent population estimate of the San Miguel Island stock is 9,968 animals (Carretta *et al.,* 2013) and is 611,617 animals for the Eastern Pacific stock (Allen and Angliss, 2013). The northern fur seal population on the Farallon Islands has fluctuated greatly over the past two centuries. Current PRBO weekly counts on Maintop Island show a peak of 296 adult and juvenile northern fur seals and 180 pups in 2011 (PRBO, unpub. data). Although it is difficult to differentiate, animals on the Farallon Islands during the time of the proposed rocky intertidal monitoring are likely from the San Miguel Island stock.

Other Marine Mammals in the Proposed Action Area

California (southern) sea otters (*Enhydra lutris nereis*), listed as threatened under the ESA and categorized as depleted under the MMPA, usually range in coastal waters within 2 km (1.2 mi) of shore. PRBO has not encountered California sea otters on Southeast Farallon Island during the course of seabird or pinniped research activities over the past five years. This species is managed by the USFWS and is not considered further in this notice.

Potential Effects of the Specified Activity on Marine Mammals

The appearance of researchers may have the potential to cause Level B harassment of any pinnipeds hauled out on Southeast Farallon and Maintop (West End) Islands. Although marine mammals are never deliberately approached by abalone survey personnel, approach may be unavoidable if pinnipeds are hauled out in the immediate vicinity of the permanent abalone study plots. Disturbance may result in reactions ranging from an animal simply becoming alert to the presence of researchers (e.g., turning the head, assuming a more upright posture) to flushing from the haul-out site into the water. NMFS does not consider the lesser reactions to constitute behavioral harassment, or Level B harassment takes, but rather assumes that pinnipeds that move greater than 1 m (3.3 ft) or change the speed or direction of their movement in response to the presence of researchers are behaviorally harassed, and thus subject to Level B taking. Animals that respond to the presence of researchers by becoming alert, but do not move or change the nature of locomotion as described, are not considered to have been subject to behavioral harassment.

Numerous studies have shown that human activity can flush harbor seals off haulout sites (Allen *et al.,* 1984; Calambokidis *et al.,* 1991; Suryan and Harvey, 1999; Mortenson *et al.,* 2000). The Hawaiian monk seal (*Monachus schauinslandi*) has been shown to avoid beaches that have been disturbed often by humans (Kenyon, 1972). And in one case, human disturbance appeared to cause Steller sea lions to desert a breeding area at Northeast Point on St. Paul Island, Alaska (Kenyon, 1962).

Typically, even those reactions constituting Level B harassment would result at most in temporary, short-term disturbance. Researchers will visit approximately 12 sites over about an 8 day period. Each site visit typically lasts 3–5 hours. Therefore, disturbance of pinnipeds resulting from the presence of researchers lasts only for short periods of time. Because such disturbance is sporadic, rather than chronic, and of low intensity, individual marine mammals are unlikely to incur any detrimental impacts to vital rates or ability to forage and, thus, loss of fitness. Correspondingly, even local populations, much less the overall stocks of animals, are extremely unlikely to accrue any significantly detrimental impacts.

There are three ways in which disturbance, as described previously, could result in more than Level B harassment of marine mammals. All three are most likely to be consequences of stampeding, a potentially dangerous occurrence in which large numbers of animals succumb to mass panic and rush away from a stimulus, an occurrence that is not expected on Southeast Farallon and Maintop Islands. The three situations are (1) falling when entering the water at high-relief locations; (2) extended separation of mothers and pups; and (3) crushing of elephant seal pups by large males during a stampede.

Because hauled-out animals may move towards the water when disturbed, there is the risk of injury if animals stampede towards shorelines with precipitous relief (e.g., cliffs). However, while cliffs do exist on the islands, shoreline habitats near the abalone study sites are of steeply sloping rocks with unimpeded and non-obstructive access to the water. If disturbed, hauled-out animals in these situations may move toward the water without risk of encountering barriers or hazards that would otherwise prevent them from leaving the area. In these circumstances, the risk of injury, serious injury, or death to hauled-out animals is very low. Thus, abalone research activity poses no risk that disturbed

animals may fall and be injured or killed as a result of disturbance at high-relief locations.

The risk of marine mammal injury, serious injury, or mortality associated with abalone research increases somewhat if disturbances occur during breeding season. These situations present increased potential for mothers and dependent pups to become separated and, if separated pairs do not quickly reunite, the risk of mortality to pups (through starvation) may increase. Separately, adult male elephant seals may trample elephant seal pups if disturbed, which could potentially result in the injury, serious injury, or mortality of the pups. The risk of either of these situations is greater in the event of a stampede.

The proposed site visits in late January/early February fall outside of the pupping and breeding seasons for California sea lions, harbor seals, northern fur seals, and Steller sea lions. The most sensitive months for northern elephant seals are generally December through March. However, though elephant seal pups are occasionally present when researchers visit abalone survey sites, risk of pup mortalities is very low because elephant seals are far less reactive to researcher presence than the other two species. Further, pups are typically found on sand beaches, while study sites are located in the rocky intertidal zone, meaning that there is typically a buffer between researchers and pups. Finally, the caution used by researchers in approaching sites generally precludes the possibility of behavior, such as stampeding, that could result in extended separation of mothers and dependent pups or trampling of elephant seal pups. No research would occur where separation of mother and her nursing pup or crushing of pups can become a concern.

In summary, NMFS does not anticipate that the proposed activities would result in the injury, serious injury, or mortality of pinnipeds because (1) the timing of research visits would preclude separation of mothers and pups for four of the pinniped species, as activities occur outside of the pupping/breeding season and (2) elephant seals are generally not susceptible to disturbance as a result of researchers' presence. In addition, researchers will exercise appropriate caution approaching sites, especially when pups are present and will redirect activities when pups are present.

Anticipated Effects on Marine Mammal Habitat

The only habitat modification associated with the proposed activity is the quadrat locations being marked with marine epoxy. The plot corners are marked with a 3 × 3 cm (1.2 × 1.2 in) patch of marine epoxy glued to the benchrock for relocating the quadrat sites. Markers have been in place since 1993, and pinniped populations have increased throughout the islands during this time. Maintenance is sometimes required, which consists of replenishing worn markers with fresh epoxy or replacing markers that have become dislodged. No gas power tools are used, so there is no potential for noise or accidental fuel spills disturbing animals and impacting habitats. Thus, the proposed activity is not expected to have any habitat-related effects, including to marine mammal prey species, that could cause significant or long-term consequences for individual marine mammals or their populations.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under Section 101(a)(5)(D) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant).

GFNMS proposes to implement several mitigation measures to reduce potential take by Level B (behavioral disturbance) harassment. Measures include: (1) Coordinating sampling efforts with other permitted activities (i.e., Point Blue and USFWS); (2) conducting slow movements and staying close to the ground to prevent or minimize stampeding; (3) avoiding loud noises (i.e., using hushed voices); (4) vacating the area as soon as sampling of the site is completed; (5) monitoring the offshore area for predators (such as killer whales and white sharks) and avoid flushing of pinnipeds when predators are observed in nearshore waters; (6) using binoculars to detect pinnipeds before close approach to avoid being seen by animals; and (7) rescheduling work at sites where pups are present, unless other means to accomplishing the work can be done without causing disturbance to mothers and dependent pups.

The methodologies and actions noted in this section will be utilized and included as mitigation measures in any issued IHA to ensure that impacts to marine mammals are mitigated to the lowest level practicable. The primary method of mitigating the risk of disturbance to pinnipeds, which will be in use at all times, is the selection of judicious routes of approach to abalone study sites, avoiding close contact with pinnipeds hauled out on shore, and the use of extreme caution upon approach. In no case will marine mammals be deliberately approached by abalone survey personnel, and in all cases every possible measure will be taken to select a pathway of approach to study sites that minimizes the number of marine mammals potentially harassed. In general, researchers will stay inshore of pinnipeds whenever possible to allow maximum escape to the ocean. Each visit to a given study site will last for approximately 3–5 hours, after which the site is vacated and can be re-occupied by any marine mammals that may have been disturbed by the presence of abalone researchers. By arriving before low tide, worker presence will tend to encourage pinnipeds to move to other areas for the day before they haul out and settle onto rocks at low tide.

The following measures are proposed for implementation to avoid disturbances to elephant seal pups. Disturbances to females with dependent pups can be mitigated to the greatest extent practicable by avoiding visits to those intertidal sites with pinnipeds that are actively nursing, with the exception of northern elephant seals. The time of year when GFNMS plans to sample avoids disturbance to young, dependent pups, with the exception of northern elephant seals. Thus, late January/early February, at minimum, is preferable for the proposed intertidal survey work in order to minimize the risk of harassment. Harassment of nursing northern elephant seal pups may occur but only to a limited extent. Disruption of nursing to northern elephant seal pups will occur only as biologists pass by the area. No flushing on nursing northern elephant seal pups will occur, and no disturbance to newborn northern elephant seals (pups less than one week old) will occur. Moreover, elephant seals have a much higher tolerance of nearby human activity than sea lions or harbor seals. In the event of finding pinnipeds breeding and nursing, the intertidal monitoring activities will be re-directed to sites where these activities and behaviors are not occurring. This mitigation measure will reduce the possibility of takes by harassment and further reduce the remote possibility of serious injury or mortality of dependent pups.

GFNMS will suspend sampling and monitoring operations immediately if an injured marine mammal is found in the

vicinity of the project area and the abalone site sampling activities could aggravate its condition.

NMFS has carefully evaluated GFNMS' proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's proposed measures, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must, where applicable, set forth ''requirements pertaining to the monitoring and reporting of such taking''. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

Currently many aspects of pinniped research are being conducted by Point Blue scientists on the Farallon Islands, which includes elephant seal pup tagging and behavior observations with special notice to tagged animals. Additional observations are always desired, such as observations of pinniped carcasses bearing tags, as well as any rare or unusual marine mammal occurrences. GFNMS' observations and reporting will add to the observational database and on-going marine mammal assessments on the Farallon Islands.

GFNMS can add to the knowledge of pinnipeds on the South Farallon Islands by noting observations of: (1) Unusual behaviors, numbers, or distributions of pinnipeds, such that any potential follow-up research can be conducted by the appropriate personnel; (2) tag-bearing carcasses of pinnipeds, allowing transmittal of the information to appropriate agencies and personnel; and (3) rare or unusual species of marine mammals for agency follow-up.

Proposed monitoring requirements in relation to GFNMS' abalone research surveys will include observations made by the applicant. Information recorded will include species counts (with numbers of pups/juveniles), numbers of observed disturbances, and descriptions of the disturbance behaviors during the abalone surveys. Observations of unusual behaviors, numbers, or distributions of pinnipeds on the South Farallon Islands will be reported to NMFS and Point Blue so that any potential follow-up observations can be conducted by the appropriate personnel. In addition, observations of tag-bearing pinniped carcasses as well as any rare or unusual species of marine mammals will be reported to NMFS and Point Blue.

If at any time injury, serious injury, or mortality of the species for which take is authorized should occur, or if take of any kind of any other marine mammal occurs, and such action may be a result of the proposed abalone research, GFNMS will suspend research activities and contact NMFS immediately to determine how best to proceed to ensure that another injury or death does not occur and to ensure that the applicant remains in compliance with the MMPA.

A draft final report must be submitted to NMFS Office of Protected Resources within 60 days after the conclusion of the 2014 field season or 60 days prior to the start of the next field season if a new IHA will be requested. The report will include a summary of the information gathered pursuant to the monitoring requirements set forth in the IHA. A final report must be submitted to the Director of the NMFS Office of Protected Resources and to the NMFS Southwest Office Regional Administrator within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report will be considered to be the final report.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

All anticipated takes would be by Level B harassment, involving temporary changes in behavior. The proposed mitigation and monitoring measures are expected to minimize the possibility of injurious or lethal takes such that take by injury, serious injury, or mortality is considered remote. Animals hauled out close to the actual survey sites may be disturbed by the presence of biologists and may alter their behavior or attempt to move away from the researchers. No motorized equipment is involved in conducting the proposed abalone monitoring surveys.

As discussed earlier, NMFS considers an animal to have been harassed if it moved greater than 1 m (3.3 ft) in response to the researcher's presence or if the animal was already moving and changed direction and/or speed, or if the animal flushed into the water. Animals that became alert without such movements were not considered harassed. The distribution of pinnipeds hauled out on beaches is not consistent throughout the year. The number of marine mammals disturbed will vary by month and location. PRBO (now Point Blue) obtains weekly counts of pinnipeds on the South Farallon Islands, dating back to the early 1970s. GFNMS used data collected by PRBO in February 2010 and 2011 to estimate the number of pinnipeds that may potentially be taken by Level B (behavioral) harassment. Table 3 in GFNMS' IHA application and Table 1 here present the maximum numbers of California sea lions, harbor seals, northern elephant seals, northern fur seals, and Steller sea lions that may be present at the various sampling sites during the proposed activity timeframe under this proposed IHA. Based on this information, NMFS proposes to authorize the take, by Level B harassment only, of 5,270 California sea lions, 141 harbor seals, 79 northern elephant seals, 64 northern fur seals, and 99 Steller sea lions. These numbers are considered to be maximum take estimates; therefore, actual take may be slightly less if animals decide to haul out at a different location for the day or animals are out foraging at the time of the survey activities.

Negligible Impact and Small Numbers Analysis and Preliminary Determination

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the take occurs.

No injuries or mortalities are anticipated to occur as a result of GFNMS' rocky intertidal monitoring work and searching for black abalone, and none are proposed to be authorized. The behavioral harassments that could occur would be of limited duration, as researchers will only conduct sampling over a period of 8 days. Additionally, each site is sampled for approximately 3–5 hours before moving to the next sampling site. Therefore, disturbance will be limited to a short duration, allowing pinnipeds to reoccupy the sites within a short amount of time.

Some of the pinniped species use the islands to conduct pupping and/or breeding. However, with the exception of northern elephant seals, GFNMS will conduct its abalone site sampling outside of the pupping/breeding seasons. GFNMS has proposed measures to minimize impacts to northern elephant seals nursing or tending to dependent pups. Such measures will avoid mother/pup separation or trampling of pups.

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Table 1. Estimated number of animals to be disturbed at each sampling site during from January 25 through February 1 based on maximum daily counts of pinnipeds estimated from PRBO monitoring data and the total proposed number of Level B harassment takes to be authorized for each species.

	East Landing & Blowhole Peninsula	North Landing & Fisherman's Bay	Dead Sea Lion Flat	Mussel Flat	Low Arch	Weather Service Peninsula	Raven's Cliff	Indian Head	Shell Beach	Drunk Uncle Islet & Pelican Bowl	Total
CA Sea Lion January	0	30	581	160	334	270	180	1002	1734	517	
CA Sea Lion February	50	35	850	110	280	215	260	775	1420	575	
Maximum	50	35	850	160	334	270	260	1002	1734	575	5270
Harbor Seal Jan.	7	14	5	93	8	0	0	0	0	0	
Harbor Seal Feb.	10	20	10	55	0	0	0	0	0	0	
Maximum	10	20	10	93	8	0	0	0	0	0	141
N. Elephant Seal Jan.	0	5	3	19	0	0	1	28	16	0	
N. Elephant Seal Feb.	0	5	5	5	5	0	0	25	10	0	
Maximum	0	5	5	19	5	0	1	28	16	0	79
N. Fur Seal Jan.	0	0	0	0	0	0	0	32	0	0	
N. Fur Seal Feb.	0	0	0	0	0	0	0	20	0	0	
Maximum*	0	0	0	0	0	0	0	32	0	0	64*
Steller Sea Lion Jan.	0	0	8	8	0	0	1	14	33	1	
Steller Sea Lion Feb.	0	0	15	15	5	5	5	20	20	0	
Maximum	0	0	15	15	5	5	5	20	33	1	99
									MAXIMUM TOTAL		5653

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None of the five marine mammal species anticipated to occur in the proposed activity area are listed as threatened or endangered under the ESA. Table 2 in this document presents the abundance of each species or stock, the proposed take estimates, and the percentage of the affected populations or stocks that may be taken by harassment. Based on these estimates, GFNMS would take less than 1% of each species or stock, with the exception of the California sea lion, which would result in an estimated take of 1.8% of the stock. Because these are maximum estimates, actual take numbers are likely to be lower, as some animals may select other haulout sites the day the researchers are present.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed mitigation and monitoring measures, NMFS preliminarily finds that the rocky intertidal monitoring program will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the rocky intertidal monitoring program will have a negligible impact on the affected species or stocks.

TABLE 2—POPULATION ABUNDANCE ESTIMATES, TOTAL PROPOSED LEVEL B TAKE, AND PERCENTAGE OF POPULATION THAT MAY BE TAKEN FOR THE POTENTIALLY AFFECTED SPECIES DURING THE PROPOSED ROCKY INTERTIDAL MONITORING PROGRAM

Species	Abundance *	Total proposed level B take	Percentage of stock or population
Harbor Seal	30,196	141	0.5
California Sea Lion	296,750	5,270	1.8
Northern Elephant Seal	124,000	79	0.06
Steller Sea Lion	58,334–72,223	99	0.1–0.2
Northern Fur Seal	9,968	64	0.6

* Abundance estimates are taken from the 2012 U.S. Pacific Marine Mammal Stock Assessments (Carretta *et al.,* 2013).

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

None of the marine mammals for which incidental take is proposed are listed as threatened or endangered under the ESA. Therefore, NMFS has determined that issuance of the proposed IHA to GFNMS under section 101(a)(5)(D) of the MMPA will have no effect on species listed as threatened or endangered under the ESA.

National Environmental Policy Act (NEPA)

In 2012, we prepared an EA analyzing the potential effects to the human environment from conducting rocky intertidal surveys along the California and Oregon coasts and issued a Finding of No Significant Impact (FONSI) on the issuance of an IHA for GFNMS' rocky intertidal surveys in accordance with section 6.01 of the NOAA Administrative Order 216–6 (Environmental Review Procedures for Implementing the National Environmental Policy Act, May 20, 1999). GFNMS' proposed activities and impacts for 2014 are within the scope of our 2012 EA and FONSI. We have reviewed the 2012 EA and determined that there are no new direct, indirect, or cumulative impacts to the human and natural environment associated with the IHA requiring evaluation in a supplemental EA and we, therefore, intend to reaffirm the 2012 FONSI.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to authorize the take of marine mammals incidental to GFNMS' rocky intertidal and black abalone monitoring research activities, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: November 22, 2013.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–28474 Filed 11–26–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2013–HA–0195]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by December 27, 2013.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: Certification of Non-Contributory TriCare Supplemental Insurance Plan; OMB Control Number 0720–0044.

Type of Request: Extension.

Number of Respondents: 1,500.

Responses per Respondent: 1.

Annual Responses: 1,500.

Average Burden Per Response: 10 minutes.

Annual Burden Hours: 250 hours.

Needs and Uses: Section 707 of the John Warner National Defense Authorization Act for Fiscal Year 2007 added section 1097c to Title 10. Section 1097c prohibits employers from offering financial or other incentives to certain TRICARE-eligible employees to not enroll in an employer-offered group health plan. In other words, employers may no longer offer TRICARE supplemental insurance plans as part of an employee benefit package. Employers may, however, offer TRICARE supplemental insurance plans as part of an employee benefit package provided that the plan is not paid for in whole or in part by the employer and is not endorsed by the employer. When such TRICARE supplemental plans are offered, the employer must properly

document that they did not provide any payment for the benefit nor receive any direct or indirect consideration or compensation for offering the benefit; the employer's only involvement is providing the administrative support. That certification will be provided upon request to the Department of Defense.

Affected Public: Business or other for-profit; Not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to Obtain or Retain Benefit.

OMB Desk Officer: Mr. John Kraemer.

Written comments and recommendations on the proposed information collection should be sent to Mr. John Kraemer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: November 22, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–28442 Filed 11–26–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2013–OS–0197]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by December 27, 2013.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: Application for Homeowners Assistance; DD Form 1607; OMB Control Number 0704–0463.

Type of Request: Revision of a currently approved collection.

Number of Respondents: 100.

Responses Per Respondent: 1.

Annual Responses: 100.

Average Burden Per Response: 1 hour.

Annual Burden Hours: 100.

Needs and Uses: Homeowners Assistance Program (HAP) is dedicated to helping military families and DoD civilians who recently sold their homes at a loss. The priority access to the funds will go to survivors of those killed during deployment, and those who were wounded, ill or injured during deployment.

Affected Public: Individuals or Households.

Frequency: On occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: November 21, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–28372 Filed 11–26–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2013–0041]

Proposed Collection; Comment Request

AGENCY: Office of the Administrative Assistant to the Secretary of the Army, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Department of the Army announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by January 27, 2014.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

• Mail: Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this

same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Department of the Army, Military Surface Deployment and Distribution Command, 1 Soldier Way, Scott AFB, IL 62225–1604, ATTN: Richard Cody, or call Department of the Army Reports Clearance Officer at (703) 428–6440.

SUPPLEMENTARY INFORMATION: *Title; Associated Form; and OMB Number:* Department of Defense Standard Tender of Freight Services; SDDC Form 364–R; OMB Control Number 0704–0261.

Needs and Uses: The information derived from the DoD tenders on file with the Military Surface Deployment and Distribution Command (SDDC) is used by SDDC subordinate commands and DoD shippers to select the best value carriers to transport surface freight shipments. Freight carriers furnish information in a uniform format so that the Government can determine the cost of transportation, accessorial, and security services, and select the best value carriers for 1.1 million Bill of Lading shipments annually. The DoD tender is the source document for the General Services Administration post-shipment audit of carrier freight bills.

Affected Public: Business or other for-profit.

Annual Burden Hours: 300.

Number of Respondents: 1,200.

Responses per Respondent: 1.

Average Burden per Response: 15 minutes.

Frequency: On occasion.

The DoD tender format was developed to take advantage of improved information collection technology and to connect with ongoing initiatives to implement automated systems to file tenders, select carriers, quote rates, and audits. The disciplined data fields of the tenders will facilitate the Electronic Data Interchange of tender data between carriers and SDDC, also between SDDC subordinate commands and DoD shippers. This initiative ultimately will permit electronic filing of the tender and eliminate mailing paper documents, which are manually processed.

Dated: November 22, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–28483 Filed 11–26–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2013–ICCD–0144]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Designation as an Eligible Institution Under the Title III and Title V Programs and To Request a Waiver of the Non-Federal Cost-Share Requirement (1894–0001)

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before December 27, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0144 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E103,Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For questions related to collection activities or burden, please call Kate Mullan, 202–401–0563 or electronically mail *ICDocketMgr@ed.gov.* Please do not send comments here. We will ONLY accept comments in this mailbox when the *regulations.gov* site is not available to the public for any reason.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Designation as an Eligible Institution Under the Title III and Title V Programs and To Request a Waiver of the Non-Federal Cost-Share Requirement (1894–0001).

OMB Control Number: 1840–0103.

Type of Review: Extension without change of an existing collection of information.

Respondents/Affected Public: State, Local, or Tribal Governments, Private Sector.

Total Estimated Number of Annual Responses: 1,166.

Total Estimated Number of Annual Burden Hours: 8,162.

Abstract: This collection of information is necessary in order for the Secretary of Education to designate an institution of higher education eligible to apply for funding under Title III, Part A and Title V of the Higher Education Act of 1965, as amended. An institution must apply to the Secretary to be designated as an eligible institution. The programs authorized include the Strengthening Institutions, Alaskan Native and Native Hawaiian-Serving Institutions, Asian-American and Native American Pacific Islander-Serving Institutions, Native American Serving Institutions, Hispanic-Serving Institutions, Hispanic-Serving Institutions (Science, Technology, Engineering and Math and Articulation), Promoting Postbaccalaureate Opportunities for Hispanic Americans, and Predominantly Black Institutions Programs. These programs award discretionary grants to eligible

institutions of higher education so that they might increase their self-sufficiency by improving academic programs, institutional management and fiscal stability.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–28476 Filed 11–26–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2013–ICCD–0143]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and approval; Comment Request; William D. Ford Federal Direct Loan Program—150% Limitation

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before December 27, 2013.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2013–ICCD–0143 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E103, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For questions related to collection activities or burden, please call Kate Mullan, 202–401–0563 or electronically mail *ICDocketMgr@ed.gov.* Please do not send comments here. We will ONLY accept comments in this mailbox when the *regulations.gov* site is not available to the public for any reason.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: William D. Ford Federal Direct Loan Program—150% Limitation

OMB Control Number: 1845–0116

Type of Review: Extension without change of an existing collection of information.

Respondents/Affected Public: Individuals or households, State, Local, or Tribal Governments, Private Sector

Total Estimated Number of Annual Responses: 7,770,494

Total Estimated Number of Annual Burden Hours: 282,713

Abstract: These data will allow the Department to calculate the borrowers maximum eligibility period, subsidized usage period, and remaining eligibility period as described in 685.200(f)(1)(ii)–(f)(1)(iv), determine whether the borrower is eligible to receive an additional Direct Subsidized Loan, and ensure that borrowers do not receive Direct Subsidized Loans if they are no longer eligible to receive a Direct Subsidized Loan under 685.200(f)(2).

The Department will determine whether the borrower is responsible for accruing interest on their previously received Direct Subsidized Loans. To ensure that the Department has the information to necessary to make that determination, institutions will be required to report additional information to NSLDS. For example, institutions will be required to report: The CIP code and the credential level for the program in which a borrower is enrolled; the length of the program in academic years, weeks, or months (consistent with current institutional reporting in the COD System); and a more detailed enrollment status of the borrower (e.g., full-time, three-quarter-time, half-time, or less-than-half-time).

These data will allow the Department to determine whether a borrower who is not eligible for additional Direct Subsidized Loans is responsible for accruing interest on his or her previously received Direct Subsidized Loans.

The regulations implement a new statutory requirement that significantly limits a borrower's eligibility for Direct Subsidized Loans and potentially results in the borrower becoming responsible for accruing interest on existing Direct Subsidized Loans. Under section 485(l) of the HEA, which requires that borrowers be provided with entrance and exit counseling on the provisions governing federal student aid, institutions will be required to revise the entrance and exit counseling provided to borrowers.

For entrance counseling, the added counseling requirements under 685.304 will require institutions to explain the new provisions to borrowers.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–28475 Filed 11–26–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Ultra-Deepwater Advisory Committee

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Ultra-Deepwater Advisory Committee. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Monday, December 16, 2013, 12:00 p.m.–1:00 p.m. (EST).

ADDRESSES: U.S. Department of Energy, 1000 Independence Avenue SW., Room 3G–043, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Elena Melchert, U.S. Department of Energy, Office of Oil and Natural Gas, 1000 Independence Avenue SW., Washington, DC 20585. Phone: (202) 586–5600.

SUPPLEMENTARY INFORMATION: *Purpose of the Committee:* The purpose of the Ultra-Deepwater Advisory Committee is to provide advice on development and implementation of programs related to ultra-deepwater architecture and technology to the Secretary of Energy and provide comments and recommendations and priorities for the Department of Energy Annual Plan per requirements of the Energy Policy Act of 2005, Title IX, Subtitle J, Section 999D.

Tentative Agenda

11:30 a.m. Registration

Noon Welcome and Roll Call; Opening Remarks by the Committee Chair; Report by the Editing Subcommittee; Facilitated Discussion by the Members regarding Final Report; Approval of Committee Final Report

12:45 p.m. Public Comments, if any

1:00 p.m. Adjourn.

Public Participation: The meeting is open to the public. The Designated Federal Officer and the Chairman of the Committee will lead the meeting for the orderly conduct of business. Individuals who would like to attend must RSVP to *UltraDeepwater@hq.doe.gov* no later than 5:00 p.m. on Tuesday, December 10, 2013. Please provide your name, organization, citizenship and contact information. Space is limited. Everyone attending the meeting will be required to present government issued identification. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Elena Melchert at the telephone number listed above. You must make your request for an oral statement at least three business days prior to the meeting, and reasonable provisions will be made to include all who wish to speak. Public comment will follow the three minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 60 days at *http://energy.gov/fe/services/advisory-committees/ultra-deepwater-advisory-committee.*

Issued at Washington, DC, on November 21, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–28469 Filed 11–26–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Unconventional Resources Technology Advisory Committee

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Unconventional Resources Technology Advisory Committee. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, December 18, 2013, 10:00 a.m.—11:00 a.m. (EST).

ADDRESSES: U.S. Department of Energy, 1000 Independence Avenue SW., Room 3G–043, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Elena Melchert, U.S. Department of Energy, Office of Oil and Natural Gas, 1000 Independence Avenue SW., Washington, DC 20585. Phone: (202) 586–5600.

SUPPLEMENTARY INFORMATION: *Purpose of the Committee:* The purpose of the Unconventional Resources Technology Advisory Committee is to provide advice on development and implementation of programs related to onshore unconventional natural gas and other petroleum resources to the Secretary of Energy and provide comments and recommendations and priorities for the Department of Energy Annual Plan per requirements of the Energy Policy Act of 2005, Title IX, Subtitle J, Section 999.

Tentative Agenda

9:30 a.m. Registration

10:00 a.m. Welcome and Roll Call; Opening Remarks by the Committee Chair; Report by the Editing Subcommittee; Facilitated Discussion by the Members regarding Final Report; Approval of Committee Final Report.

10:45 a.m. Public Comments, if any.

11:00 a.m. Adjourn.

Public Participation: The meeting is open to the public. The Designated Federal Officer and the Chairman of the Committee will lead the meeting for the orderly conduct of business. Individuals who would like to attend must RSVP to *UnconventionalResources@hq.doe.gov* no later than 5:00 p.m. on Friday, December 13, 2013. Please provide your name, organization, citizenship and contact information. Space is limited. Everyone attending the meeting will be required to present government issued identification. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Elena Melchert at the telephone number listed above. You must make your request for an oral statement at least three business days prior to the meeting, and reasonable provisions will be made to include all who wish to speak. Public comment will follow the three minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 60 days at *http://energy.gov/fe/services/advisory-committees/unconventional-resources-technology-advisory-committee.*

Issued at Washington, DC, on November 21, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–28468 Filed 11–26–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Nuclear Energy Advisory Committee

AGENCY: Office of Nuclear Energy, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Nuclear Energy Advisory Committee (NEAC). The Federal Advisory Committee Act (Public Law No. 94–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, December 19, 2013, 8:30 a.m.—4:00 p.m.

ADDRESSES: Washington Marriott at Metro Center, 775 12th Street NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Bob Rova, Designated Federal Officer, U.S. Department of Energy, 19901 Germantown Rd, Germantown, MD 20874; telephone (301) 903–9096; email at: *Robert.rova@nuclear.energy.gov.*

SUPPLEMENTARY INFORMATION:

Background: The Nuclear Energy Advisory Committee (NEAC), formerly the Nuclear Energy Research Advisory Committee (NERAC), was established in 1998 by the U.S. Department of Energy (DOE) to provide advice on complex scientific, technical, and policy issues that arise in the planning, managing, and implementation of DOE's civilian nuclear energy research programs. The committee is composed of 18 individuals of diverse backgrounds selected for their technical expertise and experience, established records of

distinguished professional service, and their knowledge of issues that pertain to nuclear energy.

Purpose of the Meeting: To inform the committee of recent developments and current status of research programs and projects pursued by the Department of Energy's Office of Nuclear Energy and receive advice and comments in return from the committee.

Tentative Agenda: The meeting is expected to include presentations that cover such topics as an update on activities for the Office of Nuclear Energy and a discussion on the future of domestic nuclear power. In addition, there will be presentations by Nuclear Energy Advisory Committee subcommittees. The agenda may change to accommodate committee business. For updates, one is directed to the NEAC Web site: *http://energy.gov/ne/services/nuclear-energy-advisory-committee.*

Public Participation: Individuals and representatives of organizations who would like to offer comments and suggestions may do so on the day of the meeting, Thursday, December 19, 2013. Approximately thirty minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak but is not expected to exceed 5 minutes. Anyone who is not able to make the meeting or has had insufficient time to address the committee is invited to send a written statement to Bob Rova, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, or email at: *Robert.rova@nuclear.energy.gov.*

Minutes: The minutes of the meeting will be available by contacting Mr. Rova at the address above or on the Department of Energy, Office of Nuclear Energy Web site at *http://www.ne.doe.gov/neac/neNeacMeetings.html.*

Issued in Washington, DC on November 21, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–28462 Filed 11–26–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC14–28–000.

Applicants: Black Bear Hydro Partners, LLC,Black Bear Development Holdings, LLC, Black Bear SO, LLC, Black Bear Holding LLC.

Description: Amendment to November 14, 2013 Joint Application for Authorization Under Section 203 of Black Bear Hydro Partners, LLC, et al.

Filed Date: 11/20/13.

Accession Number: 20131120–5019.

Comments Due: 5 p.m. ET 12/5/13.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–1850–004; ER13–1192–001; ER11–1847–004; ER11–1846–004; ER11–2509–006; ER11–1848–004; ER11–2598–007; ER11–2516–005; ER12–1153–004; ER12–1152–004.

Applicants: Direct Energy Business, LLC, Direct Energy Marketing Inc., Direct Energy Services, LLC, Energetix, Inc., Energy America, LLC, Gateway Energy Services Corporation, NYSEG Solutions, Inc., Bounce Energy NY, LLC, Bounce Energy PA, LLC Hess energy Marketing, LLC.

Description: Notice of Change in Status of the Centrica Companies.

Filed Date: 11/19/13.

Accession Number: 20131119–5143.

Comments Due: 5 p.m. ET 12/10/13.

Docket Numbers: ER11–3872–006.

Applicants: Stony Creek Energy LLC.

Description: Notice of Change in Status of Stony Creek Energy LLC.

Filed Date: 11/20/13.

Accession Number: 20131120–5043.

Comments Due: 5 p.m. ET 12/11/13.

Docket Numbers: ER11–4304–003.

Applicants: Golden Spread Electric Cooperative, Inc.

Description: Golden Spread Electric Cooperative, Inc. submits Supplement to Compliance Filing to April 24 Order to be effective 7/25/2012.

Filed Date: 11/20/13.

Accession Number: 20131120–5045.

Comments Due: 5 p.m. ET 12/11/13.

Docket Numbers: ER13–342–002.

Applicants: CPV Shore, LLC.

Description: Supplement to October 18, 2013 Notice of Non-Material Change in Status of CPV Shore, LLC.

Filed Date: 11/15/13.

Accession Number: 20131115–5220.

Comments Due: 5 p.m. ET 12/6/13.

Docket Numbers: ER13–1987–000.

Applicants: Catalina Solar, LLC.

Description: Catalina Solar, LLC submits Catalina Solar Notice of Effective Date of MBR Tariff Cancellation to be effective N/A.

Filed Date: 11/19/13.

Accession Number: 20131119–5124.

Comments Due: 5 p.m. ET 12/10/13.

Docket Numbers: ER13–2023–000.

Applicants: Catalina Solar, LLC.

Description: Catalina Solar, LLC submits Catalina Solar Notice of Certificate of Concurrence Effective Cancellation Date to be effective N/A.

Filed Date: 11/19/13.

Accession Number: 20131119–5129.

Comments Due: 5 p.m. ET 12/10/13.

Docket Numbers: ER13–2024–000.

Applicants: Catalina Solar Lessee, LLC.

Description: Catalina Solar Lessee, LLC submits Catalina Solar Lessee Notice of Certificate of Concurrence Effective Date to be effective N/A.

Filed Date: 11/19/13.

Accession Number: 20131119–5132.

Comments Due: 5 p.m. ET 12/10/13.

Docket Numbers: ER14–427–000.

Applicants: Public Service Company of Colorado.

Description: 2013–11–19_PSC–COGRN–WF–Rev ISA–146–0.0.0 to be effective 1/18/2014.

Filed Date: 11/19/13.

Accession Number: 20131119–5090.

Comments Due: 5 p.m. ET 12/10/13.

Docket Numbers: ER14–428–000.

Applicants: EME Homer City Generation, L.P.

Description: EME Homer City Generation, L.P. submits EME Homer City Generation, L.P. Request to Update Category Seller Status to be effective 11/20/2013.

Filed Date: 11/19/13.

Accession Number: 20131119–5098.

Comments Due: 5 p.m. ET 12/10/13.

Docket Numbers: ER14–429–000.

Applicants: Midwest Generation LLC.

Description: Midwest Generation LLC submits Midwest Generation, LLC Request for Category 1 Seller Status to be effective 11/20/2013.

Filed Date: 11/19/13.

Accession Number: 20131119–5099.

Comments Due: 5 p.m. ET 12/10/13.

Docket Numbers: ER14–430–000.

Applicants: Public Service Company of Colorado.

Description: Public Service Company of Colorado submits 2013–11–19_PSC-Barr Lake-REV–ISA–161–0.0.0 to be effective 1/18/2014.

Filed Date: 11/19/13.

Accession Number: 20131119–5105.

Comments Due: 5 p.m. ET 12/10/13.

Docket Numbers: ER14–431–000.

Applicants: Ohio Power Company.

Description: Ohio Power Company submits 11th Amd to Station Agreement Among Ohio Power-Buckeye-Cardinal to be effective 12/27/2013.

Filed Date: 11/19/13.

Accession Number: 20131119–5130.

Comments Due: 5 p.m. ET 12/4/13.

Docket Numbers: ER14–432–000.

Applicants: AEP Generation Resources Inc.

Description: AEP Generation Resources Inc. submits 12th Amd to Station Agreement Among AEP GR-Buckeye-Cardinal to be effective 1/1/2014.

Filed Date: 11/19/13.

Accession Number: 20131119–5131.

Comments Due: 5 p.m. ET 12/4/13.

Docket Numbers: ER14–433–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits Notice of Cancellation of Letter Agreement with Houweling Nurseries Oxnard, Inc. to be effective 8/10/2012.

Filed Date: 11/20/13.

Accession Number: 20131120–5001.

Comments Due: 5 p.m. ET 12/11/13.

Docket Numbers: ER14–435–000.

Applicants: Public Service Company of Colorado.

Description: Public Service Company of Colorado submits 2013–11–20–PSC–SWGA–Arapahoe–ISA–163–0.0.0 to be effective 1/19/2014.

Filed Date: 11/20/13.

Accession Number: 20131120–5055.

Comments Due: 5 p.m. ET 12/11/13.

Docket Numbers: ER14–436–000.

Applicants: Public Service Company of Colorado.

Description: Public Service Company of Colorado submits 2013–11–20–PSC–SWGC–Valmont Rev–ISA–164–0.0.0 to be effective 1/19/2014.

Filed Date: 11/20/13.

Accession Number: 20131120–5063.

Comments Due: 5 p.m. ET 12/11/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 20, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–28511 Filed 11–26–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Trespassing on DOE Property: Kansas City Plant Facilities

AGENCY: National Nuclear Security Administration (NNSA), U.S. Department of Energy (DOE).

ACTION: Notice of designation of Kansas City Plant Facilities as off-limit areas.

SUMMARY: DOE hereby amends and adds to previously published site descriptions of various DOE and contractor occupied facilities as off-limit areas. In accordance with 1O CFR part 860, it is a federal crime under section 229 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2278a), for unauthorized persons to enter into or upon the facilities of the Kansas City Plant of the United States Department of Energy, National Nuclear Security Administration, Kirtland Operations operating area. The facilities are described in this notice. If unauthorized entry into or upon these properties is into an area enclosed by a fence, wall, floor, roof or other such structural barrier, conviction for such unauthorized entry may result in a fine not to exceed $100,000 or imprisonment for not more than one year, or both. If unauthorized entry into or upon the properties is into an area not enclosed by a fence, wall, floor, roof, or other such structural barrier, conviction for such unauthorized entry may result in a fine of not more than $5,000.'

• By operation of law, the Criminal Fine Improvements Act of 1987, Public Law 100–185, 101 Stat. 1279 (1987), increased the fine amounts from $1000/$5000 to $5000/$100,000. See, *e.g., U.S.* v. *Lentsch,* 369 F.3d 948, 950 (6th Cir. 2004) (quoting 58 FR 47984 (Sept. 14, 1993)); see *also* 10 CFR 860.5.

DATES: This action is effective on November 27, 2013.

FOR FURTHER INFORMATION CONTACT: Laurel I. Hautala, Director, Security & Information Technology Systems, NNSA Kansas City Plant, 14520 Botts Road, Kansas City, MO 64147, Telephone: (816) 488–5109, Facsimile: (816) 488–3718.

Albert N. Guarino, Site Counsel, NNSA Kansas City Plant, 14520 Botts Road, Kansas City, MO 64147, Telephone: (816) 488–3344, Facsimile: (816) 488–3718.

SUPPLEMENTARY INFORMATION: The DOE, successor agency to the Atomic Energy Commission (AEC), is authorized, pursuant to § 229 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2278a), and § 104 of the Energy Reorganization Act of 1974 (42 U.S.C. 5814), as implemented by 10 CFR part 860, published in the *Federal Register* on September 14, 1993 (58 FR 47984–47985) and § 301 of the Department of Energy Organization Act (42 U.S.C. 7151), to prohibit unauthorized entry and the unauthorized introduction of weapons or dangerous materials into or upon any DOE facility, installation, or real property.

By notice dated October 19, 1965 (30 FR 13290), DOE prohibited unauthorized entry into or upon the Kansas City Plant. The boundary was revised on November 25, 1983 (48 FR 56822–568224) and again revised on October 26, 2012 (FR 65376–65377).

Accordingly, NNSA prohibits the unauthorized entry and the unauthorized introduction of weapons or dangerous materials, as provided in 10 CFR 860.3 and 860.4 into and upon the following additions to the existing Kansas City Plant boundary. The additions are described in further detail in the paragraphs that follow.

Property Description:

Air Park Building

2100 Air Park Road SE., Albuquerque, Bernalillo County, NM—Legal Description: Lot Numbered Four (4) of Airport Business Park, within Section 34, Tl0N, R3E, NMPM containing 1.4204 acres.

Alamo Building

2445 Alamo Avenue SE., Albuquerque, Bernalillo County, NM—Legal Description: 1. Building and parking for Alamo Building—Legal Description: Tract A-2-A-2 replat of Tract A-2-A in Block Numbered Two (2) of Airport Industrial Park containing 0.9944 Acres. 2. Parking lot on Baylor for 2445 Alamo building—Legal Description: Lot Numbered 11–B in Block Numbered One (1) of Airport Industrial Park of the Plat of Lot 11–A and 11–B, Block 1. of Airport Industrial Park containing .4931 Acres.

Craddock A

2540 Alamo Avenue SE., Albuquerque, Bernalillo County, NM—Legal Description: 87106 TR A-1-A replat of tract Z-4 & A-1 Airport Industrial Park to TRS A-4-A, A-1-A, A-1-B & A-1-C of Airport Industrial Park containing 1.8989 AC MIL, or 82,717 SF M/L, consisting of approximately 34,860 square feet including the means of access thereto and egress therefrom along ways controlled by lessor and together with the use of outside perimeter and grounds appurtenant to the building for purposes of parking

employees, visitors, and guests and in addition thereto, approximately 6,500 square feet of paved, stripped parking lot area (the parking lot) adjacent to the above described property, hereinafter described collectively as the leased premises.

Craddock B

2460 Alamo Avenue SE Albuquerque, Bernalillo County, NM—Legal Description: TR Z-4-A replat of tract Z-4 & A-1 Airport Industrial Park to TRS A-4-A, A-1-A, A-1-B & A-1-C of Airport Industrial Park containing 1.5470 AC MIL OR 67,390 SF MIL consisting of approximately 5,828 square feet including the means of access thereto and egress therefrom along ways controlled by lessor and together with the use of outside perimeter and grounds appurtenant to the building for purposes of parking employees, visitors, and guests and in addition thereto, hereinafter described collectively as the leased premises to be used for administrative offices, engineering, production, maintenance and repair, and storage for such other lawful purposes as may be incidental thereto.

Craddock C

2450 Alamo Avenue SE., Albuquerque, Bernalillo County, NM—Legal Description: TR C-1 Airport Industrial Park consisting of approximately 23,732 square feet including the means of access thereto and egress therefrom along ways controlled be lessor and together with the use of outside perimeter and grounds appurtenant to the building for purposes of parking employees, visitors, and guests and in addition thereto, hereinafter described collectively as the leased premises to be used for administrative offices, engineering, production, maintenance and repair, and storage for such other lawful purposes as may be incidental thereto.

This revised boundary is in addition to the property description contained in the **Federal Register** notice published October 19, 1965 (30 FR 13290), revised on November 25, 1983 (48 FR 56822–56824), and again revised on October 26, 2012 (77 FR 65376–65377). Addition of the Kirtland Operations operating area property does not terminate the prior Kansas City Plant section 229 listing.

Notices stating the pertinent prohibitions of 10 CFR 860.3 and 860.4 and the penalties of 10 CFR 860.5 are being posted at all entrances of the above-referenced areas and at intervals along their perimeters, as provided in 10 CFR 860.6.

Issued in Kansas City, MO., this 5th day of November 2013.

Laurel I. Hautala,

Director, Security & Information Technology Systems, NNSA Kansas City Plant.

[FR Doc. 2013–28466 Filed 11–26–13; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2013–0743; FRL–9903–46–OAR]

Notice of Availability of the Environmental Protection Agency's 2011 Emissions Modeling Platform

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability (NODA).

SUMMARY: The Environmental Protection Agency (EPA) is providing notice that the 2011 Emissions Modeling Platform data are available for public review and comment. The 2011 Emissions Modeling Platform consists of emissions inventory data, supporting data, and methods that are used to process the 2011 National Emissions Inventory (NEI) and related data into a form that can be used for air quality modeling. The platform, or portions of the data that make up the platform, may be used by the Office of Air and Radiation in several contexts, including the development of rules related to the transport of air pollution and the National Ambient Air Quality Standards. The platform may also be used for other studies such as the National Air Toxics Assessment. The EPA is requesting comment on the 2011 Emissions Modeling Platform, including the emissions inventories and on the supporting data and methods. A docket has been established to track the comments.

DATES: Comments must be received on or before March 31, 2014. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on submitting comments and on the provided data.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2013–0743, by one of the following methods:

- *www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Fax:* (202)566–9744. Attention Docket ID No. EPA–HQ–OAR–2013–0743.
- *Mail:* EPA Docket Center, WJC West (Air Docket), Attention Docket ID No. EPA–HQ–OAR–2013–0743, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460. Please include a total of 2 copies.
- *Hand Delivery:* U.S. Environmental Protection Agency, WJC West (Air Docket), 1301 Constitution Avenue NW., Room 3334, Washington, DC 20004, Attention Docket ID No. EPA–HQ- OAR–2013–0743. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2013–0743. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in

www.regulations.gov or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, WJC West Building Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For questions on the 2011 platform and on how to submit comments, contact Alison Eyth, Air Quality Assessment Division, Environmental Protection Agency, C339–02, 109 T.W. Alexander Drive, Research Triangle Park, NC 27709; telephone number: (919)541–2478; fax number: (919) 541–0684; email address: *eyth.alison@epa.gov.*

SUPPLEMENTARY INFORMATION: The EPA is requesting comment on the 2011 platform emission inventories; supporting ancillary files used to allocate emissions temporally, spatially, and by species; and on the emissions modeling methods used to process the inventories into data suitable for input to air quality models. Summaries of the emission inventories and data are provided to aid in the review of the data, but comments are sought on the actual data.

I. Additional Information on Submitting Comments

A. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to the EPA through EDOCKET, *www.regulations.gov,* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to the EPA docket office specified in the *Instructions,* mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the notification by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Explain your comments, why you agree or disagree; suggest alternatives and substitute data that reflects your requested changes.

iii. Describe any assumptions and provide any technical information and/or data that you used.

iv. Provide specific examples to illustrate your concerns, and suggest alternatives.

v. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

vi. Make sure to submit your comments by the comment period deadline identified.

B. Instructions for Agencies That Submit Data to the NEI

1. *Updates to the 2011 NEI.* State, local, and tribal agencies that submit data to the NEI via the Emissions Inventory System (EIS) are encouraged to submit any updates to the 2011 emission inventory data through EIS as described in *http://www.epa.gov/ttn/chief/net/2011inventory.html#v2instructions.* Updates to emission inventories, and to model inputs used to develop mobile source emission inventories in the NEI, should be submitted through EIS even in cases in which the 2011 modeling platform inventory data does not exactly match the NEI data. Specific examples of non-matching data are given in Section II. The EPA requests that agencies submitting updates via EIS also submit to the docket a comment that describes the nature of, and rationale for, the changes that were made in EIS to aid in the documentation of changes to the inventories. These agencies do not need to submit to the docket the actual updated emission inventory data or model inputs already provided to EIS.

2. *Updates to Other Data.* EIS can accept updates to some of the categories of data for which EPA is requesting comments, but not for all of the data that exists in the modeling platform. The types of data that can be updated through EIS are noted below. Updates to all other modeling platform data and comments on the methods used must be provided through the docket. Additional details follow in Section I.C.

C. Instructions for Comments Not Submitted Through EIS

The EPA can most effectively incorporate comments that provide specific alternative values to those in the EPA data sets, and for which accompanying documentation supports the alternative values. Commenters should provide the alternative data at a level of detail appropriate to the data set into which it will be incorporated, thereby including all key fields needed to substitute the old data with the new. For example, commenters should not provide a new set of county total emissions as an alternative to more detailed point source emissions data.

Any alternative emission inventory or other data provided should be compatible with the formats used by the Sparse Matrix Operator Kernel Emissions (SMOKE) modeling system version 3.5, which is used by the EPA to process emission inventories into a format that can be used for air quality modeling. Formats are defined in the SMOKE Version 3.5 User's Manual available from *http://www.smoke-model.org.* Only the rows of data that have changed from those provided by the EPA should be included in the alternative data sets.

II. Information Available for Public Comment

The 2011 Emissions Modeling Platform consists of emission inventories primarily based on the 2011 NEI version 1, additional ancillary data files that are used to convert the NEI emissions into a form that can be used for air quality modeling, along with the methods used to prepare the air quality model inputs. The NEI represents emissions of criteria and hazardous pollutants into the atmosphere from all source categories within the United States. 2011 is the latest year for which a complete NEI for all emission processes is available. These complete, national emission inventories are prepared every three years and are primarily based on data and inputs provided by state, local, and tribal agencies for sources within their jurisdictions. The NEI includes emissions from sources at specific locations called point sources, emissions from fire events, and county-level emissions of onroad mobile sources, nonroad mobile sources, and other nonpoint sources.

The 2011 emissions modeling platform is named for the year of the data that it represents. The emission inventories in the modeling platform are primarily based on the 2011 NEI version 1, although there are some key differences between the platform inventories and the NEI. First, in the modeling platform, the NEI inventories are split into additional categories called modeling sectors. For example, the point sources are split into peaking electric generating units (EGUs), other EGUs, oil and gas sources, and other point sources. The nonpoint sources are split into agricultural ammonia sources, residential wood sources, oil and gas

sources, and other nonpoint sources. Other differences between the platform inventories and the NEI are in the emission values for commercial marine vessel emissions in specific areas, in the mobile source emissions in California and Texas, and the inclusion of additional ethanol plants in the modeling platform. Another difference is in the onroad mobile source emissions inventory values due to the use of different versions of the Motor Vehicle Emissions Simulator (MOVES) in the two data sets.

The 2011 emissions modeling platform also includes emissions inventories for Canada and Mexico, along with ancillary data files used to allocate annual emissions to the hourly, gridded emissions of chemical species used by an air quality model (AQM). The types of ancillary data files include temporal profiles that allocate annual and monthly emissions down to days and hours, spatial surrogates that allocate county-level emissions onto the grid cells used by an AQM, and speciation profiles that allocate the pollutants in the NEI to the chemical species used by an AQM. In addition, there are temporal, spatial, and speciation cross-reference files that map the emission sources in the emission inventories to the appropriate profiles based on their location, emissions source classification code (SCC), and in some cases the specific facility or unit.

The 2011 emissions modeling platform, or portions of the data that make up the platform, may be used by the Office of Air and Radiation in several contexts including the development of rules related to the transport of air pollution and the National Ambient Air Quality Standards. Air quality modeling results that are based on the outputs of the emissions modeling platform are typically used in support of Regulatory Impact Analyses (RIAs) and sometimes support other aspects of rulemaking. The platform may also be used for other studies such as the National Air Toxics Assessment.

The EPA has placed key information related to the 2011 emissions modeling platform into the electronic docket available at *www.regulations.gov.* However, many of the detailed data files are too large to be directly uploaded into the electronic docket and/or are not in formats accepted by that docket. Therefore, the information placed in the electronic docket, associated detailed data, and summaries to help with interpretation of the data are available for public review on the CHIEF Emissions Modeling Clearinghouse on EPA's Web site at *http://www.epa.gov/ttn/chief/emch/index.html#2011.* Supplementary custom and prepared summaries and extractions of the 2011 NEI, and documentation thereof, are also available on EPA's Web site at *http://www.epa.gov/ttn/chief/net/2011inventory.html.*

The emissions inventories, along with many of the ancillary files, are provided in the form of flat files that can be input to SMOKE. Flat files are comma-separated value style text files with columns and rows that can be loaded into spreadsheet or database software. The columns of interest in the emission inventory files are specified in each subsection below. The EPA requests comment on the following components of the 2011 emissions modeling platform data:

- *Emission values.* The emissions inventories used for the modeling platform are largely consistent with the 2011 NEI version 1 but are split into smaller sectors for emissions modeling. The EPA requests comment on both the criteria air pollutant (CAP) and hazardous air pollutant (HAP) emissions in the modeling inventories. The annual emissions values are located in the ANN_VALUE column of the emission inventory files in Flat File 2010 (FF10) format. Some emission inventories (e.g., nonroad) may also have values filled in to the monthly value columns (e.g., JAN_VALUE, FEB_VALUE, …, DEC_VALUE). The EPA requests comment on both the annual and monthly emissions values, where applicable. Summaries of emissions by state and county are provided to aid in the review of emissions values. Because the onroad emissions data differs from that in the NEI, and because of the data volume, state-specific extractions of the onroad emissions inventory data are provided. For EIS data submitters, updates to emission values can be provided via EIS.
- *Model inputs and activity data used to develop mobile source emission inventories.* The emission inventories in the NEI for onroad and nonroad mobile sources are developed by running MOVES and the National Mobile Inventory Model (NMIM), respectively. The EPA requests comment on the model input data used to develop the mobile source emission inventories. These include both the direct inputs to MOVES used to create emission factors and the vehicle miles traveled and vehicle population activity data used to compute the emissions. Alternative activity data may be provided in MOVES county databases or in SMOKE FF10 activity data format. For EIS data submitters, updates to mobile source input databases can be provided via EIS.
- *CEMS data differing from NEI values.* In most cases, the Continuous Emissions Monitoring System (CEMS) data for 2011 are very close to the values in the 2011 NEI version 1 for specific units. However, there are some cases for which the values are different, such as when a CEMS only reports for part of the year. The EPA requests comment on the specific instances in which the NEI data and CEMS data are not consistent. A report specifying the sources that differ is provided.
- *Stack parameters.* The release of emissions from stack-based point sources are characterized with stack height, diameter, temperature, and either flow or velocity. In the 2011 NEI version 1, some sources are not adequately characterized with all of the needed parameters. In some cases, the specified parameters do not seem realistic given the volume of emissions exiting the stack. The EPA requests comment on the stack parameters found in the STKHGT, STKDIAM, STKTEMP, STKFLOW, and STKVEL columns of point source emission inventory flat files. To facilitate review of this information, a stack parameter summary is provided for EGU point sources and for non-EGU point sources other than airports, fires, and commercial marine vessels. For EIS data submitters, updates to stack parameters can be provided via EIS.
- *Stack locations.* The location of point sources is specified by the values in the LATITUDE, LONGITUDE, and LL_DATUM columns in point source emission inventory flat files. The EPA seeks comment on these stack locations, which can be especially important in the context of risk modeling. Stack locations are included in the stack parameter summary. For EIS data submitters, updates to stack locations can be provided via EIS.
- *Existing control techniques.* The 2011 NEI version 1 includes information on emissions control techniques listed in terms of control codes submitted to the EIS. These are listed in the CONTROL_IDS and CONTROL_MEASURES columns in the emission inventory data sets, with levels of reduction in the ANN_PCT_RED column. Projection of point source emissions to future years is dependent on this information. The EPA seeks comment on whether information on existing controls given in the inventory flat files is incomplete or erroneous. Control techniques independent of pollutant are included in the stack parameter summary. The flat files must be consulted for details of control techniques by pollutant. For EIS data

submitters, updates to control techniques can be provided via EIS.

• *Boiler design capacity.* The EPA seeks comment on the design capacity of boilers as characterized in the DESIGN_CAPACITY and DESIGN_CAPACITY_UNITS columns of point source emission inventory flat files. Design capacity is included in the stack parameter summary. For EIS data submitters, updates to design capacities can be provided via EIS.

• *Emissions modeling methods.* The EPA is using the SMOKE version 3.5 to prepare data for air quality modeling. The EPA requests comment on the methods by which SMOKE is used to develop air quality model-ready emissions, as illustrated in the scripts provided with the modeling platform.

• *Temporal allocation.* Annual emission inventories must be allocated to hourly values prior to air quality modeling. This may be done with temporal profiles in several steps, such as annual-to-month, month-to-day, and day-to-hour. The exact method used depends on the type of emissions being processed. The EPA seeks comment on the allocation of the emission inventories to month, day, and hour for all types of emission processes. In particular, the EPA seeks information that could help improve the temporal allocation of emissions from EGUs, onroad and nonroad mobile sources, and residential wood combustion sources. The EPA seeks to continue to improve temporal allocation factors with additional local and region-specific data. In addition to providing temporal allocation data as SMOKE input files, spreadsheets containing temporal allocation factors and cross references are provided for readability.

• *Spatial surrogates.* Spatial surrogates are used to allocate county-level emissions into grid cells used for air quality modeling. The EPA requests comment on the spatial surrogates used in the 2011 emissions modeling platform. Plots of spatial surrogates and a spreadsheet containing the spatial cross reference data are provided for readability.

• *Chemical speciation.* Prior to air quality modeling, the pollutants in the emission inventories must be converted into the chemical species used by the air quality model using speciation profiles. The speciation profiles in the 2011 emissions modeling platform are consistent with version 4.5 of the SPECIATE database. The EPA requests comment on the speciation profiles used in the 2011 modeling platform, as well as any information that could help improve the speciation of oil and gas emissions in both the eastern and western United States. In addition to providing chemical speciation data as SMOKE input files, spreadsheets containing chemical speciation factors and cross references are provided for readability.

To aid in the interpretation of the provided data files and how they relate to the aspects of the data on which the EPA is requesting comment, the EPA has provided in the docket a document describing the information included in the provided data files.

Dated: November 20, 2013.

Mary Henigin,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. 2013–28508 Filed 11–26–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2013–0579; FRL–9394–7]

Draft Guidelines; Product Environmental Performance Standards and Ecolabels for Voluntary Use in Federal Procurement; Notice of Availability and Request for Comments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is announcing for public review and comment draft Guidelines intended to provide a transparent, fair, and consistent approach to using non-governmental product environmental performance standards and ecolabels in Federal purchasing, consistent with Federal standards policy and sustainable acquisition mandates. These draft Guidelines have been developed in response to requests via a wide variety of stakeholder engagement channels from suppliers, manufacturers, environmental organizations, Federal purchasers, and other stakeholders over the last several years. Voluntary guidelines for standards and ecolabels would help agencies implement sustainable acquisition requirements of Executive Order 13514 and the Federal Acquisition Regulation (FAR) 23.103 which requires 95% of the government's applicable contract actions to be sustainable. Specifically, the Guidelines for standards and ecolabels could provide clarity regarding the term ''environmentally preferable'' for purposes of the Executive Order. In addition to seeking input on the draft Guidelines themselves, EPA is seeking input on how standards and ecolabels should be assessed for conformance to such guidelines. The proposed draft Guidelines and supplementary information can be found in the docket and at *http://www.epa.gov/epp/draftGuidelines.*

DATES: Comments must be received on or before February 25, 2014.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2013–0579, by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.

• *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

• *Delivery:* OPPT Document Control Office (DCO), William Jefferson Clinton (WJC) East Bldg., Rm. 6428, 1201 Constitution Ave. NW., Washington, DC. ATTN: Docket ID Number EPA–HQ–OPPT–2013–0579. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

• *Instructions:* Direct your comments to docket ID number EPA–HQ–OPPT–2013–0579. EPA's policy is that all comments received will be included in the docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or email. The regulations.gov Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid

the use of special characters, any form of encryption, and be free of any defects or viruses.

• *Docket:* All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, WJC West Bldg., 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: *For information regarding environmentally preferable purchasing, contact:* Alison Kinn Bennett, Senior Advisor, Pollution Prevention Division (7409M), Office of Pollution Prevention and Toxics, Office of Chemical Safety and Pollution Prevention, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–8859; email address: *kinn.alison@epa.gov.*

For information regarding standards policy, contact: Mary McKiel, Standards Executive, International Staff (7101M), Office of Chemical Safety and Pollution Prevention, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–0532; email address: *mckiel.mary@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

This action is directed to the public in general. Although this action may be of particular interest to those persons who purchase or provide products and services for Federal agencies, developers of standards and ecolabels, and the manufacturers of products, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical contact person listed under **FOR FURTHER INFORMATION CONTACT**.

II. Background

A. What action is the agency taking?

EPA is announcing for public review and comment draft Guidelines intended to assist the Federal workforce in more consistently utilizing non-governmental product environmental performance standards and ecolabels in the Federal procurement process, consistent with Federal standards policy and sustainable acquisition mandates.

Federal agencies must comply with the following sustainability-related purchasing mandates: section 2(h) of Executive Order 13514 (Federal Leadership in Environmental, Energy and Economic Performance), section 6002 of the Resource Conservation and Recovery Act, section 9002 of the Farm Security and Rural Investment Act of 2002, The Energy Policy Act, section 2(d) of Executive Order 13423 (Strengthening Federal Environmental, Energy, and Transportation Management) (72 FR 3919, January 26, 2007), and the FAR, including FAR Part 23 (Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace) (see *http://www.whitehouse.gov/omb/procurement_index_green).*

Section 2(h) of Executive Order 13514 states that:

> The Head of each Agency shall . . . advance sustainable acquisition to ensure that 95 percent of new contract actions including task and delivery orders, for products and services with the exception of acquisition of weapon systems, are . . . energy-efficient (Energy Star or Federal Energy Management Program (FEMP) designated), water-efficient, biobased, environmentally preferable (e.g., Electronic Product Environmental Assessment Tool (EPEAT) certified), non-ozone depleting, contain recycled content, or are non-toxic or less toxic alternatives, where such products and services meet agency performance requirements.

In addition, via the ''National Technology Transfer and Advancement Act of 1995'' (Pub. L. 104–113; hereinafter ''the NTTAA''), Congress required Federal agencies to ''use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities,'' except when an agency determines that such use ''is inconsistent with applicable law or otherwise impractical.'' Office of Management and Budget (OMB) Circular A–119 (titled ''Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities'') reaffirms Federal agency use of non-governmental standards in procurement.

While Federal purchasing policy is clear for the several standards and ecolabels that are listed in statute, regulation, or Executive Order, the lack of guidance on using other product environmental performance standards and ecolabels often results in an inconsistent approach by Federal purchasers and confusion and uncertainty for vendors and manufacturers.

Therefore, in accordance with Federal obligations under the NTTAA and OMB Circular A–119 (see *http://www.standards.gov),* EPA is requesting comments on draft Guidelines that could be used to select non-governmental product environmental performance standards and ecolabels for voluntary use in Federal procurement. Additionally, the Guidelines could provide clarity regarding the term ''environmentally preferable'' for purposes of Executive Order 13514, building upon EPA's ''1999 Final Guidance on Environmentally Preferable Purchasing'' (see *http://www.epa.gov/epp/pubs/guidance/finalguidance.htm*) which defines ''environmentally preferable'' to mean products or services that ''have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose. This comparison may consider raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance or disposal of the product or service''.

As envisioned by EPA, guidelines for standards and ecolabels that would be used by the Federal government would not be applied to products directly or to government standards and ecolabels or to non-governmental standards and ecolabels that are already mandated for procurement via statute or Executive Order. Moreover, these draft Guidelines are not intended to discontinue or diminish procurement of products conforming to government standards and ecolabels. Existing mandates and government standards and ecolabels were influential in framing the draft Guidelines, especially guidelines regarding the environmental effectiveness of a standard's criteria. These standards and ecolabels were

later assessed for conformance with the draft Guidelines and found to align in principle (e.g., participatory process, transparency), considering the differences in administrative procedures of the government and of standards development organizations.

Rather, EPA envisions that non-governmental standards and ecolabels determined to be in conformance with the Guidelines would supplement existing mandates and government standards and ecolabels. [For illustration purposes, ''product category x'' has a recovered content minimum of 20% per the EPA Comprehensive Procurement Guidelines (CPG) (section 6002 of the Resource Conservation and Recovery Act). A multi-attribute environmental performance standard for ''product category x'' is determined to conform to the Guidelines. Depending on the standard, Federal procurement officials could be informed that either (1) the non-governmental standard facilitates meeting the mandate (e.g., the standard includes the CPG requirement as a prerequisite) or (2) the non-governmental standard addresses important environmental considerations, but does not necessarily fully address the CPG requirement, so the standard could be specified in addition to the CPG requirement.]

B. How were these draft guidelines developed?

In 2011 and 2012, EPA and the General Services Administration (GSA) convened several listening sessions to solicit input regarding the Federal Government's role in sustainability. A number of sessions were held following the release of the National Academy of Sciences report ''Sustainability and the U.S. EPA.'' Other sessions were held under the auspices of the Interagency Workgroup established by GSA per section 13 of Executive Order 13514: Federal Leadership in Environmental, Energy, and Economic Performance (74 FR 52117, October 8, 2009).

EPA heard some common themes from suppliers, manufacturers, environmental organizations, multi-stakeholder bodies, regulatory partners, and others. Key points included: (1) The desire for greater clarity in the marketplace regarding standards and ecolabels and (2) the opportunity to leverage the Federal Government's purchasing power toward sustainability goals.

The Interagency Workgroup developed an initial set of draft Guidelines and contracted with Big Room Inc. (developers of *www.EcoLabelIndex.com*) to test the feasibility and appropriateness of the draft Guidelines. Big Room Inc. conducted a survey of a subset of government and non-governmental environmental performance standards and ecolabel developers. Based on the results of the study and external stakeholder input, the Interagency workgroup revised the draft Guidelines.

C. Authorities

EPA is issuing this notice pursuant to the authority in the Pollution Prevention Act [42 U.S.C.A. § 13103(b)(11)] which requires EPA to ''Identify opportunities to use Federal procurement to encourage source reduction'' and Section 12(d) of the NTTAA, which requires Federal agencies to ''use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities.''

III. Draft Guidelines

The draft Guidelines are organized into the following four sections:

- Section I, ''Guidelines for the Process for Developing Standards'' addresses the procedures used to develop, maintain, and update a product environmental performance standard.
- Section II, ''Guidelines for the Environmental Effectiveness of Standards'' addresses the criteria in the standard or ecolabel that support the claim of environmental preferability.
- Section III, ''Guidelines for Conformity Assessment'' addresses the procedures and practices by which products are assessed for conformity to the criteria specified by standards and ecolabeling programs.
- Section IV, ''Guidelines for Management of Ecolabeling Programs'' addresses the organizational and management practices of an ecolabeling program.

EPA recognizes that the level to which sustainability practices have been incorporated varies by industry sector and even from product category to product category. Therefore, a single, one-size-fits-all approach to assessing standards and ecolabels would not be appropriate or useful. To address differences among sectors, EPA is requesting comment on an approach that provides flexibility. For example, each draft Guideline has been designated either as ''baseline'' or ''leadership.'' Based on initial analysis, draft ''baseline'' Guidelines align with Federal goals and requirements, are relatively straightforward to evaluate, and are applicable across industry sectors. Draft ''leadership'' Guidelines represent best practices and are currently achievable by some standards and ecolabels.

Another example of the flexibilities EPA has considered arises with respect to the draft Guidelines sections addressing Conformity Assessment and Management of Ecolabeling Programs. Specifically, there may not be a marketplace need for a second or third-party conformity assessment program depending upon, among other factors, the degree of risk associated with a product's nonconformity to the standard. In those cases, a supplier's self-declaration of conformity would suffice. Similarly, there may not be a marketplace need for an ecolabel, depending upon the type of product and/or how it is procured. In those cases, the Guidelines for Management of Ecolabeling Programs would not apply.

The proposed draft Guidelines and supplementary information can be found at *http://www.epa.gov/epp/draftGuidelines.*

IV. Pilot Program Under Consideration

In addition to seeking input on the draft Guidelines themselves, EPA is seeking input on how standards and ecolabels should be assessed for conformance to the Guidelines if they are finalized and implemented. Based on discussions with stakeholders, EPA anticipates that a number of organizations may be positioned to respond to the need for assessment of standards and ecolabels for conformity with the Guidelines. Taking this into account, EPA is considering a limited pilot project, assuming sufficient appropriations are available, to test an assessment approach, especially with respect to Guidelines addressing the ''environmental effectiveness'' of a standard or ecolabel's criteria. During this pilot, EPA expects that an external entity (or entities) would convene and work with a multi-stakeholder panel (or panels) to develop product category-specific programs to assess conformity of standards and ecolabels with the Guidelines. The entity (or entities) would then conduct the assessments for selected product categories in a manner consistent with the International Organization for Standardization's Guides on conformity assessment, and develop a list of standards and ecolabels that conform to the Guidelines. The results from the pilot project would be made publicly available and EPA would evaluate the results to inform any future action such as making available a list of conforming standards and ecolabels for voluntary use by Federal agencies in procurement activities.

The external entity (or entities) would not perform any inherently governmental functions such as procurement policy, procurement decisions, or strategic implementation decisions.

V. Request for Comments

EPA is seeking public input on the draft Guidelines and the concept of assessing non-governmental standards and ecolabels for voluntary use in Federal procurement. Recognizing that implementation of these draft Guidelines will call for additional stakeholder engagement and assessment processes, EPA also welcomes comment on the overall approach, including the potential pilot project. In particular:

1. How might the Guidelines benefit the broader marketplace?

2. Are there any draft Guidelines that should be removed or modified? Are there gaps in the draft Guidelines that could be addressed by a new Guideline(s)?

3. Are the designations of ''baseline'' and ''leadership'' in the draft Guidelines understandable? Can the designations be easily implemented? Do they appropriately reflect varying approaches in the marketplace today?

4. How should the leadership Guidelines be applied to standards and ecolabels in different product categories (e.g., different weightings in an overall conformity assessment scheme)?

5. What processes, approaches, measures, and mechanisms should be used to determine conformance with the Guidelines, if they are finalized and implemented?

6. Under what circumstances and under what authorities, if any, should the Federal Government require a particular type of conformity assessment to provide adequate confidence that the products have met a particular environmental performance standard or ecolabel?

7. Are there alternatives to the pilot project that EPA should consider?

8. If EPA were to move forward with a pilot project to test the proposed standards and ecolabels assessment approach, which product categories should be prioritized?

9. What challenges need to be addressed/resolved in implementing the proposed Guidelines in order to be a transparent, fair, and consistent process?

List of Subjects

Environmental protection, government procurement, standards, ecolabels, Guidelines.

Dated: November 15, 2013.

James Jones,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2013–28507 Filed 11–26–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9903–55–Region–5]

Notification of a Public Teleconference of the Great Lakes Advisory Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) announces a public teleconference of the Great Lakes Advisory Board (GLAB). The purpose of the teleconference is to conclude discussions that will inform the development of a draft Great Lakes Restoration Initiative FY 2015–2019 Action Plan.

DATES: The public teleconference will be held on Wednesday, December 11, 2013 from 1:00 p.m. to 3 p.m. Central Time, 2 p.m. to 4 p.m. Eastern Time. The teleconference number is: (877) 744–6030; Participant code: 11645588.

ADDRESSES: The public teleconference will take place by telephone only.

FOR FURTHER INFORMATION: Any member of the public wishing further information regarding this teleconference may contact Taylor Fiscus, Acting Designated Federal Officer (DFO), GLAB, by telephone at 312–353–6059 or email at *mailto:Fiscus.Taylor@epa.gov*. General information on the Great Lakes Restoration Initiative (GLRI) and the GLAB can be found on the GLRI Web site at *http://www.glri.us*.

SUPPLEMENTARY INFORMATION:

Background: The GLAB is a federal advisory committee chartered under the Federal Advisory Committee Act (FACA), Public Law 92–463. EPA established the GLAB in 2013 to provide independent advice to the EPA Administrator in her capacity as Chair of the federal Great Lakes Interagency Task Force. The GLAB conducts business in accordance with FACA and related regulations.

The GLAB consists of 18 members appointed by EPA's Administrator. Members serve as representatives of state, local and tribal government, environmental groups, agriculture, business, transportation, foundations, educational institutions, and as technical experts.

The GLAB held a teleconference and meeting on May 21–22, 2013 (as noticed in 78 FR 26636–26637) and on November 13, 2013 (as noted in 78 FR 66356) to discuss the development of a draft FY 2015–2019 GLRI Action Plan.

The teleconference will provide opportunity for members of the public to submit oral comments in response to the draft of the Great Lakes Restoration Initiative FY 2015–2019 Action Plan.

Availability of Teleconference Materials: The agenda and other materials in support of the teleconference will be available on the GLRI Web site at *http://www.glri.us* in advance of the teleconference.

Procedures for Providing Public Input: Federal advisory committees provide independent advice to federal agencies. Members of the public can submit relevant comments for consideration by the GLAB. Input from the public to the GLAB will have the most impact if it provides specific information for the GLAB to consider. Members of the public wishing to provide comments should contact the Acting DFO directly.

Oral Statements: In general, individuals or groups requesting an oral presentation at this public teleconference will be limited to three minutes per speaker, subject to the number of people wanting to comment. Interested parties should contact the Acting DFO in writing (preferably via email) at the contact information noted above by December 9, 2013 to be placed on the list of public speakers for the teleconference.

Written Statements: Written statements must be received by December 9, 2013 so that the information may be made available to the GLAB for consideration. Written statements should be supplied to the Acting DFO in the following formats: One hard copy with original signature and one electronic copy via email. Commenters are requested to provide two versions of each document submitted: one each with and without signatures because only documents without signatures may be published on the GLRI Web page.

Accessibility: For information on access or services for individuals with disabilities, please contact the Acting DFO at the phone number or email address noted above, preferably at least 10 days prior to the teleconference, to give EPA as much time as possible to process your request.

Dated: November 20, 2013.

Cameron Davis,

Senior Advisor to the Administrator.

[FR Doc. 2013–28527 Filed 11–26–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2013–0682; FRL–9402–6]

Notice of Receipt of Requests for Amendments To Delete Uses in Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is issuing a notice of receipt of request for amendments by registrants to delete uses in certain pesticide registrations. FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be amended to delete one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any request in the **Federal Register**.

DATES: The deletions are effective December 27, 2013, unless the Agency receives a written withdrawal request on or before December 27, 2013. The Agency will consider a written withdrawal request postmarked no later than December 27, 2013.

Users of these products who desire continued use on crops or sites being deleted should contact the applicable registrant on or before December 27, 2013.

ADDRESSES: Submit your withdrawal request, identified by docket identification (ID) number EPA–HQ–OPP–2013–0682, by one of the following methods:

- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Christopher Green, Information Technology and Resources Management Division, (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 347–0367; email address: *green.christopher@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. Although this action may be of particular interest to persons who produce or use pesticides, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket ID number EPA–HQ–OPP–2013–0682, is available either electronically through *http://www.regulations.gov* or in hard copy at the OPP Docket in the Environmental Protection Agency Docket Center (EPA/DC), located in EPA West, Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. What action is the agency taking?

This notice announces receipt by the Agency of applications from registrants to delete uses in certain pesticide registrations. These registrations are listed in Table 1 of this unit by registration number, product name, active ingredient, and specific uses deleted:

TABLE 1—REQUESTS FOR AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE REGISTRATIONS

EPA registration No.	Product name	Active ingredient	Delete from label
100–1347	Concert II	Chlorothalonil & Propiconazole	Use on Dichondra Turf.
352–835	Velista	Penthiopyrad	Use on Ornamental Plants.
1021–0791	Pyrocide Aerosol Mix 6451	MGK 264, Piperonyl butoxide & Pyrethrins (No Inert Use).	General Outdoor Use.
1021–1545	Evercide Intermediate 2417	MGK 264, Pyrethrins (No Inert Use) & Permethrin	Outdoor Use.
1021–1550	Evercide Intermediate 2416	Bioallethrin, MGK 264 & Permethrin	General Outdoor Use.
1021–1632	Multicide Concentrate 2593	MGK 264, Piperonyl butoxide, Phenothrin & Prallethrin.	General Outdoor Use.
1021–1789	Evercide Concentrate 2801	MGK 264, Prallethrin & Permethrin	General Outdoor Use.
1021–1810	Pyrocide Falcon 7452	Pyriproxyfen, Esfenvalerate, MGK 264, Piperonyl butoxide & Pyrethrins (No Inert Use).	General Outdoor Use.
53883–201	IMI 75 Insecticide in Water Soluble Packets.	Imidacloprid	Turf and Ornamental Use.

Users of these products who desire continued use on crops or sites being deleted should contact the applicable registrant on or before December 27, 2013, because the registrants requested a waiver of the 180-day comment period, to discuss withdrawal of the application for amendment. This 30-day period will also permit interested members of the public to intercede with registrants prior to the Agency's approval of the deletion.

Table 2 of this unit includes the names and addresses of record for all registrants of the products listed in Table 1 of this unit, in sequence by EPA company number.

TABLE 2—REGISTRANTS REQUESTING AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE REGISTRATIONS

EPA company No.	Company name and address
100	Syngenta Crop Protection, LLC, 410 Swing Rd., P.O. Box 18300, Greensboro, NC 27419–8300.

TABLE 2—REGISTRANTS REQUESTING AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE REGISTRATIONS—Continued

EPA company No.	Company name and address
352	E. I. Du Pont De Nemours & Company (S300/419), Manager, Registration & Regulatory Affairs, 1007 Market St., Wilmington, DE 19898–0001.
1021	McLaughlin Gormley King Company, 8810 Tenth Ave. North, Minneapolis, MN 55427–4319.
53883	Control Solutions, Inc., 5903 Genoa-Red Bluff Rd., Pasadena, TX 77507–1041.

III. What is the agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be amended to delete one or more uses. The FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, the EPA Administrator may approve such a request.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for use deletion must submit the withdrawal in writing to Christopher Green using the methods in **ADDRESSES**. The Agency will consider written withdrawal requests postmarked no later than December 27, 2013.

V. Provisions for Disposition of Existing Stocks

The Agency has authorized the registrants to sell or distribute a product under the previously approved labeling for a period of 18 months after approval of the revision, unless other restrictions have been imposed, as in special review actions.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: September 27, 2013.

Michael Hardy,

Acting Director, Information Technology and Resources Management Division, Office of Pesticide Programs.

[FR Doc. 2013–28230 Filed 11–26–13; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SES Performance Review Board—Appointment of Members

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given of the appointment of members to the Performance Review Board of the Equal Employment Opportunity Commission.

FOR FURTHER INFORMATION CONTACT: Lisa M. Williams, Chief Human Capital Officer, U.S. Equal Employment Opportunity Commission, 131 M Street NE., Washington, DC 20507, (202) 663–4306.

SUPPLEMENTARY INFORMATION: Publication of the Performance Review Board (PRB) membership is required by 5 U.S.C. 4314(c)(4). The PRB reviews and evaluates the initial appraisal of a senior executive's performance by the supervisor, and makes recommendations to the Chair, EEOC, with respect to performance ratings, pay level adjustments and performance awards.

The following are the names and titles of executives appointed to serve as members of the SES PRB. Members will serve a 12-month term, which begins on November 18, 2013.

PRB Chair

Mr. Dexter R. Brooks, Director, Federal Sector Programs, Office of Federal Operations, Equal Employment Opportunity Commission.

Members

Mr. Kevin J. Berry, Director, New York District Office, Equal Employment Opportunity Commission;

Ms. Katherine E. Bissell, Deputy Solicitor for Regional Enforcement, Department of Labor;

Ms. Kathryn A. Ellis, Assistant General Counsel, Division of Educational Equity and Research, and Agency Dispute Resolution Specialist, Department of Education;

Ms. Gwendolyn Y. Reams, Associate General Counsel, Equal Employment Opportunity Commission;

Alternate

Ms. Delner Franklin-Thomas, Director, Birmingham District Office, Equal Employment Opportunity Commission.

By the direction of the Commission.

Dated: November 15, 2013.

Jacqueline A. Berrien,

Chair.

[FR Doc. 2013–28538 Filed 11–26–13; 8:45 am]

BILLING CODE 6570–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request Re: Application Pursuant to Section 19 of the Federal Deposit Insurance Act

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. chapter 35), the FDIC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. As part of its continuing effort to reduce paperwork and respondent burden, the FDIC invites the general public and other Federal agencies to take this opportunity to comment on renewal of an existing information collection, as required by the PRA. On September 16, 2013 (78 FR 56895), the FDIC requested comment for 60 days on renewal of its information collection entitled *Application Pursuant to Section 19 of the Federal Deposit Insurance Act,* which is currently approved under OMB Control No. 3064–0018. No comments were received on the proposal. The FDIC hereby gives notice of submission to OMB of its request to renew the collection without change.

DATES: Comments must be submitted on or before December 27, 2013.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *Email: comments@fdic.gov.* Include the name of the collection in the subject line of the message.

• *Mail:* Leneta G. Gregorie (202–898–3719), Counsel, Room NY–5050, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

• *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Leneta Gregorie, at the FDIC address above.

SUPPLEMENTARY INFORMATION:

Proposal To Renew the Following Currently Approved Collection of Information

Title: Application Pursuant to Section 19 of the Federal Deposit Insurance Act.

OMB Number: 3064–0018.

Form Number: 6710/07.

Frequency of Response: On occasion.

Affected Public: Insured depository institutions.

Estimated Number of Respondents: 50.

Estimated Time per Response: 16 hours.

Total Annual Burden: 800 hours.

General Description of Collection: Section 19 of the Federal Deposit Insurance Act (FDI), 12 U.S.C. 1829, requires the FDIC's consent prior to any participation in the affairs of an insured depository institution by a person who has been convicted of crimes involving dishonesty or breach of trust. To obtain that consent, an insured depository institution must submit an application to the FDIC for approval on Form FDIC 6710/07.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, this 21st day of November, 2013.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–28393 Filed 11–26–13; 8:45 am]

BILLING CODE 6741–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012201–002.

Title: WWL/K-Line Space Charter Agreement.

Parties: Wallenius Wilhelmsen Logistics AS and Kawasaki Kisen Kaisha, Ltd.

Filing Party: John P. Meade, Esq.; General Counsel; K-Line America, Inc.; 6009 Bethlehem Road; Preston, MD 21655.

Synopsis: The Amendment extends the agreement indefinitely.

By Order of the Federal Maritime Commission.

Dated: November 22, 2013.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2013–28499 Filed 11–26–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meeting Notice

November 22, 2013.

TIME AND DATE: 1:00 p.m., Thursday, December 5, 2013.

PLACE: The Richard V. Backley Hearing Room, Room 511N, 1331 Pennsylvania Avenue NW., Washington, DC 20004 (entry from F Street entrance).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *United Mine Workers of America on behalf of Franks* v. *Emerald Coal Resources, LP,* Docket No. PENN 2012–250–D; and *United Mine Workers of America on behalf of Hoy* v. *Emerald Coal Resources, LP,* Docket No. PENN 2012–251–D (Issues include whether the Administrative Law Judge erred in concluding that miners' suspensions for refusing to provide certain safety-related information to the operator constituted unlawful discrimination.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO: Jean Ellen (202) 434–9950/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Emogene Johnson,

Administrative Assistant.

[FR Doc. 2013–28586 Filed 11–25–13; 11:15 am]

BILLING CODE 6735–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meeting Notice

November 22, 2013.

TIME AND DATE: 10:00 a.m., Thursday, December 5, 2013.

PLACE: The Richard V. Backley Hearing Room, Room 511N, 1331 Pennsylvania Avenue NW., Washington, DC 20004 (entry from F Street entrance).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will hear oral argument in the matters *United Mine Workers of America on behalf of Franks* v. *Emerald Coal Resources, LP,* Docket No. PENN 2012–250–D; and *United Mine Workers of America on behalf of Hoy* v. *Emerald Coal Resources, LP,* Docket No. PENN 2012–251–D (Issues include whether the Administrative Law Judge erred in concluding that miners' suspensions for refusing to provide certain safety-related information to the operator constituted unlawful discrimination.)

Any person attending this oral argument who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO: Jean Ellen (202) 434–9950/(202) 708–9300

for TDD Relay/1–800–877–8339 for toll free.

Emogene Johnson,

Administrative Assistant.

[FR Doc. 2013–28587 Filed 11–25–13; 11:15 am]

BILLING CODE 6735–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 13, 2013.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309:

1. *James Brian Ponder, Melissa Kay Ponder, Kenneth Earl Ponder, June Sumner Ponder, Beverly Ponder Paulk, all of Tifton, Georgia, Marlyn Jones Ponder, and Earline Ponder, individually and as trustee for April Farron Paulk Trust, Jessica Shannon Paulk Trust, Cyrus Jones Ponder Trust, Marilyn Elisabeth Ponder Trust, Victoria Lorriane Ponder Trust, Ponder-Tolbert Trust No. II, Ona Tolbert Family Trust, Earl Tolbert Family Trust, and Ona Tolbert Family Trust No. II,* all of Omega, Georgia; to retain voting shares of South Georgia Bank Holding Company, and thereby indirectly retain voting shares of South Georgia Banking Company, both in Omega, Georgia.

Board of Governors of the Federal Reserve System, November 22, 2013.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2013–28431 Filed 11–26–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Federal Open Market Committee; Domestic Policy Directive of October 29–30, 2013

In accordance with Section 271.25 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on October 29–30, 2013.[1]

Consistent with its statutory mandate, the Federal Open Market Committee seeks monetary and financial conditions that will foster maximum employment and price stability. In particular, the Committee seeks conditions in reserve markets consistent with federal funds trading in a range from 0 to ¼ percent. The Committee directs the Desk to undertake open market operations as necessary to maintain such conditions. The Desk is directed to continue purchasing longer-term Treasury securities at a pace of about $45 billion per month and to continue purchasing agency mortgage-backed securities at a pace of about $40 billion per month. The Committee also directs the Desk to engage in dollar roll and coupon swap transactions as necessary to facilitate settlement of the Federal Reserve's agency mortgage-backed securities transactions. The Committee directs the Desk to maintain its policy of rolling over maturing Treasury securities into new issues and its policy of reinvesting principal payments on all agency debt and agency mortgage-backed securities in agency mortgage-backed securities. The System Open Market Account Manager and the Secretary will keep the Committee informed of ongoing developments regarding the System's balance sheet that could affect the attainment over time of the Committee's objectives of maximum employment and price stability.

By order of the Federal Open Market Committee, November 21, 2013.

William B. English,

Secretary, Federal Open Market Committee.

[FR Doc. 2013–28486 Filed 11–26–13; 8:45 am]

BILLING CODE 6210–01–P

[1] Copies of the Minutes of the Federal Open Market Committee at its meeting held on October 29–30, 2013, which includes the domestic policy directive issued at the meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, DC 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's Annual Report.

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 23, 2013.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Plains Bancshares, Inc.,* Plains, Kansas; to become a bank holding company by acquiring 100 percent of the voting shares of Plains State Bank, Plains, Kansas.

Board of Governors of the Federal Reserve System, November 22, 2013.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2013–28434 Filed 11–26–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*)

(BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 23, 2013.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *First Liberty Capital Corporation Employee Stock Ownership Plan,* Hugo, Colorado; to acquire an additional 4.02 percent for a total of 31.99 percent of the voting shares of the First Liberty Capital Corporation, and thereby indirectly acquire additional voting shares of The First National Bank of Hugo, both in Hugo, Colorado.

B. Federal Reserve Bank of San Francisco (Gerald C. Tsai, Director, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *Heritage Oaks Bancorp,* Paso Robles, California; to merge with Mission Community Bancorp, and thereby indirectly acquire Mission Community Bank, both in San Luis Obispo, California.

Board of Governors of the Federal Reserve System, November 22, 2013.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2013–28471 Filed 11–26–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 13, 2013.

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. Cistern, LLC and Flatonia Investments, LLC, both in Houston, Texas; to acquire Kovar, LLC, and indirectly acquire Envoy Mortgage, Ltd, both in Houston, Texas, and thereby engage in activities related to extending credit, and servicing loans, pursuant to sections 225.28(b)(1) and (b)(2)(i) through (b)(2)(viii) of Regulation Y.

Board of Governors of the Federal Reserve System, November 22, 2013.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2013–28432 Filed 11–26–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under the Home Owners' Loan Act (HOLA) (12 U.S.C. 1461 *et seq.*) and Regulation LL (12 CFR Part 238) or Regulation MM (12 CFR Part 239) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is described in § 238.53 or 238.54 of Regulation LL (12 CFR 238.53 or 238.54) or § 239.8 of Regulation MM (12 CFR 239.8). Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 10a(c)(4)(B) of HOLA (12 U.S.C. 1467a(c)(4)(B)).

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 13, 2013.

A. Federal Reserve Bank of Philadelphia (William Lang, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105–1521:

1. *Metuchen, MHC, and Metuchen Bancorp, Inc.,* both in Metuchen, New Jersey; to indirectly engage through a subsidiary of Metuchen Savings Bank, Metuchen, New Jersey, in real estate development activities, pursuant to sections 238.53(b)(4) and (5).

Board of Governors of the Federal Reserve System, November 22, 2013.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2013–28433 Filed 11–26–13; 8:45 am]

BILLING CODE 6210–01–P

GENERAL SERVICES ADMINISTRATION

[Notice-MK–2013–12; Docket No. 2013–0002; Sequence No. 38]

The President's Management Advisory Board (PMAB); Notification of Upcoming Public Advisory Meeting

AGENCY: Office of Executive Councils, U.S. General Services Administration (GSA).

ACTION: Meeting Notice.

SUMMARY: The President's Management Advisory Board (PMAB), a Federal Advisory Committee established in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C., App., and Executive Order 13538, will hold a public teleconference meeting on Thursday, December 19, 2013.

DATES: The meeting will be held on Thursday, December 19, 2013, beginning at 3:00 p.m. eastern time, ending no later than 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Brockelman, Designated Federal Officer, President's Management Advisory Board, Office of Executive Councils, General Services Administration, 1800 F Street NW., Washington, DC 20006, at *stephen.brockelman@gsa.gov.*

SUPPLEMENTARY INFORMATION:

Background: The PMAB was established to provide independent advice and recommendations to the President and the President's Management Council on a wide range of issues related to the development of effective strategies for the implementation of best business practices to improve Federal Government management and operation.

Agenda: The main purpose for this meeting is for the PMAB to discuss and define areas of work for the PMAB emerging from the new President's Management Agenda. Focal areas are likely to involve recommendations for initiatives designed to improve the effectiveness of federal government operations. The meeting will also cover planning and logistics for PMAB during the coming year.

Meeting Access: The teleconference meeting is open to the public; interested members of the public may listen to the PMAB discussion using 1–888–606–9802 and passcode 9937336. Members of the public will not have the opportunity to ask questions or otherwise participate in the teleconference. However, members of the public wishing to comment should follow the steps detailed in *Procedures for Providing Public Comments* below.

Availability of Materials for the Meeting: Please see the PMAB Web site (*http://www.whitehouse.gov/administration/advisory-boards/pmab*) for any materials available in advance of the meeting and for meeting minutes that will be made available after the meeting. Detailed meeting minutes will be posted within 90 days of the meeting.

Procedures for Providing Public Comments: In general, public statements will be posted on the PMAB Web site (*http://www.whitehouse.gov/administration/advisory-boards/pmab*). Non-electronic documents will be made available for public inspection and copying in PMAB offices at GSA, 1800 F Street NW., Washington, DC 20006, on official business days between the hours of 10 a.m. and 5 p.m. eastern time. You can make an appointment to inspect statements by telephoning 202–501–1398. All statements, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. Any statements submitted in connection with the PMAB meeting will be made available to the public under the provisions of the Federal Advisory Committee Act.

The public is invited to submit written statements for this meeting until 12:30 p.m. eastern time on Wednesday, December 18, 2013, by either of the following methods: *Electronic or Paper Statements:* Submit electronic statements to Mr. Brockelman, Designated Federal Officer at *stephen.brockelman@gsa.gov;* or send paper statements in triplicate to Mr. Brockelman at the PMAB GSA address above.

Dated: November 21, 2013.

Anne Rung,

Associate Administrator, Office of Government-wide Policy, General Services Administration.

[FR Doc. 2013–28404 Filed 11–26–13; 8:45 am]

BILLING CODE 6820–BR–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: HHS–OS–20518–30D]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, has submitted an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB) for review and approval. The ICR is for renewal of the approved information collection assigned OMB control number OS–0990–0323, scheduled to expire on 30 April 2014. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public on this ICR during the review and approval period.

DATES: Comments on the ICR must be received on or before December 27, 2013.

ADDRESSES: Submit your comments to *OIRA_submission@omb.eop.gov* or via facsimile to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Information Collection Clearance staff, *Information.CollectionClearance@hhs.gov* or (202) 690–6162.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the OMB control number 0990–0323 and document identifier HHS–OS–20518–30D for reference.

Supplementary Information: When submitting comments or requesting information, please include the document identifier HHS–OS–20518–30D.

Information Collection Request Title: Medical Countermeasures.gov.

OMB No.: 0990–0323.

Abstract: In order to route product developers to the most appropriate personnel within the Department of Health and Human Services (HHS), HHS collects some basic information about the company's product through Medical Countermeasures.gov. Using this information and a routing system that has been developed with input from participating agencies within HHS, including the Office of the Assistant Secretary for Preparedness and Response (ASPR), the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and the National Institutes of Health (NIH), Medical Countermeasures.gov routes the meeting request to the appropriate person within HHS. ASPR is requesting an extension by OMB for a three-year clearance.

Need and Proposed Use of the Information: Meeting Request Routing System for Medical Countermeasures.gov—OMB No. 0990–0323, Extension—Office of the Assistant Secretary for Preparedness and Response (ASPR), Office of the Biomedical Advanced Research and Development Authority (BARDA).

Likely Respondents: Medical Countermeasure Developers.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information, to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review

the collection of information, and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Type of respondent	Estimated number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Developers of medical countermeasures to naturally occurring and intentional public health threats	225	1	8/60	30
Total				30

Darius Taylor,

Deputy, Information Collection Clearance Officer.

[FR Doc. 2013–28385 Filed 11–26–13; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: HHS–OS–20987–60D]

Agency Information Collection Activities; Proposed Collection; Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, announces plans to submit a new Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting that ICR to OMB, OS seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on the ICR must be received on or before January 27, 2014.

ADDRESSES: Submit your comments to *Information.CollectionClearance@hhs.gov* or by calling (202) 690–6162.

FOR FURTHER INFORMATION CONTACT: Information Collection Clearance staff, *Information.CollectionClearance@hhs.gov* or (202) 690–6162.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the document identifier HHS–OS–20987–60D for reference. Information Collection Request Title: Pre-Test of Instruments of Psychosocial Care for the Treatment of Adults with PTSD.

Abstract: ASPE is requesting to pretest a survey that measures quality of psychotherapy for adults with Post Traumatic Stress Disorder (PTSD) in outpatient treatment settings, defined in terms of the concordance with evidence-based strategies. Despite enormous expenditures and remarkable breakthroughs in treatment, there is a clear gap between what is known about effective treatments for individuals diagnosed with Post Traumatic Stress Disorder (PTSD) and what clinicians actually implement in treatment settings. A quality improvement initiative that measures clinicians' use of evidence based treatment and promotes feedback to providers from the consumers' perspective may enhance the adoption of evidence based services. This could ultimately improve the quality of care and consumer health outcomes.

Need and Proposed Use of the Information: Quality measures of the treatment of PTSD in concordance with evidence-based methods do not currently exist and could be used to reduce this gap. ASPE, in partnership with NIMH, has undertaken this project to pretest 3 surveys (a clinician, clinical supervisor, and consumer measure) of the delivery of evidence based psychotherapies to adults with PTSD. The current data collection is scheduled to occur only once, over a 6 month time period in summer 2014 through winter 2014 at a total of 6 behavioral health care sites.

Likely Respondents: Respondents are clinicians, clinician's supervisors and consumers.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Clinician (demographics questionnaire)	36	1	5/60	3
Clinician Supervisor (demographics questionnaire)	6	1	5/60	1
Clinician (clinician survey)	36	3	10/60	18
Clinician Supervisor (survey)	6	18	10/60	18
Consumer	108	1	10/60	18
Site Coordinator	6	1	96	576
Total				634

OS specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Darius Taylor,

Deputy, Information Collection Clearance Officer.

[FR Doc. 2013–28376 Filed 11–26–13; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention, Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice concerning the final effect of the HHS decision to designate a class of employees from the Pantex Plant in Amarillo, Texas, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, NIOSH, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by email to *DCAS@CDC.GOV.*

SUPPLEMENTARY INFORMATION:

Authority: 42 U.S.C. 7384q(b). 42 U.S.C. 7384*l*(14)(C).

On September 30, 2013, as provided for under the Secretary of HHS designated the following class of employees as an addition to the SEC:

All employees of the Department of Energy, its predecessor agencies, and their contractors and subcontractors who worked at the Pantex Plant in Amarillo, Texas, from January 1, 1984, through December 31, 1991, for a number of work days aggregating at least 250 work days, occurring either solely under this employment, or in combination with work days within the parameters established for one or more other classes of employees included in the Special Exposure Cohort.

This designation became effective on October 30, 2013. Hence, beginning on October 30, 2013, members of this class of employees, defined as reported in this notice, became members of the SEC.

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2013–28454 Filed 11–26–13; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention, Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice concerning the final effect of the HHS decision to designate a class of employees from the Feed Materials Production Center (FMPC) in Fernald, Ohio, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, NIOSH, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by email to *DCAS@CDC.GOV.*

SUPPLEMENTARY INFORMATION:

Authority: 42 U.S.C. 7384q(b). 42 U.S.C. 7384*l*(14)(C).

On September 30, 2013, as provided for under the Secretary of HHS designated the following class of employees as an addition to the SEC:

All employees of the Department of Energy, its predecessor agencies, and their contractors and subcontractors who worked at the Feed Materials Production Center (FMPC) in Fernald, Ohio, from January 1, 1954, through December 31, 1967, for a number of work days aggregating at least 250 work days, occurring either solely under this employment, or in combination with work days within the parameters established for one or more other classes of employees included in the Special Exposure Cohort.

This designation became effective on September 30, 2013. Hence, beginning on October 30, 2013, members of this class of employees, defined as reported in this notice, became members of the SEC.

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2013–28453 Filed 11–26–13; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention, Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice concerning the final effect of the HHS decision to designate a class of employees from the Feed Materials Production Center (FMPC) in Fernald, Ohio, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, NIOSH, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 877–222–7570. Information requests can also be submitted by email to *DCAS@CDC.GOV.*

SUPPLEMENTARY INFORMATION: Authority: 42 U.S.C. 7384q(b). 42 U.S.C. 7384*l*(14)(C). On September 30, 2013, as provided for under the Secretary of HHS designated the following class of employees as an addition to the SEC:

All employees of the Feed Materials Production Center (FMPC) in Fernald, Ohio, who were not employed by National Lead of Ohio, NLO, or the Department of Energy or its predecessor agencies, who worked at FMPC from January 1, 1951, through December 31, 1983, for a number of work days aggregating at least 250 work days, occurring either solely under this employment, or in combination with work days within the parameters established for one or more other classes of employees included in the Special Exposure Cohort.

This designation became effective on September 30, 2013. Hence, beginning on October 30, 2013, members of this class of employees, defined as reported

in this notice, became members of the SEC.

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2013–28452 Filed 11–26–13; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: 45 CFR 303.7—Provision of Services in Intergovernmental IV–D; Federally Approved Forms.

OMB No.: 0970–0085.

Description: The Intergovernmental forms were initially approved by OMB in 1988; 45 CFR 303.7 requires child support programs to use the OMB federally-approved forms in intergovernmental IV–D cases unless a country has provided alternative forms as a part of its chapter in a Caseworker's Guide to Processing Cases with Foreign Reciprocating Countries. Additionally Public Law 104–193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, amended 42 U.S.C. 666 to require State Child Support Enforcement (CSE) agencies to enact the Uniform Interstate Family Support Act (UIFSA) into State law by January 1, 1998. Section 311(b) of UIFSA requires the States to use forms mandated by Federal law.

Based on the comments we received in response to the 60-day notice in the **Federal Register** (Volume 78, Number 126, page 39298), we have determined we need to address several issues, particularly relating to the protection of Personal Identifiable Information (PII), and may need to restructure the intergovernmental forms. Because multiple changes to the forms may impact state and federal procedures and systems, we need to thoroughly analyze the options for revising the forms, and provide states and the public the opportunity to comment on any changes and associated burden.

Therefore, at this time, we are requesting an extension of the current forms without any changes. Once we complete the analysis of the issues raised in response to the recent 60 day notice, we will propose changes to the forms and associated burden and request a new round of comments under the Paperwork Reduction Act. The changes will be based on the state's needs and the best interest of the program.

Respondents: State, local, or Tribal agencies administering a child support enforcement program under title IV–D of the Social Security Act.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Transmittal 1	54	19,392	0.25	261,790.25
Transmittal 2	54	14,544	0.08	62,829.66
Transmittal 3	54	970	0.08	4,188.64
Uniform Petition	54	11,635	0.08	50,263.73
General Testimony	54	11,635	0.33	207,337.88
Affidavit Paternity	54	5,818	0.17	53,405.21
Locate Data Sheet	54	388	0.08	1,675.46
Notice of Controlling Order	54	388	0.08	1,675.46
Registration Statement	54	7,757	0.08	33,509.15
Estimated Total Annual Burden Hours				676,683.20

Additional Information

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–7285, Email: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis

Reports Clearance Officer.

[FR Doc. 2013–28448 Filed 11–26–13; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: National Extranet Optimized Runaway and Homeless Youth Management Information System (NEORHYMIS) Version 2.1.

OMB No.: 0970–0123.

Description: The Runaway and Homeless Youth Act, as amended by Public Law 106–71 (42 U.S.C. 5701 et seq.), mandates that the Department of Health and Human Services (HHS) report regularly to Congress on the status of HHS-funded programs serving runaway and homeless youth. Such reporting is similarly mandated by the Government Performance and Results Act. Organizations funded under the Runaway and Homeless Youth program are required by statute (42 U.S.C. 5712, 42 U.S.C. 5714–2) to meet certain data collection and reporting requirements. These requirements include maintenance of client statistical records on the number and the characteristics of the runaway and homeless youth, and youth at risk of family separation, who participate in the project, and the services provided to such youth by the project.

Respondents: States localities, private entities and coordinated networks of

such entities. Typical respondents are non-profit community based organizations who are reporting on the youth that they serve through their Basic Center, Transitional Living and Street Outreach programs.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Youth Profile: BCP Entrance Report	321	118	.125	4, 735
Youth Profile: TLP Entrance Report	205	19	.125	487
Youth Profile: BCP Exit Report	321	118	.125	4,735
Youth Profile: TLP Exit Report	205	19	.125	487
Brief Contacts	526	153	.05	4, 024
BCP Turn-a-ways	321	9	.05	144
TLP Turn-a-ways	205	24	.05	246
Street Outreach Report	138	5,660	.02	15,622
Data Transfer	664	2	.50	664

Estimated Total Annual Burden Hours: 31, 441.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov*.

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Email: *OIRA_SUBMISSION@OMB.EOP.GOV*. Attn: Desk Officer for the Administration for Children and Families

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2013–28430 Filed 11–26–13; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–1423]

Agency Information Collection Activities; Proposed Collection; Comment Request; Importer's Entry Notice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on FDA's Importer's Entry Notice.

DATES: Submit either electronic or written comments on the collection of information by January 27, 2014.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Information Request Regarding Importer's Entry Notice—(OMB Control Number 0910–0046)—Extension

Section 801 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (U.S.C. 381) charges the Secretary of Health and Human Services (HHS), through FDA, with the responsibility of assuring foreign origin FDA regulated foods, drugs, cosmetics, medical devices, radiological health, and tobacco products offered for import into the United States meet the same requirements of the FD&C Act as do domestic products, and for preventing products from entering the country if they are not in compliance. The discharge of this responsibility involves close coordination and cooperation

between FDA headquarters and field inspectional personnel and the U.S. Customs Service (USCS), as the USCS is responsible for enforcing the revenue laws covering the very same products.

This collection of information gathers data for FDA-regulated products being imported into the United States and is being used by FDA to review and prevent imported products from entering the United States if the products do not meet the same requirements of the FD&C Act as domestic products.

Until October 1995, importers were required to file manual entries on OMB-approved forms which were accompanied by related documents. FDA did away with use of the paper forms effective October 1, 1995, to eliminate duplicity of information and to reduce the paperwork burden both on the import community and FDA. FDA then implemented an automated nationwide entry processing system which enabled FDA to more efficiently obtain and process the information it requires to fulfill its regulatory responsibility.

Most of the information FDA requires to carry out its regulatory responsibilities under section 801 is already provided electronically by filers to USCS. Because USCS relays this data to FDA using an electronic interface, the majority of data submitted by the entry filer need be completed only once.

At each U.S. port of entry (seaport, landport, and airport) where foreign-origin, FDA-regulated products are offered for import, FDA is notified through USCS's Automated Commercial System (ACS) by the importer (or his/her agent) of the arrival of each entry. Following such notification, FDA reviews relevant data to ensure the imported product meets the standards as required for domestic products, decides on the admissibility of the imported product, and informs the importer and USCS of its decision. A single entry frequently contains multiple lines of different products. FDA may authorize products listed on specific lines to enter the United States unimpeded, while other products listed in the same entry may be held pending further FDA review/action.

All entry data pass through a screening criteria program resident on a USCS computer. This screening program was developed and is maintained by FDA. This electronic screening criteria module makes the initial screening decision on every entry of foreign-origin, FDA-regulated product. Almost instantaneously after the entry is filed, the filer receives FDA's admissibility decision for each entry, i.e., ''MAY PROCEED'' or ''FDA REVIEW.''

In addition to the information collected by USCS, FDA requires four additional pieces of information that were not available from USCS's system in order to make an admissibility decision for each entry. These data elements include the FDA Product Code, FDA country of production, manufacturer/shipper, and ultimate consignee. OMB has previously approved the automated collection of these four data elements for tobacco products that filers could provide to FDA along with other entry-related information. Providing this information to FDA results in importers receiving an FDA admissibility decision more expeditiously, e.g., the quantity, value, and Affirmation(s) of Compliance with Qualifier(s).

Since the inception of the interface with ACS, FDA's electronic screening criteria program has been applied nationwide. This eliminates issues such as ''port shopping'' (attempts to intentionally slip products through one FDA port when refused by another, or filing entries at a port known to receive a high volume of entries). Every electronically submitted entry line of foreign-origin, FDA-regulated product undergoes automated screening and the screening criteria can be set to be as specific or as broad as applicable; changes are immediately effective. This capability is of tremendous value in protecting the public if there is a need to immediately halt specific product from entering the United States.

If the data in this collection of information is not collected, FDA could not adequately meet its statutory responsibilities to regulate imported products, nor control potentially dangerous products from entering the U.S. marketplace.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

FDA Imported Products	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Non-Tobacco	3,406	1,089	3,709,134	.14 (8 minutes)	519,279
Tobacco	330	68	22,440	.14 (8 minutes)	3142
Total					522,421

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The hourly burden for this information collection is based on FDA's averaging of data obtained during a survey of nine representative filers nationwide and FDA's experience. For purposes of comparison of hourly burden, the filers also were requested to provide the same information with regard to filing entries manually. FDA felt that the average time for completing either electronic or manual entries was very similar.

Based on data collected by FDA's survey of nine filers and its experience, the total annual burden to the import community to submit information electronically for 3,731,574 average annual responses was 522,421 hours. The previously OMB-approved hours per response (0.14 hours) are expected to remain the same.

This burden includes the time FDA estimates it will take respondents to compile and provide documents to FDA for those entries where FDA cannot make an admissibility decision based on the electronic data alone. Based on the survey of nine filers and FDA's past experience, FDA estimates that there will be no additional costs to provide import data electronically to FDA, as filers already have equipment and software in place to enable them to provide data to USCS via the automated system. Therefore, no additional software or hardware need be developed or purchased to enable filers to file the FDA data elements at the same time they file entries electronically with USCS.

Dated: November 18, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–28438 Filed 11–26–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2007–D–0369]

Draft Guidance for Industry on Bioequivalence Recommendations for Fluticasone Propionate; Salmeterol Xinafoate; Reopening of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; reopening of the comment period.

SUMMARY: The Food and Drug Administration (FDA) is reopening the comment period for the notice of availability entitled ''Draft Guidance for Industry on Bioequivalence Recommendations for Fluticasone Propionate; Salmeterol Xinafoate'', published in the **Federal Register** of September 10, 2013 (78 FR 55263). In that notice, FDA requested public comment on the draft guidance. FDA is reopening the comment period due to the inability of some commenters to submit comments through the *www.regulations.gov* Web site from November 4, 2013, through November 13, 2013, due to technical difficulties.

DATES: Submit either electronic or written comments to the docket by December 11, 2013.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Bhawana Saluja, Center for Drug Evaluation and Research (HFD–643), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–8465.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of September 10, 2013 (78 FR 55263), FDA announced the notice of availability for the draft guidance entitled ''Draft Guidance for Industry on Bioequivalence Recommendations for Fluticasone Propionate; Salmeterol Xinafoate.'' Interested persons were given until November 12, 2013, to provide comments. The Agency is reopening the comment period until December 11, 2013 to allow interested persons additional time to submit comments.

II. Request for Comments

Following publication of the September 10, 2013, notice of availability, there were technical difficulties with the *www.regulations.gov* Web site from November 4, 2013, through November 13, 2013, which would have prevented comments from being submitted.

III. How To Submit Comments

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

Dated: November 20, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–28394 Filed 11–26–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–0880]

Draft Guidance for Industry on Generic Drug User Fee Amendments of 2012: Questions and Answers (Revision 1); Reopening of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; reopening of the comment period.

SUMMARY: The Food and Drug Administration (FDA) is reopening the comment period for the notice of availability entitled ''Draft Guidance for Industry on Generic Drug User Fee Amendments of 2012: Questions and Answers (Revision 1)'', published in the **Federal Register** of September 10, 2013 (78 FR 55261). In that notice, FDA requested public comment on the draft guidance. FDA is reopening the comment period due to the inability of some commenters to submit comments through the *www.regulations.gov* Web site from November 4, 2013, through November 13, 2013, due to technical difficulties.

DATES: Submit either electronic or written comments to the docket by December 11, 2013.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Jaewon Hong, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., rm. 4145, Silver Spring, MD 20993–0002, 301–796–6707, email: *askGDUFA@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of September 10, 2013 (78 FR 55261), FDA announced the notice of availability for the draft guidance entitled ''Draft Guidance for Industry on Generic Drug User Fee Amendments of 2012: Questions and Answers (Revision 1).'' Interested persons were given until November 12, 2013, to provide comments. The Agency is reopening the comment period until December 11, 2013 to allow interested persons additional time to submit comments.

II. Requests for Comments

Following publication of the September 10, 2013, notice of availability, there were technical difficulties with the *www.regulations.gov* Web site from November 4, 2013, through November 13, 2013, which would have prevented comments from being submitted.

III. How To Submit Comments

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

Dated: November 20, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–28392 Filed 11–26–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

Risk Communications Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Risk Communications Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on December 17, 2013, from 9 a.m. to 5 p.m.

Location: FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (rm. 1503), Silver Spring, MD 20993. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading ''Resources for You,'' click on ''Public Meetings at the FDA White Oak Campus.'' Please note that visitors to the White Oak Campus must enter through Building 1.

Contact Person: Luis G. Bravo, Office of Planning, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 3274, 240–402–5274, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

If you are unable to join us in person, we encourage you to watch the free Webcast. Visit the Risk Communication Advisory Committee Web site at *http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/RiskCommunicationAdvisoryCommittee/default.htm.* The link will become active shortly before the open session begins at 9 a.m.

Agenda: On December 17, 2013, the Committee will meet to identify and discuss new methods for communicating risk information as part of Risk Evaluation and Mitigation Strategies (REMS) to health care providers. The discussion will also address how sponsors and FDA can evaluate whether REMS communications are reaching the targeted population, are increasing awareness and understanding of the key risk messages, as well as whether the communications are having the intended impact on knowledge, behaviors, and/or outcomes.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before December 10, 2013. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before December 2, 2013. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by December 3, 2013.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Luis G. Bravo at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: November 21, 2013.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2013–28435 Filed 11–26–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–1424]

Transport Format for the Submission of Regulatory Study Data; Notice of Pilot Project

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Center for Drug Evaluation and Research (CDER) and the Center for Biologics Evaluation and Research (CBER) in the Food and Drug Administration (FDA) are announcing a pilot project to evaluate the Clinical Data Interchange Standard Consortium (CDISC) Submission Data Standards (SDS) Extensible Markup Language (XML) transport format for the submission of regulatory study data. The current study data transport format supported by FDA is the SAS Transport (XPORT) version 5 file format. Although XPORT has been a reliable exchange format for many years, it is not an extensible modern technology. SDS XML is an extension of the CDISC Operational Data Model, which is a vendor neutral, platform-independent format for the exchange and archive of study data. FDA is announcing an invitation to sponsors to participate in this pilot project to evaluate the SDS XML transport format.

DATES: Submit either electric or written requests for participation in the pilot project by January 27, 2014.

ADDRESSES: Submit electronic requests to participate in the pilot and comments regarding this pilot project to *http://www.regulations.gov.* Summit written requests and comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1062, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Ron Fitzmartin, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 1160, Silver Spring, MD 20993, 301–796–5333, *ronald.fitzmartin@fda.hhs.gov;* or Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N Rockville, MD 20852, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

In the 1999 ''Guidance to Industry: Providing Regulatory Submissions in Electronic Format'' FDA recommended that regulatory submissions of clinical data to FDA utilize SAS Institute's open transport called XPORT version 5 format (XPORT). The XPORT format was developed in the late 1980s and there have been no version updates since 1999. XPORT is now considered by many to be an outdated transport technology for transferring data across different hardware and operating systems.

Following a **Federal Register** Notice, FDA held a public meeting on November 5, 2012, entitled ''Regulatory New Drug Review: Solutions for Study Data Exchange Standards.'' The purpose of the public meeting was to solicit input from industry, technology vendors, and other members of the public regarding the advantages and disadvantages of current and emerging open, consensus-based standards for the exchange of regulated study data. FDA indicated, in the Notice and at the meeting, based on feedback received at the public meeting and other information sources, it would undertake further requirements analysis in support of expected evaluation projects.

II. Project Participation

FDA envisions several pilot projects conducted to evaluate new transport formats. The purpose of this pilot project is to obtain additional experience with CDISC SDS XML format. A successful pilot may allow CDER and CBER to routinely receive study data that employ CDISC SDS XML format as the transport format once an alternatives analysis is completed. As part of this pilot, FDA would like to have sponsors participate in the preparation and submission of previously submitted study datasets using the SDS XML transport format. Participation in this evaluation will be outside of the regulatory pathway and, as such, will not be used to make regulatory decisions.

FDA expects that the pilot will assess the technical capability of SDS XML to exchange and archive regulatory study data in investigational new drug applications, new drug applications, and biologics licensing applications.

III. Requests for Participation

Requests to participate in the SDS XML pilot project are to be identified with the docket number found in brackets in the heading of this document. Interested persons should include the following information in the request: Contact name, contact phone number, email address, name of the sponsor, address, and license number. Once requests for participation are received, FDA will contact interested sponsors to discuss the pilot project. FDA is seeking a limited number of sponsors (approximately three to five, but no more than six) to participate in this project. The elapsed time duration of the pilot is expected to be approximately 12 months but may be extended as needed. Participants should be willing to provide previously submitted study data using both the SAS XPORT version 5 format and the CDISC SDS XML format.

Dated: November 20, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–28391 Filed 11–26–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive Patent License: GMCSF-BclxL-Derived Chimeric Therapeutics for Use in Treatment of Cancer, Neutropenia, CNS Injury and Parkinson's Disease

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: This notice, in accordance with 35 U.S.C. 209 and 37 CFR Part 404, indicates that the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an exclusive patent license to practice the inventions embodied in technology family E–150–2005/0, including U.S. Patent application 11/991,692 [HHS Ref. E–150–2005/0–US–07], PCT Application PCT/US06/35070 [HHS Ref. E–150–2005/0–PCT–02] and foreign equivalents thereof, entitled ''Methods and Compositions for Inhibiting Cell Death or Enhancing Cell Proliferation'', to Medicenna Therapeutics, Inc., located in Vancouver, Canada. The patent rights in these inventions have been assigned to and/or exclusively licensed to the Government of the United States of America.

The prospective exclusive patent license territory may be worldwide, and the field of use may be limited to:

Development and commercialization of GMCSF-BclxL-derived chimeric therapeutics and immunotherapeutics, alone or in combination, for restoring, protecting, or stimulating cells in order to treat (i) cancer, (ii) neutropenia, (iii) CNS injury and (iv) Parkinson's disease.

DATES: Only written comments and/or applications for a license which are received by the NIH Office of Technology Transfer on or before December 27, 2013 will be considered.

ADDRESSES: Requests for copies of the patent application, inquiries, comments, and other materials relating to the contemplated exclusive patent license should be directed to: Surekha Vathyam, Ph.D., Senior Licensing and Patenting Manager, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; Telephone: (301) 435–4076; Facsimile: (301) 402–0220; Email: *vathyams@mail.nih.gov.*

SUPPLEMENTARY INFORMATION: The subject invention is to a chimeric protein comprising human granulocyte-macrophage colony stimulating factor (GMCSF) and B-cell lymphoma-extra large (BclxL). Chimeric proteins such as GMCSF-BclxL and its analogs have the potential to enhance cell survival, inhibit apoptosis and promote cell growth or proliferation (collectively referred to as ''anti-apoptotic''). Such anti-apoptotic proteins could have utility for restoring, protecting and stimulating cells in patients to treat a variety of disorders.

This technology relates to compositions comprising an anti-apoptotic chimeric protein and its use to inhibit apoptosis *in vivo* and *ex vivo.* One domain of the chimeric protein is the ligand for GMCSF receptor. Receptors for GMCSF are found on a

variety of normal tissues, including hematopoietic stem cells, neurons, and dendritic cells. The other domain is BclxL, which prevents targeted cell death. GMCSF-BclxL chimeric protein could potentially be used as an adjuvant to treat cancer and to treat acute neurological disorders (such as brain or spinal cord injury, stroke) or chronic CNS diseases (Alzheimers, Parkinson's, and ALS). It could be used to prevent hematopoietic cell loss during chemo or radiotherapy. It could also be used in patients receiving stem cell transplantation or in *ex vivo* expansion of hematopoietic stem and progenitor cells.

The prospective exclusive license will be royalty bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless within thirty (30) days from the date of this published notice, the NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Applications for a license in the field of use filed in response to this notice will be treated as objections to the grant of the contemplated exclusive license. Comments and objections submitted to this notice will not be made available for public inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: November 21, 2013.

Richard U. Rodriguez,

Director, Division of Technology Development & Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2013–28374 Filed 11–26–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: AIDS and AIDS Related Research.

Date: December 6, 2013.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Shiv A Prasad, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5220, MSC 7852, Bethesda, MD 20892, 301–443–5779, *prasads@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 21, 2013.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–28375 Filed 11–26–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4148–DR; Docket ID FEMA–2013–0001]

New Mexico; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New Mexico (FEMA–4148–DR), dated September 30, 2013, and related determinations.

DATES: *Effective Date:* November 20, 2013.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of New Mexico is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of September 30, 2013.

Sierra County and the Navajo Nation for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2013–28473 Filed 11–26–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–103]

30-Day Notice of Proposed Information Collection: Assessment of Native American, Alaska Native and Native Hawaiian Housing Needs

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* December 27, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email

Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on August 1, 2012.

A. Overview of Information Collection

Title of Information Collection: Assessment of Native American, Alaska Native and Native Hawaiian Housing Needs.

OMB Approval Number: 2528–0288.

Type of Request: Revision of a currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: The Department is conducting this study under contract with The Urban Institute and its subcontractors, NORC, Econometrica and SSI. The project is a housing needs assessment that will produce national level estimates of housing needs in tribal areas in the United States. HUD provides funding though several programs to Native American and Alaskan Native populations, most notably through the Indian Housing Block Grant. The level of housing need is of particular interest to HUD and the Congress has mandated this study. HUD has not published a study on housing needs, in general, for this population since 1996. The surveys covered by this data collection include a household survey of native Hawaiians, living in Hawaii, served by the Department of Hawaiian Home Lands.

Respondents (i.e. affected public): Native Hawaiian households on the DHHL waiting list: 500 surveys total, 10% by telephone, the remainder in-person. Native Hawaiian households residing in the home lands (potentially): 500 surveys total, 10% by telephone, the remainder in-person.

Estimation of the Total Number of Hours Needed To Prepare the Information Collection Including Number of Respondents, Frequency of Response, and Hours of Response:

Respondents	Number of respondents	Number responses per respondent	Average burden/ response (in hours)	Total burden hours
Household Survey (waiting list)	500	1	45 minutes (.75 hour)	375
Household Survey (home lands residents)	500	1	45 minutes (.75 hour)	375
Total				750

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapters 35.

Date: November 21, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–28513 Filed 11–26–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5687–N–46]

60-Day Notice of Proposed Information Collection: HUD-Owned Real Estate Good Neighbor Next Door Program

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* January 27, 2014.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Ivery W. Himes, Director, Office of Single Family Asset Management, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Ivery Himes at *Ivery.W.Himes@hud.gov* or telephone 202–708–1672. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Himes.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: HUD Real Estate Owned Good Neighbor Next Door.

OMB Approval Number: 2502–0570.

Type of Request: Extension of currently approved collection.

Form Number: HUD 9549, HUD 9549–A, HUD 9549–B, HUD 9549–C, HUD 9549–D and HUD 9549–E.

Description of the need for the information and proposed use: This information collection is used to determine the eligibility of prospective program participants and in binding contracts between purchasers of acquired single family assets and HUD through the GNND program.

Respondents: 5786.

Estimated Number of Responses: 5786.

Frequency of Response: On occasion.

Average Hours per Response: 2 minutes.

Total Estimated Burdens: 205 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: November 21, 2013.

Laura M. Marin,

Associate General Deputy Assistant Secretary for Housing—Associate Deputy Federal Housing Commissioner.

[FR Doc. 2013–28514 Filed 11–26–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–104]

30-Day Notice of Proposed Information Collection: Recordkeeping for HUD's Continuum of Care Program

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* December 27, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on March 25, 2013.

A. Overview of Information Collection

Title of Information Collection: Recordkeeping for HUD's Continuum of Care Program.

OMB Approval Number: 2506—New.

Type of Request: New collection.

Form Number: None.

Description of the need for the information and proposed use:

This submission is to request a new OMB number for the information collection for the recordkeeping requirements that Continuum of Care program recipients will be expected to implement and retain. On May 20, 2009, the President signed into law ''An Act to Prevent Mortgage Foreclosures and Enhance became Public Law 111–22; Division B of this law is the HEARTH Act. As amended by the HEARTH Act, Subpart C of the McKinney-Vento Homeless Assistance Act establishes the Continuum of Care Program. The Continuum of Care Program is formed from the consolidation and amendment of three separate homeless assistance programs (The Supportive Housing Program, the Shelter Plus Care Program, and the Moderate Rehabilitation/Single Room Occupancy Program) into one single grant program. The three programs that had been carried out under title IV of the McKinney-Vento Homeless Assistance Act (42 U.S.C.11371 et seq.). The HEARTH Act was designed to improve administrative efficiency and enhance response coordination and effectiveness in addressing the needs of homeless persons through the Continuum of Care Program. The purpose of the program is to promote communitywide commitment to the goal of ending homelessness; provide funding for efforts by nonprofit providers, and State and local governments to quickly rehouse homeless individuals and families while minimizing the trauma and dislocation caused to homeless individuals, families, and communities by homelessness; promote access to and effective utilization of mainstream programs by homeless individuals and families; and optimize self-sufficiency among individuals and families experiencing homelessness. Publication of the interim rule for the Continuum of Care Program on July 31, 2012, found at 24 CFR part 578, continues HUD's implementation of the HEARTH Act. This rule establishes the regulatory framework for the Continuum of Care Program and the Continuum of Care planning process, including requirements applicable to the establishment of a Continuum of Care. A Continuum of Care is designed to address the critical problem of homelessness through a coordinated community-based process of identifying needs and building a system of housing and services to address those needs. The statutory provisions and implementing interim regulations govern the Continuum of Care Program recordkeeping requirements for recipient and subrecipients and the standard operating procedures for ensuring that Continuum of Care Program funds are used in accordance

Mortgage Credit Availability,'' which with the program requirements. To see the regulations for the new CoC program and applicable supplementary documents, visit HUD's Homeless Resource Exchange at *https://www.onecpd.info/resource/2033/hearthcoc-program-interim-rule/.*

Respondents (i.e. affected public): Continuum of Care program recipients and subrecipients.

Estimation of the Total Number of Hours Needed To Prepare the Information Collection Including Number of Respondents, Frequency of Response, and Hours of Response: The CoC record keeping requirements include 45 distinct activities. Each activity requires a different number of respondents ranging from 10 to 350,000. Each activity also has a unique frequency of response, ranging from once to 200 times annually, and a unique associated number of hours of response, ranging from 15 minutes to 180 hours. The total number of hours needed for all reporting is 1,921,711 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapters 35.

Dated: November 21, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–28505 Filed 11–26–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[DR.5A311.IA000514]

Commission on Indian Trust Administration and Reform

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of Renewal of the Commission on Indian Trust Administration and Reform.

SUMMARY: Following consultation with the General Services Administration, notice is hereby given that the Secretary of the Interior is renewing the Commission on Indian Trust Administration and Reform.

FOR FURTHER INFORMATION CONTACT: Sarah Harris, Designated Federal Officer, Office of the Secretary, 1849 C Street NW., Mailstop 4141, Washington DC 20240; or email to *trustcommission@ios.doi.gov.* To review all related material on the Commission's work, please refer to *http://www.doi.gov/cobell/commission/index.cfm.*

SUPPLEMENTARY INFORMATION: The purpose of the Commission is to provide advice and recommendations to the Secretary of the Interior (Secretary) regarding trust management. This includes a thorough evaluation of the existing management and administration of the trust administration system to support a reasoned and factually based set of options for potential management improvements. This further includes a review of the manner in which the Department audits the management of the trust administration system, including the possible need for audits of management of trust assets.

Certification Statement

I hereby certify that the renewal of the Commission on Indian Trust Administration and Reform is necessary, is in the public interest and is established under the authority of the Secretary of the Interior, Department of the Interior under Section 2 of the Reorganization Plan No. 3 of 1950 (64 Stat. 1262), as amended, the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. 4001–4061, and the Claims Resolution Act of 2010, Public Law 111–291.

Dated: November 20, 2013.

Sally Jewell,

Secretary.

[FR Doc. 2013–28440 Filed 11–26–13; 8:45 am]

BILLING CODE 4310–W7–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[14X LLIDB00100 LF1000000.HT0000 LXSS020D0000 4500060036]

Gateway West Project Subcommittee of the Resource Advisory Council to the Boise District; Public Meeting

AGENCY: Bureau of Land Management, U.S. Department of the Interior.

ACTION: Notice of Public Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Gateway West Project Subcommittee of the Boise District Resource Advisory Council (RAC), will hold meetings as indicated below.

DATES: The meetings will be held on December 5, 2013, December 17, 2013, January 7, 2014, and January 16, 2014 at the Boise District Office located at 3948 Development Avenue, Boise, ID 83705, beginning at 9:00 a.m. and adjourning at 3:00 p.m. Members of the public are invited to attend. A public comment period will be held.

FOR FURTHER INFORMATION CONTACT: Marsha Buchanan, Supervisory Administrative Specialist and RAC Coordinator, BLM Boise District, 3948 Development Ave., Boise, ID 83705, Telephone (208) 384–3364.

SUPPLEMENTARY INFORMATION: The Gateway West Project Subcommittee advises the Boise District Resource Advisory Council on matters of planning and management of the Gateway West Project (segments 8 and 9). The Boise District Resource Advisory Council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in southwestern Idaho. The subcommittee will be discussing proposed routes of the Gateway West transmission line segments 8 and 9. Agenda items and location may change due to changing circumstances. The public may present written or oral comments to members of the Subcommittee. Individuals who plan to attend and need special assistance should contact the BLM Coordinator as provided above. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week,

to leave a message or question with the above individual. You will receive a reply during normal business hours.

James M. Fincher,

District Manager.

[FR Doc. 2013–28459 Filed 11–26–13; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUT980300–L11200000–PH0000–24–1A]

Utah Resource Advisory Council/ Recreation Resource Advisory Council Meeting/Conference Call

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Meeting/Conference Call

SUMMARY: In accordance with the Federal Land Policy and Management Act, the Federal Advisory Committee Act, and the Federal Lands Recreation Enhancement Act, the Bureau of Land Management's (BLM) Utah Resource Advisory Council (RAC)/Recreation Resource Advisory Council (RRAC) will host a meeting/conference call.

DATES: The Utah RAC/RRAC will host a meeting/conference call on Friday, Jan. 10, 2014, from 8:00 a.m.–5:00 p.m., MST.

ADDRESSES: Those attending in person must meet at the BLM, Utah State Office, 440 West 200 South, Salt Lake City, Utah, in the Monument Conference Room on the fifth floor.

FOR FURTHER INFORMATION CONTACT: If you wish to listen to the teleconference, orally present material during the teleconference, or submit written material for the RAC/RRAC to consider during the teleconference, please notify Sherry Foot, Special Programs Coordinator, Bureau of Land Management, Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101; phone (801)539–4195; or, *sfoot@blm.gov* by Monday, Jan. 6, 2014.

SUPPLEMENTARY INFORMATION: BLM-Utah's Executive Leadership Team collaborated to produce a Draft Program Development and Budget Strategic Plan that will define BLM-Utah's organization vision and provide an important starting point for meeting future challenges. The RAC will have a discussion and provide comments on the draft plan. The RRAC will listen to fee presentations from the BLM Grand Staircase-Escalante National Monument, which is proposing to increase camping, day-use and group reservation picnic fees at Calf Creek Recreation Area and Deer Creek Campground. The BLM Moab Field Office is proposing to charge expanded amenity fees at the Bitter Creek, Westwater, Hideout, Cowskin, Fish Ford, and Swasey's Rapid Campgrounds. The U.S. Forest Service will present fee proposals on the Miller Flat Campground, Orange Olsen Dwelling and Bunkhouse; reduce the fee area, designate three separate stand-alone sites, and eliminate the Standard Amenity Fee at the American Fork Canyon-Recreation Fee Area; eliminate the current fee area designation and designate specific recreation sites and special recreation fee areas for groomed winter trail systems at the Mirror Lake Scenic Byway Recreation Fee Area.

Presentations will also be given on the Utah Greater Sage-Grouse Draft Land Use Plan Amendment and Environmental Impact Statement and the newly-created Utah Office of Outdoor Recreation.

A half-hour public comment period will take place from 11:45 a.m.–12:15 p.m. The meeting is open to the public; however, transportation, lodging, and meals are the responsibility of the participating individuals.

The conference call will be recorded for purposes of minute-taking. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to leave a message or question for the above individual. The FIRS is available 24 hours a day, seven days a week. Replies are provided during normal business hours.

Authority: 43 CFR 1784.4–1.

Jenna Whitlock,

Associate State Director.

[FR Doc. 2013–28470 Filed 11–26–13; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUT980300–L11200000–PH0000–24–1A]

Utah Resource Advisory Council Meeting/Conference Call

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Meeting/Conference Call.

SUMMARY: In accordance with the Federal Land Policy and Management Act, the Bureau of Land Management (BLM) Utah Resource Advisory Council (RAC) will host a meeting/conference call.

DATES: The BLM-Utah RAC will host a meeting/conference call on Thursday, Jan. 23, 2014, from 8:30 a.m.–5:00 p.m., MST.

ADDRESSES: Those attending in person should meet at the BLM Utah State Office, 440 West 200 South, Salt Lake City, Utah, in the Monument Conference Room on the fifth floor.

FOR FURTHER INFORMATION CONTACT: If you wish to listen to the teleconference, orally present material during the teleconference, or submit written material for the RAC to consider during the teleconference, please notify Sherry Foot, Special Programs Coordinator, Bureau of Land Management, Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101; phone (801) 539–4195; or, *sfoot@blm.gov* by close of business, Monday, Jan. 6, 2014.

SUPPLEMENTARY INFORMATION: The Utah RAC will elect officers for calendar year 2014. The Utah RAC is tasked to provide collective input on the Utah Greater Sage-Grouse Draft Land Use Plan Amendment and Environmental Impact Statement and to submit a draft comment letter to the BLM Utah. A 30-minute public comment period will take place from 9:45–10:15 a.m. The meeting is open to the public; however, transportation, lodging, and meals are the responsibility of the participating individuals.

The conference call will be recorded for purposes of minute-taking. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to leave a message or question for the above individual. The FIRS is available 24 hours a day, seven days a week. Replies are provided during normal business hours.

Authority: 43 CFR 1784.4–1

Approved:

Jenna Whitlock,

Associate State Director.

[FR Doc. 2013–28465 Filed 11–26–13; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Act

On November 20, 2013, the Department of Justice lodged a proposed consent decree with the United States District Court for the Central District of Illinois in the lawsuit entitled *United States* v. *PolyOne Corporation,* Civil Action No.13–cv–01550.

The consent decree resolves the claims of the United States and the State of Illinois under the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and relevant state law at facilities formerly owned by PolyOne Corporation (''PolyOne'') in Pedricktown, New Jersey and Henry, Illinois. Under the consent decree, PolyOne will pay a civil penalty of $280,000, of which $35,000 will be paid to the State of Illinois, and implement Supplemental Environmental Projects valued at $800,000. The decree also contains injunctive relief provisions relating to both facilities. These injunctive provisions are binding on Mexichem Specialty Resins Inc., which is the current owner of the facilities and a signatory to the Consent Decree.

The publication of this notice opens a period for public comment on the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *PolyOne Corporation,* D.J. Ref. No. 90–5–2–1–08917. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General; U.S. DOJ—ENRD; P.O. Box 7611; Washington, DC 20044–7611.

During the public comment period, the consent decree may be examined and downloaded at this Justice Department Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $11.25 (25 cents per page reproduction cost for the 45 page proposed Consent Decree) payable to the U.S. Treasury. If you would also like a copy of the attachments to the proposed Consent Decree, please so note and include an additional $7.25 (25 cents per page for the 29 pages of attachments).

Robert E. Maher, Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resource Division.

[FR Doc. 2013–28463 Filed 11–26–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Filing of Proposed Settlement Agreement Under the Comprehensive Environmental Response, Compensation and Liability Act and the United States Bankruptcy Code

On November 21, 2013, the Trustees for the bankruptcy estates of Port Arthur Chemical & Environmental Services, LLC (''PACES'') and CES Environmental Services, Inc. (''CES'') filed a proposed Settlement Agreement with the United States Bankruptcy Court for the Southern District of Texas in the matters entitled *In re: CES Environmental Services, Inc., Case No. 10–36924–H4–7* and *In re: Port Arthur Chemical & Environmental Services, LLC, Case No. 10–36978–H4–7.*

The United States is seeking recovery of response cost incurred as part of an emergency removal action conducted on a site owned by the PACES estate in Port Arthur, Jefferson County, Texas at 2420 South Gulfway Drive under CERCLA Section 107(a) and Section 503 of the Bankruptcy Code. The United States' incurred a total of approximately $1.875 million in response costs. The Settlement Agreement provides that the United States will recover $1.4 million on a sale of certain real property owned by the estate for $3.75. Should the property sell for more than $3.75 million, the United States will recover a proportion of sale proceeds above that amount until the United States recovers a total of $1.875 million.

The publication of this notice opens a period for public comment on the Settlement Agreement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *In re Port Arthur Chemical & Environmental Services, LLC,* D.J. Ref. No. 90–11–3–10667/1. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email ...	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Settlement Agreement may be examined and downloaded at this Justice Department Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A paper copy of the Consent Decree will be provided upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $17.25 (25 cents per page reproduction cost) payable to the United States Treasury.

Thomas P. Carroll,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–28500 Filed 11–26–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Notice to Employees of Coverage Options Under Fair Labor Standards Act Section 18B

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employee Benefits Security Administration (EBSA) sponsored information collection request (ICR) titled, ''Notice to Employees of Coverage Options Under Fair Labor Standards Act Section 18B,'' to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq.

DATES: Submit comments on or before December 27, 2013.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201307-1210-003*

(this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov*.

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–EBSA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–6881 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov*. Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Information Policy and Assessment Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov*.

FOR FURTHER INFORMATION CONTACT: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov*.

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: This ICR seeks to maintain PRA authorization for information collections contained in EBSA Technical Release 2013–2 and a related model notice of healthcare coverage options available under the Patient Protection and Affordable Care Act (ACA). ACA section 2623 created a new Fair Labor Standards Act (FLSA) section 18B, 29 U.S.C. 218B, requiring a covered employer to give an employee notice of coverage options available through the Health Insurance Marketplace. An employer may use the model notice in meeting the FLSA section 18B requirement.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1210–0149.

The current approval for this collection is scheduled to expire on November 30, 2013; however, the DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 15, 2013 (78 FR 49771).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1210–0149. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–EBSA.

Title of Collection: Notice to Employees of Coverage Options Under Fair Labor Standards Act Section 18B.

OMB Control Number: 1210–0149.

Affected Public: Private Sector—businesses or other for profits, farms, and not-for-profit institutions.

Total Estimated Number of Respondents: 6,060,461.

Total Estimated Number of Responses: 72,484,292.

Total Estimated Annual Burden Hours: 347,502.

Total Estimated Annual Other Costs Burden: $12,229,992.

Dated: November 18, 2013.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2013–28355 Filed 11–26–13; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[13–135]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Frances Teel, Mail Code JF000, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Frances Teel, NASA PRA Clearance Officer, NASA Headquarters, 300 E Street SW., Mail Code JF000, Washington, DC 20546, (202).

SUPPLEMENTARY INFORMATION:

I. Abstract

Information collection is for reports, other than financial, property, or patent, data or copyrights reports (which are covered under separate ICRs) which are required for effective management and administration of contracts with an estimated value of more than $500,000, in support of NASA's mission.

II. Method of Collection

NASA collects this information electronically where feasible, but information may also be collected by mail or fax.

III. Data

Title: NASA—reports required for contracts with an estimated value of more than $500,000.

OMB Number: 2700–0089.

Type of review: Extension of a currently approved collection.

Affected Public: Business or other for-profit; Not-for-profit institutions; and State, Local or Tribal Government.

Estimated Number of Respondents: 501.

Estimated Annual Responses: 1002.

Estimated Time per Response: 7 hours.

Estimated Total Annual Burden Hours: 7014.

Estimated Total Annual Cost: $273,546.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Frances Teel,

NASA PRA Clearance Officer.

[FR Doc. 2013–28494 Filed 11–26–13; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 13–136]

NASA Advisory Council; Human Exploration and Operations Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–462, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Human Exploration and Operations Committee (HEOC) of the NASA Advisory Council (NAC). This Committee reports to the NAC.

DATES: Monday, December 9, 2013, 10:30 a.m. to 2:35 p.m.; and Tuesday, December 10, 2013, 9:00 a.m. to 2:00 p.m., Local Time.

ADDRESSES: NASA Kennedy Space Center, Headquarters Building, Room 2229, Kennedy Space Center, FL 32899.

FOR FURTHER INFORMATION CONTACT: Dr. Bette Siegel, Human Exploration and Operations Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2245, or *bette.siegel@nasa.gov.*

SUPPLEMENTARY INFORMATION: This meeting is also available telephonically and by WebEx. Any interested person may call the USA toll free conference call number (888) 989–8180 or toll number (415) 228–5016, pass code 1687504, to participate in this meeting by telephone. The WebEx link is *https://nasa.webex.com/,* the meeting number is 395 571 646, and the password is Public120910!

The agenda for the meeting includes the following topics:

—Status of Human Exploration and Operations
—Status of Commercial Spaceflight
—Status of Explorations Systems Development
—Status of International Space Station
—Update on Capability Driven Framework and Status of Advanced Exploration Systems

The meeting will be open to the public up to the seating capacity of the room. Seating will be on a first-come basis. Attendees will be required to sign a visitor's register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. All U.S. citizens desiring to attend this meeting at the NASA Kennedy Space Center must provide their full name, company affiliation (if applicable), driver's license number and state, citizenship, place of birth, and date of birth to the Kennedy Space Center Protective Services Office no later than close of business on December 5, 2013. All non-U.S. citizens must submit their name; current address; driver's license number and state (if applicable); citizenship; company affiliation (if applicable) to include address, telephone number, and title; place of birth; date of birth; U.S. visa information to include type, number, and expiration date; U.S. Social Security Number (if applicable); Permanent Resident (green card) number and expiration date (if applicable); place and date of entry into the U.S.; and passport information to include country of issue, number, and expiration date, to the Kennedy Space Center Protective Services Office no later than close of business on December 5, 2013. If the above information is not received by the noted dates, attendees should expect a minimum delay of two (2) hours. All visitors to this meeting will be required to process in through the KSC Badging Office, Building M6–0224, located just outside of KSC Gate 2, on SR 405, Kennedy Space Center, Florida. Please provide the appropriate data required above by email to Tina Hosch at *TINA.HOSCH@NASA.GOV* or fax 321–867–7206, noting at the top of the page ''Public Admission to the Human Exploration and Operations Committee Meeting of the NASA Advisory Council at KSC.'' For security questions, please email Tina Hosch at *TINA.HOSCH@NASA.GOV.* All visitors will be escorted while attending the meeting at Kennedy Space Center. All visitors will board a bus at the Kennedy Space Center Badging Office for transportation to and from the meeting.

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2013–28488 Filed 11–26–13; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 13–137]

NASA Advisory Council; Technology and Innovation Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: The National Aeronautics and Space Administration (NASA) announces a meeting of the Technology and Innovation Committee (TIC) of the NASA Advisory Council (NAC). The meeting will be held for the purpose of reviewing status of activities within the Office of the Chief Technologist with an emphasis on the discussing the Agency's Technology Roadmapping efforts; status of the Space Technology Mission Directorate programs with an emphasis on Solar Electric Propulsion and Cryogenic Propellant Storage and Transfer; and a discussion of barriers to innovation and innovation enablers.

DATES: Tuesday, December 10, 2013, 8:00 a.m. to 5:00 p.m., Local Time.

ADDRESSES: NASA Kennedy Space Center, Headquarters Building, Room 3225, Kennedy Space Center, FL 32899.

FOR FURTHER INFORMATION CONTACT: Dr. Kathleen Gallagher, Office of the Chief Technologist, NASA Headquarters, Washington, DC 20546, (202) 358–2185, fax (202) 358–4078, or *kathleen.a.gallagher@nasa.gov.*

SUPPLEMENTARY INFORMATION: This meeting is also available telephonically and by WebEx. Any interested person may call the USA toll free conference call number 866–880–0098, passcode 2851035, to participate in this meeting by telephone. The WebEx link is *https://nasa.webex.com/,* the meeting

number is 397 688 819, and the password is Technology1213#.

The agenda for the meeting includes the following topics:

—Office of the Chief Technologist Update
—Update on Technology Roadmapping
—Space Technology Mission Directorate Update
—Update on Solar Electric Propulsion Project
—Update on the Cryogenic Propellant Storage and Transfer Project
—Overview of Barriers to Innovation and Innovation Enablers

The meeting will be open to the public up to the seating capacity of the room. Seating will be on a first-come basis. Attendees will be required to sign a visitor's register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. All U.S. citizens desiring to attend the this meeting at the NASA Kennedy Space Center must provide their full name, company affiliation (if applicable), driver's license number and state, citizenship, place of birth, and date of birth to the Kennedy Space Center Protective Services Office no later than close of business on December 5, 2013. All non-U.S. citizens must submit their name; current address; driver's license number and state (if applicable); citizenship; company affiliation (if applicable) to include address, telephone number, and title; place of birth; date of birth; U.S. visa information to include type, number, and expiration date; U.S. Social Security Number (if applicable); Permanent Resident (green card) number and expiration date (if applicable); place and date of entry into the U.S.; and passport information to include country of issue, number, and expiration date, to the Kennedy Space Center Protective Services Office no later than close of business on December 5, 2013. If the above information is not received by the noted dates, attendees should expect a minimum delay of two (2) hours. All visitors to this meeting will be required to process in through the KSC Badging Office, Building M6–0224, located just outside of KSC Gate 2, on SR 405, Kennedy Space Center, Florida. Please provide the appropriate data required above by email to Tina Hosch at *TINA.HOSCH@NASA.GOV* or fax 321–867–7206, noting at the top of the page ''Public Admission to the Technology Innovation Committee Meeting of the NASA Advisory Council at KSC.'' For security questions, please email Tina Hosch at *TINA.HOSCH@NASA.GOV.* All visitors will be escorted while attending the meeting at Kennedy Space Center. All visitors will board a bus at the Kennedy Space Center Badging Office for transportation to and from the meeting.

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2013–28489 Filed 11–26–13; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Proposal Review; Notice of Meetings

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces its intent to hold proposal review meetings throughout the year. The purpose of these meetings is to provide advice and recommendations concerning proposals submitted to the NSF for financial support. The agenda for each of these meetings is to review and evaluate proposals as part of the selection process for awards. The review and evaluation may also include assessment of the progress of awarded proposals. The majority of these meetings will take place at NSF, 4201 Wilson Blvd., Arlington, Virginia 22230.

These meetings will be closed to the public. The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act. NSF will continue to review the agenda and merits of each meeting for overall compliance of the Federal Advisory Committee Act.

These closed proposal review meetings will not be announced on an individual basis in the **Federal Register**. NSF intends to publish a notice similar to this on a quarterly basis. For an advance listing of the closed proposal review meetings that include the names of the proposal review panel and the time, date, place, and any information on changes, corrections, or cancellations, please visit the NSF Web site: *http://www.nsf.gov/events/*. This information may also be requested by telephoning, 703/292–8182.

Dated: November 22, 2013.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2013–28512 Filed 11–26–13; 8:45 am]

BILLING CODE 7555–01–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Sunshine Act Meeting; Audit Committee of the Board of Directors

TIME & DATE: 3:30 p.m., Thursday, December 5, 2013.

PLACE: NeighborWorks America—Gramlich Boardroom, 999 North Capitol Street NE., Washington DC 20002.

STATUS: Open.

CONTACT PERSON: Jeffrey Bryson, General Counsel/Secretary (202) 760–4101; *jbryson@nw.org.*

AGENDA:

I. Call to order
II. Executive Session with the Chief Audit Executive
III. Executive Session: Chief Audit Executive Performance Review
IV. Executive Session with Officers: Pending Litigation & Management Internal Operations Review
V. Internal Audit Reports with Management's Response
VI. Internal Audit Status Reports
VII. MHA/NFMC/EHLP Compliance
VIII. Annual Audit Update & Other External Audits
IX. OHTS Watch List Y Affiliation/Disaffiliation Report
X. Adjournment

Jeffrey T. Bryson,

General Counsel.

[FR Doc. 2013–28642 Filed 11–25–13; 4:15 pm]

BILLING CODE 7570–02–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–034 and 52–035; NRC–2008–0594]

Luminant Generation Company, LLC

AGENCY: Nuclear Regulatory Commission.

ACTION: Combined license applications; receipt.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is giving notice once each week for four consecutive weeks of a combined license (COL) application from Luminant Generation Company, LLC. (Luminant).

ADDRESSES: Please refer to Docket ID NRC–2008–0594 when contacting the NRC about the availability of

information regarding this document. You may access publicly-available information related to this action by the following methods:

• Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for Docket ID NRC–2008–0594. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov*. For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• NRC's Agencywide Documents Access and Management System (ADAMS): You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search*.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*. The ADAMS accession number for the initial application cover letter for Comanche Peak Nuclear Power Plant, Units 3 and 4 is ML082680250. The application is also available at *http://www.nrc.gov/reactors/new-reactors/col.html*.

• NRC's PDR: You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Stephen Monarque, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–1544 or via email to: *Stephen.Monarque@nrc.gov*.

SUPPLEMENTARY INFORMATION: The following party has filed applications for COLs with the NRC, pursuant to Section 103 of the Atomic Energy Act of 1954, as amended, and part 52 of Title 10 of the *Code of Federal* Regulations (10 CFR), ''Licenses, Certifications, and Approvals for Nuclear Power Plants:''

1. On September 19, 2008, Luminant submitted an application for COLs for two United States-Advanced Pressurized Water Reactors designated as Comanche Peak Nuclear Power Plant, Units 3 and 4, in Somervell County, Texas.

This COL application is currently under review by the NRC staff.

An applicant may seek a COL in accordance with Subpart C of 10 CFR Part 52. The information submitted by the applicant includes certain administrative information, such as financial qualifications submitted pursuant to 10 CFR 52.77, as well as technical information submitted pursuant to 10 CFR 52.79. These notices are being provided in accordance with the requirements in 10 CFR 50.43(a)(3).

Dated at Rockville, Maryland, this 20th day of November 2013.

For the Nuclear Regulatory Commission.

Jennifer Dixon-Herrity,

Chief, Licensing Branch 2, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2013–28382 Filed 11–26–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–037; NRC–2008–0556]

Ameren Missouri; Combined License Application for Callaway Plant, Unit 2, Exemption

1.0 Background

Union Electric Company, doing business as Ameren UE, submitted to the U.S. Nuclear Regulatory Commission (NRC) a Combined License (COL) Application for a single unit of AREVA NP's U.S. EPR in accordance with the requirements in part 52, of Title 10 of the *Code of Federal Regulations* (10 CFR), subpart C, ''Licenses, Certifications, and Approvals for Nuclear Power Plants.'' This reactor is to be identified as Callaway Plant (Callaway), Unit 2, and located at the current Callaway County, Missouri, site of the Callaway Power Plant. The Callaway, Unit 2, COL application is based upon and linked to the U.S. EPR reference COL (RCOL) application for UniStar's Calvert Cliffs Nuclear Power Plant, Unit 3 (CCNPP3). The NRC docketed the Callaway, Unit 2, COL application on December 12, 2008. On February 25, 2009, Ameren submitted Revision 1 to the COL application, including updates to the Final Safety Analysis Report (FSAR). In its letter to the NRC dated April 28, 2009, Ameren informed the NRC that it was suspending its efforts to build a nuclear power plant in Missouri. Subsequently, by letter dated June 23, 2009, Ameren requested the NRC to suspend all review activities relating to the Callaway, Unit 2, COL application. The NRC informed Ameren by letter dated June 29, 2009, that it had suspended all review activities relating to the Callaway, Unit 2, COL application (Agencywide Documents Access and Management System (ADAMS) Accession No. ML091750665). By letter to the NRC dated October 26, 2010, Ameren requested a one-time exemption from the 10 CFR 50.71(e)(3)(iii) requirements to submit the COL application FSAR update, and proposed for approval of a new submittal deadline of December 31, 2012, for the next FSAR update. The NRC granted the exemption as described in the **Federal Register** notice published on January 21, 2011 (76 FR 3927). Prior to expiration of the exemption, while the COL application remained suspended, Ameren, on October 15, 2012, requested a second one-time exemption from the 10 CFR 50.71(e)(3)(iii) requirements to submit the COL application FSAR update, and proposed for approval of a new submittal deadline of December 31, 2014, for the next FSAR update. The NRC granted the exemption as described in the **Federal Register** notice published on December 28, 2012 (77 FR 76539). The NRC is currently performing a detailed review of the CCNPP3 RCOL application, as well as AREVA NP's application for design certification of the U.S. EPR. On October 3, 2013 (ADAMS Accession No. ML13282A311), Ameren requested an exemption from the requirements of 10 CFR part 50, appendix E, section I.5, as referenced by 10 CFR 52.79(a)(21), to submit an update by December 31, 2013, to the COL application, addressing the enhancements to Emergency Preparedness (EP) rules.

2.0 Request/Action

In part 50, appendix E, section I.5 requires that an applicant for a COL under subpart C of 10 CFR part 52 whose application was docketed prior to December 23, 2011, must revise their COL application to comply with the EP rules published in the **Federal Register** on November 23, 2011 (76 FR 72560). An applicant that does not receive a COL before December 31, 2013, shall revise its COL application to comply with these changes no later than December 31, 2013.

Since Ameren will not hold a COL prior to December 31, 2013, it is therefore, required to revise its application to be compliant with the new EP rules by December 31, 2013. By letter dated June 23, 2009, Ameren requested the NRC to suspend all review activities relating to the Callaway, Unit 2, COL application. The NRC informed Ameren by letter dated June 29, 2009, that it had suspended all review activities relating to the Callaway, Unit 2, COL application (ADAMS Accession No. ML091750665). In a letter dated, October 3, 2013 (ADAMS Accession No. ML13282A311), Ameren requested an exemption from the requirements of 10 CFR part 50, appendix E, section I.5 until a request for reactivation of the Callaway, Unit 2, COL application review is made by Ameren. Prior to this

reactivation request, Ameren commits to submit a revision to the Callaway, Unit 2, Emergency Plan, to comply with the enhancements to EP Regulations.

Ameren's requested exemption is interpreted as a one-time schedule change from the requirements of 10 CFR part 50, appendix E, section I.5. In its request, Ameren asked the NRC to grant the exemption from 10 CFR part 50, appendix E, section I.5 until requesting the NRC to resume the Callaway, Unit 2, COL application review. Such a request is seen as open-ended, and therefore, not temporary, and also contradicts with Ameren's current FSAR update due date of December 31, 2014, which includes an update of the Emergency Plan as part of the FSAR. Based on the above reasoning, and to be consistent with the FSAR update due date, the NRC included an imposed December 31, 2014, deadline as part of its review of the exemption request. The exemption would allow Ameren to comply with the new EP rules at a later date, but still in advance of NRC's reinstating its review of the application and in any event, by December 31, 2014. The current requirement to comply with the new EP rules by December 31, 2013, could not be changed, absent the exemption.

3.0 Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50, including 10 CFR part 50, appendix E, section I.5, when: (1) The exemption(s) are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) special circumstances are present. As relevant to the requested exemption, special circumstances exist if: ''[a]pplication of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule'' (10 CFR 50.12(a)(2)(ii)).

The purpose of 10 CFR part 50, appendix E, section I.5 was to ensure that applicants and new COL holders updated their COL application or Combined License to allow the NRC to review them efficiently and effectively, and to bring the applicants or licensees into compliance prior to their potential approval and receipt of license, or operate the facility. The targets of section I.5 of the rule were those applications that were in the process of being actively reviewed by the NRC staff when the rule came into effect on November 23, 2011. Since Ameren requested the NRC to suspend its review of the Callaway, Unit 2, COL application, compelling Ameren to revise its COL application in order to meet the December 31, 2013, compliance deadline would only bring on unnecessary burden and hardship for the applicant to meet the compliance date. As long as it is recognized that the COL application must be updated to comply with the enhancements to the EP rules prior to the NRC approving their COL application, it makes no difference if Ameren revises the COL application now, when Ameren requests the review be restarted, or by December 31, 2014. For this reason, the application of 10 CFR part 50, appendix E, section I.5, for the suspended Callaway, Unit 2, COL application is deemed unnecessary, and therefore, special circumstances are present.

Authorized by Law

The exemption is a one-time schedule exemption from the requirements of 10 CFR part 50, appendix E, section I.5. The exemption would allow Ameren to revise its COL application, and comply with the new EP rules on or before December 31, 2014, in lieu of December 31, 2013, the date required by 10 CFR part 50, appendix E, section I.5. As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR part 50. The NRC staff has determined that granting Ameren the requested one-time exemption from the requirements of 10 CFR part 50, appendix E, section I.5 will provide only temporary relief from this regulation under the above cited special circumstances, and will not result in a violation of the Atomic Energy Act of 1954, as amended, or NRC's regulations. Therefore, the exemption is authorized by law.

No Undue Risk to Public Health and Safety

The underlying purposes of the enhancements to EP found in 10 CFR part 50, appendix E, is to amend certain EP requirements which are aimed at enhancing protective measures in the event of a radiological emergency; address, in part, enhancements identified after the terrorist events of September 11, 2001; clarify regulations to effect consistent Emergency Plan implementation among licensees; and modify certain requirements to be more effective and efficient. Since plant construction cannot proceed until the NRC review of the application is completed, a mandatory hearing is completed, and a license is issued, the exemption does not increase the probability of postulated accidents. Additionally, based on the nature of the requested exemption as described above, no new accident precursors are created by the exemption; thus, neither the probability, nor the consequences of postulated accidents are increased. Therefore, there is no undue risk to public health and safety.

Consistent With Common Defense and Security

The requested exemption would allow Ameren to submit the revised COL application prior to requesting the NRC to resume the review, and in any event, on or before December 31, 2014. This schedule change has no relation to security issues. Therefore, the common defense and security is not impacted.

Special Circumstances

Special circumstances, in accordance with 10 CFR 50.12(a)(2)(ii) are present whenever ''[a]pplication of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule'' (10 CFR 50.12(a)(2)(ii)). The underlying purpose of 10 CFR part 50, appendix E, section I.5 is to ensure that applicants are in compliance with the new EP rules in a time that allows the NRC to effectively review their revised COL application prior to issuance of the license. Since the Callaway, Unit 2, COL application review is now suspended, the application of this regulation in this particular circumstance is unnecessary in order to achieve its underlying purpose. If the NRC were to grant this exemption and Ameren were then required to comply by December 31, 2014, or prior to any request to restart of their review, the purpose of the rule would still be achieved. Therefore, the special circumstances required by 10 CFR 50.12(a)(2)(ii) for the granting of an exemption from 10 CFR part 50, appendix E, section I.5 exist.

Eligibility for Categorical Exclusion From Environmental Review

With respect to the exemption's impact on the quality of the human environment, the NRC has determined that this specific exemption request is eligible for categorical exclusion as identified in 10 CFR 51.22(c)(25) and justified by the NRC staff as follows:

(c) The following categories of actions are categorical exclusions:

(25) Granting of an exemption from the requirements of any regulation of this chapter, provided that—

(i) There is no significant hazards consideration;

The criteria for determining whether there is no significant hazards consideration are found in 10 CFR 50.92. The proposed action involves only a schedule change regarding the submission of an update to the application for which the licensing review has been suspended. Therefore, there is no significant hazards consideration because granting the proposed exemption would not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or

(2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or

(3) Involve a significant reduction in a margin of safety.

(ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite;

The proposed action involves only a schedule change which is administrative in nature, and does not involve any changes to be made in the types or significant increase in the amounts of effluents that may be released offsite.

(iii) There is no significant increase in individual or cumulative public or occupational radiation exposure;

Since the proposed action involves only a schedule change which is administrative in nature, it does not contribute to any significant increase in occupational or public radiation exposure.

(iv) There is no significant construction impact;

The proposed action involves only a schedule change which is administrative in nature; the application review is suspended until further notice, and there is no consideration of any construction at this time, and therefore, the proposed action does not involve any construction impact.

(v) There is no significant increase in the potential for or consequences from radiological accidents; and

The proposed action involves only a schedule change which is administrative in nature, and does not impact the probability or consequences of accidents.

(vi) The requirements from which an exemption is sought involve:

(B) Reporting requirements;

The exemption request involves submitting an updated COL application by Ameren,

and

(G) Scheduling requirements;

The proposed exemption relates to the schedule for submitting COL application update to the NRC.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants Ameren a one-time exemption from the requirements of 10 CFR part 50, appendix E, section I.5 pertaining to the Callaway, Unit 2, COL application to allow submittal of the revised COL application that complies with the new EP rules prior to any request to the NRC to resume the review, and in any event, no later than December 31, 2014.

Pursuant to 10 CFR 51.22, the Commission has determined that the exemption request meets the applicable categorical exclusion criteria set forth in 10 CFR 51.22(c)(25), and the granting of this exemption will not have a significant effect on the quality of the human environment.

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 20th day of November 2013.

For The Nuclear Regulatory Commission.

John Segala,

Chief, Licensing Branch 1, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2013–28495 Filed 11–26–13; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2014–8 and CP2014–9; Order No. 1889]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings requesting the addition of Priority Mail Contract 70 to the competitive product list. This notice informs the public of the filings, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 29, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Notice of Filings
III. Ordering Paragraphs

I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Priority Mail Contract 70 to the competitive product list.[1] The Postal Service asserts that Priority Mail Contract 70 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). Request at 1. The Request has been assigned Docket No. MC2014–8.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2014–9.

Request. To support its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
- Attachment B—a redacted copy of the contract;
- Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs, make a positive contribution to coverage of institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant

[1] Request of the United States Postal Service to Add Priority Mail Contract 70 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, November 19, 2013 (Request).

products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract is scheduled to become effective within one business day after the Postal Service receives final regulatory approval from the Commission. *Id.* at 3. The contract will expire three years from the effective date. *Id.* The contract also allows two 90-day extensions of the agreement if the preparation of a successor agreement is active and the Commission is notified at least 7 days prior to the contract's expiration date. *Id.* The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *Id.* Attachment E.

The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the Governors' Decision, contract, customer-identifying information, and related financial information should remain confidential. *Id.* at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2014–8 and CP2014–9 to consider the Request pertaining to the proposed Priority Mail Contract 70 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than November 29, 2013. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Curtis E. Kidd to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2014–8 and CP2014–9 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Curtis E. Kidd is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than November 29, 2013.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–28389 Filed 11–26–13; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2014–7 and CP2014–8; Order No. 1888]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings requesting the addition of Priority Mail Contract 69 to the competitive product list. This notice informs the public of the filings, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 29, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
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I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a request and associated supporting information to add Priority Mail Contract 69 to the competitive product list.[1] The Postal Service asserts that Priority Mail Contract 69 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). *Id.* at 1. The Request has been assigned Docket No. MC2014–7.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2014–8.

Request. To support its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
- Attachment B—a redacted copy of the contract;
- Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract is scheduled to become effective one business day after the Commission issues all necessary regulatory approval. *Id.* at 2. The contract will expire one year from the effective date unless, among other things, either party terminates the agreement upon 30 days' written notice to the other party. *Id.* The contract also allows two 90-day extensions of the agreement if the preparation of a successor agreement is active and the Commission is notified within 7 days of the contract's expiration.[2] The Postal Service

[1] Request of the United States Postal Service to Add Priority Mail Contract 69 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, November 19, 2013 (Request).

[2] *Id.* at 3. Previously, the Postal Service clarified that identical language in Priority Mail Contract 60 ''contemplates the Postal Service filing any notices of extension with the Commission at least one week prior to the 3-year expiration date or the extended expiration date.'' See Docket Nos. MC2013–54 and CP2013–70, Order No. 1773, Order Adding Priority Mail Contract 60 to the Competitive Product List,

represents that the contract is consistent with 39 U.S.C. 3633(a).[3]

The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the Governors' Decision, contract, customer-identifying information, and related financial information should remain confidential. *Id.* at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2014–7 and CP2014–8 to consider the Request pertaining to the proposed Priority Mail Contract 69 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than November 29, 2013. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Pamela A. Thompson to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2014–7 and CP2014–8 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Pamela A. Thompson is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than November 29, 2013.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–28388 Filed 11–26–13; 8:45 am]

BILLING CODE 7710–FW–P

July 8, 2013, at 3; see also Docket Nos. MC2013–54 and CP2013–70, Response of the United States Postal Service to Chairman's Information Request No. 1, July 1, 2013, question 2.

[3] Although the Request appears to state that the certification only pertains to paragraphs (1) and (3) of 39 U.S.C. 3633(a), the certification itself contains an assertion that the prices are in compliance with 39 U.S.C. 3633(a)(1), (2), and (3). See Request at 2; Attachment E.

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2014–5 and CP2014–6; Order No. 1886]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings requesting the addition of Priority Mail Contract 67 to the competitive product list. This notice informs the public of the filings, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 29, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
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I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a request and associated supporting information to add Priority Mail Contract 67 to the competitive product list.[1] The Postal Service asserts that Priority Mail Contract 67 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). *Id.* at 1. The Request has been assigned Docket No. MC2014–5.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2014–6.

Request. To support its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
- Attachment B—a redacted copy of the contract;
- Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract is scheduled to become effective one business day after the Commission issues all necessary regulatory approval. *Id.* at 2. The contract will expire three years from the effective date unless, among other things, either party terminates the agreement upon 30 days' written notice to the other party or renewed by mutual agreement. *Id.* at 3. The contract also allows two 90-day extensions of the agreement if the preparation of a successor agreement is active and the Commission is notified at least 7 days prior to the contract's expiration date. *Id.* The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a).[2]

The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the Governors' Decision, contract, customer-identifying information, and related financial information should remain confidential.

[1] Request of the United States Postal Service to Add Priority Mail Contract 67 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, November 19, 2013 (Request).

[2] Although the Request appears to state that the certification only pertains to paragraphs (1) and (3) of 39 U.S.C. 3633(a), the certification itself contains an assertion that the prices are in compliance with 39 U.S.C. 3633(a)(1), (2), and (3). See Request at 2; Attachment E.

Id. at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2014–5 and CP2014–6 to consider the Request pertaining to the proposed Priority Mail Contract 67 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than November 29, 2013. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Kenneth R. Moeller to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2014–5 and CP2014–6 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Kenneth R. Moeller is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than November 29, 2013.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–28386 Filed 11–26–13; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2014–6 and CP2014–7; Order No. 1887]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings requesting the addition of Priority Mail Contract 68 to the competitive product list. This notice informs the public of the filings, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 27, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a request and associated supporting information to add Priority Mail Contract 68 to the competitive product list.[1] The Postal Service asserts that Priority Mail Contract 68 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). *Id.* at 1. The Request has been assigned Docket No. MC2014–6.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2014–7.

Request. To support its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
- Attachment B—a redacted copy of the contract;
- Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract is scheduled to become effective one business day after the Commission issues all necessary regulatory approval. *Id.* at 2. The contract will expire February 1, 2014 unless, among other things, either party terminates the agreement upon 30 days' written notice to the other party or renewed by mutual agreement. *Id.* The contract also allows two 90-day extensions of the agreement if the preparation of a successor agreement is active and the Commission is notified within at least 7 days of the contracts' expiration.[2] The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a).[3]

The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the Governors' Decision, contract, customer-identifying information, and related financial information should remain confidential. *Id.* at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

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[1] Request of the United States Postal Service to Add Priority Mail Contract 68 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, November 19, 2013 (Request).

[2] *Id.* Previously, the Postal Service clarified that identical language in Priority Mail Contract 60 ''contemplates the Postal Service filing any notices of extension with the Commission at least one week prior to the 3-year expiration date or the extended expiration date.'' See Docket Nos. MC2013–54 and CP2013–70, Order No. 1773, Order Adding Priority Mail Contract 60 to the Competitive Product List, July 8, 2013, at 3; see also Docket Nos. MC2013–54 and CP2013–70, Response of the United States Postal Service to Chairman's Information Request No. 1, July 1, 2013, question 2.

[3] Although the Request appears to state that the certification only pertains to paragraphs (1) and (3) of 39 U.S.C. 3633(a), the certification itself contains an assertion that the prices are in compliance with 39 U.S.C. 3633(a)(1), (2), and (3). See Request at 2; Attachment E.

II. Notice of Filings

The Commission establishes Docket Nos. MC2014–6 and CP2014–7 to consider the Request pertaining to the proposed Priority Mail Contract 68 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than November 27, 2013. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Lyudmila Y. Bzhilyanskaya to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2014–6 and CP2014–7 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Lyudmila Y. Bzhilyanskaya is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than November 27, 2013.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–28387 Filed 11–26–13; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 27, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 19, 2013, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 67 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2014–5, CP2014–6.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–28399 Filed 11–26–13; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 27, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 19, 2013, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 70 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2014–8, CP2014–9.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–28401 Filed 11–26–13; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 27, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 19, 2013, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 69 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2014–7, CP2014–8.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–28402 Filed 11–26–13; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* November 27, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 19, 2013, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 68 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2014–6, CP2014–7.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–28403 Filed 11–26–13; 8:45 am]

BILLING CODE 7710–12–P

RAILROAD RETIREMENT BOARD

Privacy Act of 1974, as Amended; Notice of Computer Matching Program (Railroad Retirement Board—Office of Personnel Management)

AGENCY: Railroad Retirement Board (RRB).

ACTION: Notice of a renewal of an existing computer-matching program that expired on February 1, 2013.

SUMMARY: As required by the Privacy Act of 1974, as amended, the RRB is issuing public notice of its renewal of an ongoing computer-matching program with the Office of Personnel Management (OPM). The purpose of this notice is to advise individuals applying for or receiving benefits under the Railroad Retirement Act of the use made by RRB of this information obtained from OPM by means of a computer match.

DATES: This matching program becomes effective as proposed without further notice on January 6, 2014. We will file a report of this computer-matching program with the Committee on Homeland Security and Governmental Affairs of the Senate; the Committee on Oversight and Government Reform of the House of Representatives; and the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB).

ADDRESSES: Interested parties may comment on this publication by writing to Ms. Martha P. Rico, Secretary to the Board, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092.

FOR FURTHER INFORMATION CONTACT: Mr. Timothy Grant, Chief Privacy Officer, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092, telephone 312–751–4869 or email at *tim.grant@rrb.gov*.

SUPPLEMENTARY INFORMATION:

A. General

The Computer Matching and Privacy Protection Act of 1988, (Pub. L. 100–503), amended by the Privacy Act of 1974, (5 U.S.C. 552a) as amended, requires a Federal agency participating in a computer matching program to publish a notice in the **Federal Register** for all matching programs.

The Privacy Act, as amended, regulates the use of computer matching by Federal agencies when records contained in a Privacy Act System of Records are matched with other Federal, State, or local government records. It requires Federal agencies involved in computer matching programs to:

(1) Negotiate written agreements with the other agency or agencies participating in the matching programs;

(2) Obtain the approval of the matching agreement by the Data Integrity Boards (DIB) of the participating Federal agencies;

(3) Publish notice of the computer matching program in the **Federal Register**;

(4) Furnish detailed reports about matching programs to Congress and OMB;

(5) Notify applicants and beneficiaries that their records are subject to matching; and

(6) Verify match findings before reducing, suspending, terminating, or denying a person's benefits or payments. The last notice for this matching program was published at 75 FR 53004 (August 30, 2010).

B. RRB Computer Matches Subject to the Privacy Act

We have taken appropriate action to ensure that all of our computer matching programs comply with the requirements of the Privacy Act, as amended.

Notice of Computer Matching Program, RRB with the Office of Personnel Management (OMB)

A. Name of Participating Agencies

OPM and RRB.

B. Purpose of the Matching Program

The purpose of the match is to enable the RRB to (1) identify affected RRB annuitants who are in receipt of a Federal public pension benefit but who have not reported receipt of this benefit to the RRB, and (2) receive needed Federal public pension benefit information for affected RRB annuitants more timely and accurately.

C. Authority for Conducting the Match

Sections 3(a)(1), 4(a)(1) and 4(f)(1) of the Railroad Retirement Act, as amended, 45 U.S.C. 231b(a)(1), 231c(a)(1) and 231c(f)(1) require that the RRB reduce the Railroad Retirement benefits of certain beneficiaries entitled to Railroad Retirement employee and/or spouse/widow benefits who are also entitled to a government pension based on their own non-covered earnings. We call this reduction a Public Service Pension (PSP) offset.

Section 224 of the Social Security Act, as amended, 42 U.S.C. 424a, provides for the reduction of disability benefits when the disabled worker is also entitled to a public disability benefit (PDB). We call this a PDB offset. A civil service disability benefit is considered a PDB. Section 224(h)(1) requires any Federal agency to provide RRB with information in its possession that RRB may require for the purposes of making a timely determination of the amount of reduction under section 224 of the Social Security Act. Pursuant to 5 U.S.C. Section 552a(b)(3) OPM has established routine uses to disclose the subject information to RRB.

D. Categories of Records and Individuals Covered

The records to be used in the match and the roles of the matching participants are described as follows: OPM will provide the RRB once a year via secure electronic file transfer, data extracted from its annuity and survivor master file of its Civil Service Retirement and Insurance Records. The Privacy Act System of Records designation is OPM/Central-1, (Civil Service Retirement and Insurance Records), Published in the **Federal Register** on June 7, 2011 (76 FR 32997). The RRB Privacy Act System of Records is RRB–22, Railroad Retirement, Survivor, and Pensioner Benefit System, published in the **Federal Register** on July 26, 2010 (75 FR 43727)

Normally on December of each year, OPM transmits to us approximately 2.5 million electronic records for matching. The records contain these data elements: Name, social security number, date of birth, civil service claim number, first potential month and year of eligibility for civil service benefits, first month, day, year of entitlement to civil service benefits, amount of current gross civil service benefits, and effective date (month, day, year) of civil service amount, and where applicable, civil service disability indicator, civil service FICA covered month indicator, and civil service total service months. The RRB will match the Social Security number, name, and date of birth contained in the OPM file against approximately the 1.2 million records in our files. For records that match, the RRB will extract the civil service payment information.

E. Inclusive Dates of the Matching Program

This matching program will become effective 40 days after a copy of the agreement, as approved by the Data Integrity Board of each agency, is sent to Congress and the Office of Management and Budget, or 30 days after publication of this notice in the **Federal Register**, whichever date is later. The matching program will continue for 18 months after the effective date and may be extended for an additional 12 months, if the conditions specified in 5 U.S.C. 552a(o)(2)(D) have been met.

Dated: November 19, 2013.

By authority of the Board.

Martha P. Rico,

Secretary to the Board.

[FR Doc. 2013–28395 Filed 11–26–13; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: US Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 17a–2, SEC File No. 270–189, OMB Control No. 3235–0201.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 17a–2 (17 CFR 240.17a–2), under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 17a–2—Recordkeeping Requirements Relating to Stabilizing Activities—requires underwriters to maintain information regarding stabilizing activities conducted in accordance with Rule 104 of Regulation M. The collections of information under Regulation M and Rule 17a–2 are necessary for covered persons to obtain certain benefits or to comply with certain requirements. The collections of information are necessary to provide the Commission with information regarding syndicate covering transactions and penalty bids. The Commission may review this information during periodic examinations or with respect to investigations. Except for the information required to be kept under Rule 104(i) (17 CFR 242.104(i)) and Rule 17a–2(c), none of the information required to be collected or disclosed for PRA purposes will be kept confidential. The recordkeeping requirement of Rule 17a–2 requires the information be maintained in a separate file, or in a separately retrievable format, for a period of three years, the first two years in an easily accessible place, consistent with the requirements of Exchange Act Rule 17a–4(f) (17 CFR 240.17a–4(f)).

There are approximately 795 respondents per year that require an aggregate total of 3,975 hours to comply with this rule. Each respondent makes an estimated 1 annual response. Each response takes approximately 5 hours to complete. Thus, the total compliance burden per year is 3,975 burden hours. The total estimated internal compliance cost for the respondents is approximately $250,425.00, resulting in a cost of compliance for each respondent per response of approximately $315.00 (i.e., $250,425.00/795 responses).

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

Please direct your written comments to: Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street, NE., Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: November 21, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28426 Filed 11–26–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 18f–1 and Form N–18f–1, OMB Control No. 3235–0211, SEC File No. 270–187.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 18f–1 (17 CFR 270.18f–1) enables a registered open-end management investment company (''fund'') that may redeem its securities in-kind, by making a one-time election, to commit to make cash redemptions pursuant to certain requirements without violating section 18(f) of the Investment Company Act of 1940 (15 U.S.C. 80a–18(f)). A fund relying on the rule must file Form N–18F–1 (17 CFR 274.51) to notify the Commission of this election. The Commission staff estimates that 26 funds file Form N–18F–1 annually, and that each response takes one hour. Based on these estimates, the total annual burden hours associated with the rule is estimated to be 26 hours.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Written comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: November 21, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28427 Filed 11–26–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From:
Securities and Exchange Commission, Office of Investor Education and Advocacy,
Washington, DC 20549–0213.

Extension:
Rule 12d3–1, OMB Control No. 3235–0561, SEC File No. 270–504.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget (''OMB'') for extension and approval.

Section 12(d)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a) generally prohibits registered investment companies (''funds''), and companies controlled by funds, from purchasing securities issued by a registered investment adviser, broker, dealer, or underwriter (''securities-related businesses''). Rule 12d3–1 (''Exemption of acquisitions of securities issued by persons engaged in securities related businesses'' (17 CFR 270.12d3–1)) permits a fund to invest up to five percent of its assets in securities of an issuer deriving more than fifteen percent of its gross revenues from securities-related businesses, but a fund may not rely on rule 12d3–1 to acquire securities of its own investment adviser or any affiliated person of its own investment adviser.

A fund may, however, rely on an exemption in rule 12d3–1 to acquire securities issued by its subadvisers in circumstances in which the subadviser would have little ability to take advantage of the fund, because it is not in a position to direct the fund's securities purchases. The exemption in rule 12d3–1(c)(3) is available if (i) the subadviser is not, and is not an affiliated person of, an investment adviser that provides advice with respect to the portion of the fund that is acquiring the securities, and (ii) the advisory contracts of the subadviser, and any subadviser that is advising the purchasing portion of the fund, prohibit them from consulting with each other concerning securities transactions of the fund, and limit their responsibility in providing advice to providing advice with respect to discrete portions of the fund's portfolio.

Based on an analysis of fund filings, the staff estimates that approximately 775 fund portfolios enter into subadvisory agreements each year.[1] Based on discussions with industry representatives, the staff estimates that it will require approximately 3 attorney hours to draft and execute additional clauses in new subadvisory contracts in order for funds and subadvisers to be able to rely on the exemptions in rule 12d3–1. Because these additional clauses are identical to the clauses that a fund would need to insert in their subadvisory contracts to rely on rules 10f–3, 17a–10, and 17e–1 and because we believe that funds that use one such rule generally use all of these rules, we apportion this 3 hour time burden equally to all four rules. Therefore, we estimate that the burden allocated to rule 12d3–1 for this contract change would be 0.75 hours.[2] Assuming that all 775 funds that enter into new subadvisory contracts each year make the modification to their contract required by the rule, we estimate that the rule's contract modification requirement will result in 581 burden hours annually.[3]

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: November 21, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28425 Filed 11–26–13; 8:45 am]

BILLING CODE 8011–01–P

[1] Based on information in Commission filings, we estimate that 44.4 percent of funds are advised by subadvisers.

[2] This estimate is based on the following calculation (3 hours ÷ 4 rules = .75 hours).

[3] This estimate is based on the following calculation: (0.75 hours × 775 portfolios = 581 burden hours).

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:
Rule 206(4)–6, OMB Control No. 3235–0571, SEC File No. 270–513.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget (''OMB'') for extension and approval.

The title for the collection of information is ''Rule 206(4)–6'' under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) (''Advisers Act'') and the collection has been approved under OMB Control No. 3235–0571. The Commission adopted rule 206(4)–6 (17 CFR 275.206(4)–6), the proxy voting rule, to address an investment adviser's fiduciary obligation to clients who have given the adviser authority to vote their securities. Under the rule, an investment adviser that exercises voting authority over client securities is required to: (i) Adopt and implement policies and procedures that are reasonably designed to ensure that the adviser votes securities in the best interest of clients, including procedures to address any material conflict that may arise between the interest of the adviser and the client; (ii) disclose to clients how they may obtain information on how the adviser has voted with respect to their securities; and (iii) describe to clients the adviser's proxy voting policies and procedures and, on request, furnish a copy of the policies and procedures to the requesting client. The rule is designed to assure that advisers that vote proxies for their clients vote those proxies in their clients' best interest and provide

clients with information about how their proxies were voted.

Rule 206(4)–6 contains ''collection of information'' requirements within the meaning of the Paperwork Reduction Act. The respondents are investment advisers registered with the Commission that vote proxies with respect to clients' securities. Advisory clients of these investment advisers use the information required by the rule to assess investment advisers' proxy voting policies and procedures and to monitor the advisers' performance of their proxy voting activities. The information also is used by the Commission staff in its examination and oversight program. Without the information collected under the rules, advisory clients would not have information they need to assess the adviser's services and monitor the adviser's handling of their accounts, and the Commission would be less efficient and effective in its programs.

The estimated number of investment advisers subject to the collection of information requirements under the rule is 9,650. It is estimated that each of these advisers is required to spend on average 10 hours annually documenting its proxy voting procedures under the requirements of the rule, for a total burden of 96,500 hours. We further estimate that on average, approximately 139 clients of each adviser would request copies of the underlying policies and procedures. We estimate that it would take these advisers 0.1 hours per client to deliver copies of the policies and procedures, for a total burden of 134,135 hours. Accordingly, we estimate that rule 206(4)–6 results in an annual aggregate burden of collection for SEC-registered investment advisers of a total of 230,635 hours.

Written comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burdens of the collections of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

Please direct your written comments to Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: November 21, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28428 Filed 11–26–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form N–17D–1; OMB Control No. 3235–0229, SEC File No. 270–231.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget (''OMB'') for extension and approval.

Section 17(d) (15 U.S.C. 80a–17(d)) of the Investment Company Act of 1940 (''Act'') authorizes the Commission to adopt rules that protect funds and their security holders from overreaching by affiliated persons when the fund and the affiliated person participate in any joint enterprise or other joint arrangement or profit-sharing plan. Rule 17d–1 under the Act (17 CFR 270.17d–1) prohibits funds and their affiliated persons from participating in a joint enterprise, unless an application regarding the transaction has been filed with and approved by the Commission. Paragraph (d)(3) of the rule provides an exemption from this requirement for any loan or advance of credit to, or acquisition of securities or other property of, a small business concern, or any agreement to do any of the foregoing (''investments'') made by a small business investment company (''SBIC'') and an affiliated bank, provided that reports about the investments are made on forms the Commission may prescribe. Rule 17d–2 (17 CFR 270.17d–2) designates Form N–17D–1 (17 CFR 274.00) (''form'') as the form for reports required by rule 17d–1.

SBICs and their affiliated banks use form N–17D–1 to report any contemporaneous investments in a small business concern. The form provides shareholders and persons seeking to make an informed decision about investing in an SBIC an opportunity to learn about transactions of the SBIC that have the potential for self dealing and other forms of overreaching by affiliated persons at the expense of shareholders.

Form N–17D–1 requires SBICs and their affiliated banks to report identifying information about the small business concern and the affiliated bank. The report must include, among other things, the SBIC's and affiliated bank's outstanding investments in the small business concern, the use of the proceeds of the investments made during the reporting period, any changes in the nature and amount of the affiliated bank's investment, the name of any affiliated person of the SBIC or the affiliated bank (or any affiliated person of the affiliated person of the SBIC or the affiliated bank) who has any interest in the transactions, the basis of the affiliation, the nature of the interest, and the consideration the affiliated person has received or will receive.

Up to three SBICs may file the form in any year.[1] The Commission estimates the burden of filling out the form is approximately one hour per response and would likely be completed by an accountant or other professional. Based on past filings, the Commission estimates that no more than one SBIC is likely to use the form each year. Most of the information requested on the form should be readily available to the SBIC or the affiliated bank in records kept in the ordinary course of business, or with respect to the SBIC, pursuant to the recordkeeping requirements under the Act. Commission staff estimates that it should take approximately one hour for an accountant or other professional to complete the form.[2] The estimated total annual burden of filling out the form is 1 hour, at an estimated total annual cost of $193.[3] The Commission will not keep

[1] As of September 23, 2013, three SBICs were registered with the Commission.

[2] This estimate of hours is based on past conversations with representatives of SBICs and accountants that have filed the form.

[3] Commission staff estimates that the annual burden would be incurred by a senior accountant with an average hourly wage rate of $193 per hour. *See* Securities Industry and Financial Markets Association, Report on Management and Professional Earnings in the Securities Industry

Continued

responses on Form N–17D–1 confidential.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, C/O Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549; or send an email to: *PRA_Mailbox@sec.gov*.

Dated: November 21, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28429 Filed 11–26–13; 8:45 am]

BILLING CODE 8011–01–P

2012, modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30803; 812–14179]

Horizons ETFs Management (USA) LLC and Horizons ETF Trust; Notice of Application

November 21, 2013.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act.

SUMMARY: *Summary of Application:* Applicants request an order that would permit (a) Series of certain open-end management investment companies to issue shares (''Shares'') redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Shares to occur at negotiated market prices rather than at net asset value (''NAV''); (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Shares for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares.

Applicants: Horizons ETFs Management (USA) LLC (''Horizons'') and Horizons ETF Trust (''Trust'').

DATES: *Filing Dates:* The application was filed on July 17, 2013, and amended on October 22, 2013 and November 20, 2013.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 16, 2013, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants: Horizons ETFs Management (USA) LLC, One Bryant Park, 39th Floor, New York, NY 10036.

FOR FURTHER INFORMATION CONTACT: Courtney S. Thornton, Senior Counsel, at (202) 551–6812, or David P. Bartels, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Trust is a Delaware statutory trust will register under the Act as an open-end management investment company with multiple series. Each series will operate as an exchange traded fund (''ETF'').

2. Horizons will be the investment adviser to the initial series of the Trust (''Initial Fund''). Horizons is, and any other Adviser (as defined below) will be, registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act''). The Adviser may enter into sub-advisory agreements with one or more investment advisers to act as sub-advisers to particular Funds (each, a ''Sub-Adviser''). Any Sub-Adviser will either be registered under the Advisers Act or will not be required to register thereunder.

3. The Trust will enter into a distribution agreement with one or more distributors. Each distributor for a Fund will be a broker-dealer (''Broker'') registered under the Securities Exchange Act of 1934 (''Exchange Act'') and will act as distributor and principal underwriter (''Distributor'') for one or more of the Funds. No Distributor will be affiliated with any Exchange (defined below). The Distributor for each Fund will comply with the terms and conditions of the requested order.

4. Applicants request that the order apply to the Initial Fund and any additional series of the Trust, and any other open-end management investment company or series thereof, that may be created in the future (''Future Funds'' and together with the Initial Fund, ''Funds''), each of which will operate as an ETF and will track a specified index comprised of domestic or foreign equity and/or fixed income securities (each, an ''Underlying Index''). Any Future Fund will (a) be advised by Horizons or an entity controlling, controlled by, or under common control with Horizons (each, an ''Adviser'') and (b) comply with the terms and conditions of the application.[1]

[1] All existing entities that intend to rely on the requested order have been named as applicants. Any other existing or future entity that subsequently relies on the order will comply with

5. Each Fund holds or will hold certain securities (''Portfolio Securities'') selected to correspond generally to the performance of its Underlying Index. The Underlying Indexes will be comprised solely of equity and/or fixed income securities issued by one or more of the following categories of issuers: (i) domestic issuers and (ii) non-domestic issuers meeting the requirements for trading in U.S. markets. Other Funds will be based on Underlying Indexes that will be comprised solely of foreign and domestic, or solely foreign, equity and/or fixed income securities (''Foreign Funds'').

6. Applicants represent that each Fund will invest at least 80% of its assets (excluding securities lending collateral) in the component securities of its respective Underlying Index (''Component Securities'') and TBA Transactions,[2] and in the case of Foreign Funds, Component Securities and Depositary Receipts [3] representing Component Securities. Each Fund may also invest up to 20% of its assets in certain index futures, options, options on index futures, swap contracts or other derivatives, as related to its respective Underlying Index and its Component Securities, cash and cash equivalents, other investment companies, as well as in securities and other instruments not included in its Underlying Index but which the Adviser believes will help the Fund track its Underlying Index. A Fund may also engage in short sales in accordance with its investment objective.

7. Each Trust may issue Funds that seek to track Underlying Indexes constructed using 130/30 investment strategies (''130/30 Funds'') or other long/short investment strategies (''Long/Short Funds''). Each Long/Short Fund will establish (i) exposures equal to approximately 100% of the long positions specified by the Long/Short Index [4] and (ii) exposures equal to approximately 100% of the short positions specified by the Long/Short Index. Each 130/30 Fund will include strategies that: (i) establish long positions in securities so that total long exposure represents approximately 130% of a Fund's net assets; and (ii) simultaneously establish short positions in other securities so that total short exposure represents approximately 30% of such Fund's net assets. Each Business Day, for each Long/Short Fund and 130/30 Fund, the Adviser will provide full portfolio transparency on the Fund's publicly available Web site (''Web site'') by making available the Fund's Portfolio Holdings (defined below) before the commencement of trading of Shares on the Listing Exchange (defined below).[5] The information provided on the Web site will be formatted to be reader-friendly.

8. A Fund will utilize either a replication or representative sampling strategy to track its Underlying Index. A Fund using a replication strategy will invest in the Component Securities of its Underlying Index in the same approximate proportions as in such Underlying Index. A Fund using a representative sampling strategy will hold some, but not necessarily all of the Component Securities of its Underlying Index. Applicants state that a Fund using a representative sampling strategy will not be expected to track the performance of its Underlying Index with the same degree of accuracy as would an investment vehicle that invested in every Component Security of the Underlying Index with the same weighting as the Underlying Index. Applicants expect that each Fund will have an annual tracking error relative to the performance of its Underlying Index of less than 5%.

9. Each Fund will be entitled to use its Underlying Index pursuant to either a licensing agreement with the entity that compiles, creates, sponsors or maintains the Underlying Index (each, an ''Index Provider'') or a sub-licensing arrangement with the Adviser, which will have a licensing agreement with such Index Provider.[6] A ''Self-Indexing Fund'' is a Fund for which an Affiliated Person, or a Second-Tier Affiliate, of the Trust or a Fund, of the Adviser, of any Sub-Adviser to or promoter of a Fund, or of the Distributor (each, an ''Affiliated Index Provider'') will serve as the Index Provider. In the case of Self-Indexing Funds, an Affiliated Index Provider will create a proprietary, rules-based methodology to create Underlying Indexes (each an ''Affiliated Index'').[7] Except with respect to the Self-Indexing Funds, no Index Provider is or will be an Affiliated Person, or a Second-Tier Affiliate, of a Trust or a Fund, of the Adviser, of any Sub-Adviser to or promoter of a Fund, or of the Distributor.

10. Applicants recognize that Self-Indexing Funds could raise concerns regarding the ability of the Affiliated Index Provider to manipulate the Underlying Index to the benefit or detriment of the Self-Indexing Fund. Applicants further recognize the potential for conflicts that may arise with respect to the personal trading activity of personnel of the Affiliated Index Provider who have knowledge of changes to an Underlying Index prior to the time that information is publicly disseminated.

11. Applicants propose that each day that a Fund, the NYSE and the national securities exchange (as defined in section 2(a)(26) of the Act) (an ''Exchange'') on which the Fund's Shares are primarily listed (''Listing Exchange'') are open for business, including any day that a Fund is required to be open under section 22(e) of the Act (a ''Business Day''), each Self-Indexing Fund will post on its Web site,

the terms and conditions of the order. A Fund of Funds (as defined below) may rely on the order only to invest in Funds and not in any other registered investment company.

[2] A ''to-be-announced transaction'' or ''TBA Transaction'' is a method of trading mortgage-backed securities. In a TBA Transaction, the buyer and seller agree upon general trade parameters such as agency, settlement date, par amount and price. The actual pools delivered generally are determined two days prior to settlement date.

[3] Depositary receipts representing foreign securities (''Depositary Receipts'') include American Depositary Receipts and Global Depositary Receipts. The Funds may invest in Depositary Receipts representing foreign securities in which they seek to invest. Depositary Receipts are typically issued by a financial institution (a ''depositary bank'') and evidence ownership interests in a security or a pool of securities that have been deposited with the depositary bank. A Fund will not invest in any Depositary Receipts that the Adviser or any Sub-Adviser deems to be illiquid or for which pricing information is not readily available. No affiliated person of a Fund, the Adviser or any Sub-Adviser will serve as the depositary bank for any Depositary Receipts held by a Fund.

[4] Underlying Indexes that include both long and short positions in securities are referred to as ''Long/Short Indexes.''

[5] Under accounting procedures followed by each Fund, trades made on the prior Business Day (''T'') will be booked and reflected in NAV on the current Business Day (T+1). Accordingly, the Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

[6] The licenses for the Self-Indexing Funds will specifically state that the Affiliated Index Provider (as defined below), or in case of a sub-licensing agreement, the Adviser, must provide the use of the Affiliated Indexes (as defined below) and related intellectual property at no cost to the Trust and the Self-Indexing Funds.

[7] The Affiliated Indexes may be made available to registered investment companies, as well as separately managed accounts of institutional investors and privately offered funds that are not deemed to be ''investment companies'' in reliance on section 3(c)(1) or 3(c)(7) of the Act for which the Adviser acts as adviser or subadviser (''Affiliated Accounts'') as well as other such registered investment companies, separately managed accounts and privately offered funds for which it does not act either as adviser or subadviser (''Unaffiliated Accounts''). The Affiliated Accounts and the Unaffiliated Accounts, like the Funds, would seek to track the performance of one or more Underlying Index(es) by investing in the constituents of such Underlying Indexes or a representative sample of such constituents of the Underlying Index. Consistent with the relief requested from section 17(a), the Affiliated Accounts will not engage in Creation Unit transactions with a Fund.

before commencement of trading of Shares on the Listing Exchange, the identities and quantities of the portfolio securities, assets, and other positions held by the Fund that will form the basis for the Fund's calculation of its NAV at the end of the Business Day (''Portfolio Holdings''). Applicants believe that requiring Self-Indexing Funds to maintain full portfolio transparency will also provide an additional mechanism for addressing any such potential conflicts of interest.

12. In addition, Applicants do not believe the potential for conflicts of interest raised by the Adviser's use of the Underlying Indexes in connection with the management of the Self Indexing Funds and the Affiliated Accounts will be substantially different from the potential conflicts presented by an adviser managing two or more registered funds. Both the Act and the Advisers Act contain various protections to address conflicts of interest where an adviser is managing two or more registered funds and these protections will also help address these conflicts with respect to the Self-Indexing Funds.[8]

13. Each Adviser and any Sub-Adviser has adopted or will adopt, pursuant to Rule 206(4)–7 under the Advisers Act, written policies and procedures designed to prevent violations of the Advisers Act and the rules thereunder. These include policies and procedures designed to minimize potential conflicts of interest among the Self-Indexing Funds and the Affiliated Accounts, such as cross trading policies, as well as those designed to ensure the equitable allocation of portfolio transactions and brokerage commissions. In addition, Horizons has adopted policies and procedures as required under section 204A of the Advisers Act, which are reasonably designed in light of the nature of its business to prevent the misuse, in violation of the Advisers Act or the Securities Exchange Act of 1934 (''Exchange Act'') or the rules thereunder, of material non-public information by the Current Adviser or an associated person (''Inside Information Policy''). Any other Adviser or Sub-Adviser will be required to adopt and maintain a similar Inside Information Policy. In accordance with the Code of Ethics[9] and Inside Information Policy of the Adviser and any Sub-Adviser, personnel of those entities with knowledge about the composition of the Portfolio Deposit[10] will be prohibited from disclosing such information to any other person, except as authorized in the course of their employment, until such information is made public. In addition, an Index Provider will not provide any information relating to changes to an Underlying Index's methodology for the inclusion of component securities, the inclusion or exclusion of specific component securities, or methodology for the calculation or the return of component securities, in advance of a public announcement of such changes by the Index Provider. The Adviser will also include under Item 10.C of Part 2 of its Form ADV a discussion of its relationship to any Affiliated Index Provider and any material conflicts of interest resulting therefrom, regardless of whether the Affiliated Index Provider is a type of affiliate specified in Item 10.

14. To the extent the Self-Indexing Funds transact with an Affiliated Person of the Adviser or Sub-Adviser, such transactions will comply with the Act, the rules thereunder and the terms and conditions of the requested order. In this regard, each Self-Indexing Fund's board of directors or trustees (''Board'') will periodically review the Self-Indexing Fund's use of an Affiliated Index Provider. Subject to the approval of the Self-Indexing Fund's Board, the Adviser, Affiliated Persons of the Adviser (''Adviser Affiliates'') and Affiliated Persons of any Sub-Adviser (''Sub-Adviser Affiliates'') may be authorized to provide custody, fund accounting and administration and transfer agency services to the Self-Indexing Funds. Any services provided by the Adviser, Adviser Affiliates, Sub-Adviser and Sub-Adviser Affiliates will be performed in accordance with the provisions of the Act, the rules under the Act and any relevant guidelines from the staff of the Commission. Applications for prior orders granted to Self-Indexing Funds have received relief to operate such funds on the basis discussed above.[11]

15. The Shares of each Fund will be purchased and redeemed in Creation Units and generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified below, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments (''Deposit Instruments''), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments (''Redemption Instruments'').[12] On any given Business Day, the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, unless the Fund is Rebalancing (as defined below). In addition, the Deposit Instruments and the Redemption Instruments will each correspond pro rata to the positions in the Fund's portfolio (including cash positions)[13] except: (a) In the case of bonds, for minor differences when it is impossible to break up bonds beyond certain minimum sizes needed for transfer and settlement; (b) for minor differences when rounding is necessary to eliminate fractional shares or lots that are not tradeable round lots;[14] (c) TBA Transactions, short positions, derivatives and other positions that cannot be transferred in kind[15] will be excluded from the Deposit Instruments and the Redemption Instruments;[16](d) to the extent the Fund determines, on a given Business Day, to use a representative sampling of the Fund's portfolio;[17] or (e) for temporary periods,

[8] *See, e.g.,* Rule 17j–1 under the Act and Section 204A under the Advisers Act and Rules 204A–1 and 206(4)–7 under the Advisers Act.

[9] The Adviser has also adopted or will adopt a code of ethics pursuant to Rule 17j–1 under the Act and Rule 204A–1 under the Advisers Act, which contains provisions reasonably necessary to prevent Access Persons (as defined in Rule 17j–1) from engaging in any conduct prohibited in Rule 17j–1 (''Code of Ethics'').

[10] The instruments and cash that the purchaser is required to deliver in exchange for the Creation Units it is purchasing is referred to as the ''Portfolio Deposit.''

[11] *See, e.g.,* Guggennheim Funds Investment Advisors, LLC, Investment Company Act Release Nos. 30560 (June 14, 2013) (notice) and 30598 (July 10, 2013) (order); Sigman Investment Advisors, LLC, Investment company Act Release Nos. 30559 (June 14, 2013) (notice) and 30597 (July 10, 2013) (order)

[12] The Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the Securities Act of 1933 (''Securities Act''). In accepting Deposit Instruments and satisfying redemptions with Redemption Instruments that are restricted securities eligible for resale pursuant to rule 144A under the Securities Act, the Funds will comply with the conditions of rule 144A.

[13] The portfolio used for this purpose will be the same portfolio used to calculate the Fund's NAV for the Business Day.

[14] A tradeable round lot for a security will be the standard unit of trading in that particular type of security in its primary market.

[15] This includes instruments that can be transferred in kind only with the consent of the original counterparty to the extent the Fund does not intend to seek such consents.

[16] Because these instruments will be excluded from the Deposit Instruments and the Redemption Instruments, their value will be reflected in the determination of the Cash Amount (as defined below).

[17] A Fund may only use sampling for this purpose if the sample: (i) Is designed to generate performance that is highly correlated to the performance of the Fund's portfolio; (ii) consists

to effect changes in the Fund's portfolio as a result of the rebalancing of its Underlying Index (any such change, a ''Rebalancing''). If there is a difference between the NAV attributable to a Creation Unit and the aggregate market value of the Deposit Instruments or Redemption Instruments exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference (the ''Cash Amount'').

16. Purchases and redemptions of Creation Units may be made in whole or in part on a cash basis, rather than in kind, solely under the following circumstances: (a) To the extent there is a Cash Amount; (b) if, on a given Business Day, the Fund announces before the open of trading that all purchases, all redemptions or all purchases and redemptions on that day will be made entirely in cash; (c) if, upon receiving a purchase or redemption order from an Authorized Participant, the Fund determines to require the purchase or redemption, as applicable, to be made entirely in cash; [18] (d) if, on a given Business Day, the Fund requires all Authorized Participants purchasing or redeeming Shares on that day to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are not eligible for transfer through either the NSCC or DTC (defined below); or (ii) in the case of Foreign Funds holding non-U.S. investments, such instruments are not eligible for trading due to local trading restrictions, local restrictions on securities transfers or other similar circumstances; or (e) if the Fund permits an Authorized Participant to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are, in the case of the purchase of a Creation Unit, not available in sufficient quantity; (ii) such instruments are not eligible for trading by an Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or (iii) a holder of Shares of a Foreign Fund holding non-U.S. investments would be subject to unfavorable income tax treatment if the holder receives redemption proceeds in kind.[19]

17. Creation Units will consist of specified large aggregations of Shares (*e.g.,* 25,000 Shares) as determined by the Adviser, and it is expected that the initial price of a Creation Unit will range from $1 million to $10 million. All orders to purchase Creation Units must be placed with the Distributor by or through an ''Authorized Participant'' which is either (1) a ''Participating Party,'' i.e., a Broker or other participant in the Continuous Net Settlement System of the NSCC, a clearing agency registered with the Commission, or (2) a participant in The Depository Trust Company (''DTC'') (''DTC Participant''), which, in either case, has signed a participant agreement with the Distributor. The Distributor will be responsible for transmitting the orders to the Funds and will furnish to those placing such orders confirmation that the orders have been accepted, but applicants state that the Distributor may reject any order which is not submitted in proper form.

18. Each Business Day, before the open of trading on the Listing Exchange, each Fund will cause to be published through the NSCC the names and quantities of the instruments comprising the Deposit Instruments and the Redemption Instruments, as well as the estimated Cash Amount (if any), for that day. The list of Deposit Instruments and Redemption Instruments will apply until a new list is announced on the following Business Day, and there will be no intra-day changes to the list except to correct errors in the published list. Each Listing Exchange will disseminate, every 15 seconds during regular Exchange trading hours, through the facilities of the Consolidated Tape Association, an amount for each Fund stated on a per individual Share basis representing the sum of (i) the estimated Cash Amount and (ii) the current value of the Deposit Instruments.

19. Transaction expenses, including operational processing and brokerage costs, will be incurred by a Fund when investors purchase or redeem Creation Units in-kind and such costs have the potential to dilute the interests of the Fund's existing shareholders. Each Fund will impose purchase or redemption transaction fees (''Transaction Fees'') in connection with effecting such purchases or redemptions of Creation Units. In all cases, such Transaction Fees will be limited in accordance with requirements of the Commission applicable to management investment companies offering redeemable securities. Since the Transaction Fees are intended to defray the transaction expenses as well as to prevent possible shareholder dilution resulting from the purchase or redemption of Creation Units, the Transaction Fees will be borne only by such purchasers or redeemers.[20] The Distributor will be responsible for delivering the Fund's prospectus to those persons acquiring Shares in Creation Units and for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it. In addition, the Distributor will maintain a record of the instructions given to the applicable Fund to implement the delivery of its Shares.

20. Shares of each Fund will be listed and traded individually on an Exchange. It is expected that one or more member firms of an Exchange will be designated to act as a market maker (each, a ''Market Maker'') and maintain a market for Shares trading on the Exchange. Prices of Shares trading on an Exchange will be based on the current bid/offer market. Transactions involving the sale of Shares on an Exchange will be subject to customary brokerage commissions and charges.

21. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs. Market Makers, acting in their roles to provide a fair and orderly secondary market for the Shares, may from time to time find it appropriate to purchase or redeem Creation Units. Applicants expect that secondary market purchasers of Shares will include both institutional and retail investors.[21] The price at which Shares trade will be disciplined by arbitrage opportunities created by the option continually to purchase or redeem Shares in Creation Units, which should help prevent

entirely of instruments that are already included in the Fund's portfolio; and (iii) is the same for all Authorized Participants on a given Business Day.

[18] In determining whether a particular Fund will sell or redeem Creation Units entirely on a cash or in-kind basis (whether for a given day or a given order), the key consideration will be the benefit that would accrue to the Fund and its investors. For instance, in bond transactions, the Adviser may be able to obtain better execution than Share purchasers because of the Adviser's size, experience and potentially stronger relationships in the fixed income markets. Purchases of Creation Units either on an all cash basis or in-kind are expected to be neutral to the Funds from a tax perspective. In contrast, cash redemptions typically require selling portfolio holdings, which may result in adverse tax consequences for the remaining Fund shareholders that would not occur with an in-kind redemption. As a result, tax consideration may warrant in-kind redemptions.

[19] A ''custom order'' is any purchase or redemption of Shares made in whole or in part on a cash basis in reliance on clause (e)(i) or (e)(ii).

[20] Where a Fund permits an in-kind purchaser to substitute cash-in-lieu of depositing one or more of the requisite Deposit Instruments, the purchaser may be assessed a higher Transaction Fee to cover the cost of purchasing such Deposit Instruments.

[21] Shares will be registered in book-entry form only. DTC or its nominee will be the record or registered owner of all outstanding Shares. Beneficial ownership of Shares will be shown on the records of DTC or the DTC Participants.

Shares from trading at a material discount or premium in relation to their NAV.

22. Shares will not be individually redeemable, and owners of Shares may acquire those Shares from the Fund, or tender such Shares for redemption to the Fund, in Creation Units only. To redeem, an investor must accumulate enough Shares to constitute a Creation Unit. Redemption requests must be placed through an Authorized Participant. A redeeming investor may pay a Transaction Fee, calculated in the same manner as a Transaction Fee payable in connection with purchases of Creation Units.

23. Neither the Trust nor any Fund will be advertised or marketed or otherwise held out as a traditional open-end investment company or a ''mutual fund.'' Instead, each such Fund will be marketed as an ''ETF.'' All marketing materials that describe the features or method of obtaining, buying or selling Creation Units, or Shares traded on an Exchange, or refer to redeemability, will prominently disclose that Shares are not individually redeemable and will disclose that the owners of Shares may acquire those Shares from the Fund or tender such Shares for redemption to the Fund in Creation Units only. The Funds will provide copies of their annual and semi-annual shareholder reports to DTC Participants for distribution to beneficial owners of Shares.

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provisions of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an ''open-end company'' as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the owner, upon its presentation to the issuer, is entitled to receive approximately a proportionate share of the issuer's current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order that would permit the Funds to register as open-end management investment companies and issue Shares that are redeemable in Creation Units only. Applicants state that investors may purchase Shares in Creation Units and redeem Creation Units from each Fund. Applicants further state that because Creation Units may always be purchased and redeemed at NAV, the price of Shares on the secondary market should not vary materially from NAV.

Section 22(d) of the Act and Rule 22c–1 under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is currently being offered to the public by or through an underwriter, except at a current public offering price described in the prospectus. Rule 22c–1 under the Act generally requires that a dealer selling, redeeming or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in a Fund's prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c–1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c–1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c–1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers, and (c) ensure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Shares does not involve a Fund as a party and will not result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the price at which Shares trade will be disciplined by arbitrage opportunities created by the option continually to purchase or redeem Shares in Creation Units, which should help prevent Shares from trading at a material discount or premium in relation to their NAV.

Section 22(e)

7. Section 22(e) of the Act generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. Applicants state that settlement of redemptions for Foreign Funds will be contingent not only on the settlement cycle of the United States market, but also on current delivery cycles in local markets for underlying foreign Portfolio Securities held by a Foreign Fund. Applicants state that the delivery cycles currently practicable for transferring Redemption Instruments to redeeming investors, coupled with local market holiday schedules, may require a delivery process of up to fourteen (14) calendar days. Accordingly, with respect to Foreign Funds only, applicants hereby request relief under section 6(c) from the requirement

imposed by section 22(e) to allow Foreign Funds to pay redemption proceeds within fourteen calendar days following the tender of Creation Units for redemption.[22]

8. Applicants believe that Congress adopted section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds. Applicants propose that allowing redemption payments for Creation Units of a Foreign Fund to be made within fourteen calendar days would not be inconsistent with the spirit and intent of section 22(e). Applicants suggest that a redemption payment occurring within fourteen calendar days following a redemption request would adequately afford investor protection.

9. Applicants are not seeking relief from section 22(e) with respect to Foreign Funds that do not effect creations and redemptions of Creation Units in-kind.

Section 12(d)(1)

10. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring securities of an investment company if such securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter and any other broker-dealer from knowingly selling the investment company's shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

11. Applicants request an exemption to permit registered management investment companies and unit investment trusts (''UITs'') that are not advised or sponsored by the Adviser, and not part of the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act as the Funds (such management investment companies are referred to as ''Investing Management Companies,'' such UITs are referred to as ''Investing Trusts,'' and Investing Management Companies and Investing Trusts are collectively referred to as ''Funds of Funds''), to acquire Shares beyond the limits of section 12(d)(1)(A) of the Act; and the Funds, and any principal underwriter for the Funds, and/or any Broker registered under the Exchange Act, to sell Shares to Funds of Funds beyond the limits of section 12(d)(1)(B) of the Act.

12. Each Investing Management Company will be advised by an investment adviser within the meaning of section 2(a)(20)(A) of the Act (the ''Fund of Funds Adviser'') and may be sub-advised by investment advisers within the meaning of section 2(a)(20)(B) of the Act (each, a ''Fund of Funds Sub-Adviser''). Any investment adviser to an Investing Management Company will be registered under the Advisers Act. Each Investing Trust will be sponsored by a sponsor (''Sponsor'').

13. Applicants submit that the proposed conditions to the requested relief adequately address the concerns underlying the limits in sections 12(d)(1)(A) and (B), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees and overly complex fund structures. Applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

14. Applicants believe that neither a Fund of Funds nor a Fund of Funds Affiliate would be able to exert undue influence over a Fund.[23] To limit the control that a Fund of Funds may have over a Fund, applicants propose a condition prohibiting a Fund of Funds Adviser or Sponsor, any person controlling, controlled by, or under common control with a Fund of Funds Adviser or Sponsor, and any investment company and any issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by a Fund of Funds Adviser or Sponsor, or any person controlling, controlled by, or under common control with a Fund of Funds Adviser or Sponsor (''Fund of Funds Advisory Group'') from controlling (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any Fund of Funds Sub-Adviser, any person controlling, controlled by or under common control with the Fund of Funds Sub-Adviser, and any investment company or issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Fund of Funds Sub-Adviser or any person controlling, controlled by or under common control with the Fund of Funds Sub-Adviser (''Fund of Funds Sub-Advisory Group'').

15. Applicants propose other conditions to limit the potential for undue influence over the Funds, including that no Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in an offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (''Affiliated Underwriting''). An ''Underwriting Affiliate'' is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Fund of Funds Adviser, Fund of Funds Sub-Adviser, employee or Sponsor of the Fund of Funds, or a person of which any such officer, director, member of an advisory board, Fund of Funds Adviser or Fund of Funds Sub-Adviser, employee or Sponsor is an affiliated person (except that any person whose relationship to the Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate).

16. Applicants do not believe that the proposed arrangement will involve excessive layering of fees. The board of directors or trustees of any Investing Management Company, including a majority of the directors or trustees who are not ''interested persons'' within the meaning of section 2(a)(19) of the Act (''disinterested directors or trustees''), will find that the advisory fees charged under the contract are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract of any Fund in which the Investing Management Company may invest. In addition, under condition B.5., a Fund of Funds Adviser, or a Fund of Funds' trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under rule 12b–1 under the Act) received from a Fund by the Fund of Funds Adviser, trustee or Sponsor or an affiliated person of the

[22] Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations Applicants may otherwise have under rule 15c6–1 under the Exchange Act requiring that most securities transactions be settled within three business days of the trade date.

[23] A ''Fund of Funds Affiliate'' is a Fund of Funds Adviser, Fund of Funds Sub-Adviser, Sponsor, promoter, and principal underwriter of a Fund of Funds, and any person controlling, controlled by, or under common control with any of those entities. A ''Fund Affiliate'' is an investment adviser, promoter, or principal underwriter of a Fund and any person controlling, controlled by or under common control with any of these entities.

Fund of Funds Adviser, trustee or Sponsor, other than any advisory fees paid to the Fund of Funds Adviser, trustee or Sponsor or its affiliated person by a Fund, in connection with the investment by the Fund of Funds in the Fund. Applicants state that any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.[24]

17. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Fund will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting the Fund to purchase shares of other investment companies for short-term cash management purposes. To ensure a Fund of Funds is aware of the terms and conditions of the requested order, the Fund of Funds will enter into an agreement with the Fund (''FOF Participation Agreement''). The FOF Participation Agreement will include an acknowledgement from the Fund of Funds that it may rely on the order only to invest in the Funds and not in any other investment company.

18. Applicants also note that a Fund may choose to reject a direct purchase of Shares in Creation Units by a Fund of Funds. To the extent that a Fund of Funds purchases Shares in the secondary market, a Fund would still retain its ability to reject any initial investment by a Fund of Funds in excess of the limits of section 12(d)(1)(A) by declining to enter into a FOF Participation Agreement with the Fund of Funds.

Sections 17(a)(1) and (2) of the Act

19. Sections 17(a)(1) and (2) of the Act generally prohibit an affiliated person of a registered investment company, or an affiliated person of such a person, from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines ''affiliated person'' of another person to include (a) any person directly or indirectly owning, controlling or holding with power to vote 5% or more of the outstanding voting securities of the other person, (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with the power to vote by the other person, and (c) any person directly or indirectly controlling, controlled by or under common control with the other person. Section 2(a)(9) of the Act defines ''control'' as the power to exercise a controlling influence over the management or policies of a company, and provides that a control relationship will be presumed where one person owns more than 25% of a company's voting securities. The Funds may be deemed to be controlled by the Adviser or an entity controlling, controlled by or under common control with the Adviser and hence affiliated persons of each other. In addition, the Funds may be deemed to be under common control with any other registered investment company (or series thereof) advised by an Adviser or an entity controlling, controlled by or under common control with an Adviser (an ''Affiliated Fund''). Any investor, including Market Makers, owning 5% or holding in excess of 25% of the Trust or such Funds, may be deemed affiliated persons of the Trust or such Funds. In addition, an investor could own 5% or more, or in excess of 25% of the outstanding shares of one or more Affiliated Funds making that investor a Second-Tier Affiliate of the Funds.

20. Applicants request an exemption from sections 17(a)(1) and 17(a)(2) of the Act pursuant to sections 6(c) and 17(b) of the Act to permit persons that are Affiliated Persons of the Funds, or Second-Tier Affiliates of the Funds, solely by virtue of one or more of the following: (a) holding 5% or more, or in excess of 25%, of the outstanding Shares of one or more Funds; (b) an affiliation with a person with an ownership interest described in (a); or (c) holding 5% or more, or more than 25%, of the shares of one or more Affiliated Funds, to effectuate purchases and redemptions ''in-kind.''

21. Applicants assert that no useful purpose would be served by prohibiting such affiliated persons from making ''in-kind'' purchases or ''in-kind'' redemptions of Shares of a Fund in Creation Units. Both the deposit procedures for ''in-kind'' purchases of Creation Units and the redemption procedures for ''in-kind'' redemptions of Creation Units will be effected in exactly the same manner for all purchases and redemptions, regardless of size or number. There will be no discrimination between purchasers or redeemers. Deposit Instruments and Redemption Instruments for each Fund will be valued in the identical manner as those Portfolio Securities currently held by such Fund and the valuation of the Deposit Instruments and Redemption Instruments will be made in an identical manner regardless of the identity of the purchaser or redeemer. Applicants do not believe that ''in-kind'' purchases and redemptions will result in abusive self-dealing or overreaching, but rather assert that such procedures will be implemented consistently with each Fund's objectives and with the general purposes of the Act. Applicants believe that ''in-kind'' purchases and redemptions will be made on terms reasonable to Applicants and any affiliated persons because they will be valued pursuant to verifiable objective standards. The method of valuing Portfolio Securities held by a Fund is identical to that used for calculating ''in-kind'' purchase or redemption values and therefore creates no opportunity for affiliated persons or Second-Tier Affiliates of applicants to effect a transaction detrimental to the other holders of Shares of that Fund. Similarly, applicants submit that, by using the same standards for valuing Portfolio Securities held by a Fund as are used for calculating ''in-kind'' redemptions or purchases, the Fund will ensure that its NAV will not be adversely affected by such securities transactions. Applicants also note that the ability to take deposits and make redemptions ''in-kind'' will help each Fund to track closely its Underlying Index and therefore aid in achieving the Fund's objectives.

22. Applicants also seek relief under sections 6(c) and 17(b) from section 17(a) to permit a Fund that is an affiliated person, or an affiliated person of an affiliated person, of a Fund of Funds to sell its Shares to and redeem its Shares from a Fund of Funds, and to engage in the accompanying in-kind transactions with the Fund of Funds.[25] Applicants state that the terms of the transactions are fair and reasonable and do not involve overreaching. Applicants note that any consideration paid by a Fund of Funds for the purchase or

[24] Any references to NASD Conduct Rule 2830 include any successor or replacement FINRA rule to NASD Conduct Rule 2830.

[25] Although applicants believe that most Funds of Funds will purchase Shares in the secondary market and will not purchase Creation Units directly from a Fund, a Fund of Funds might seek to transact in Creation Units directly with a Fund that is an affiliated person of a Fund of Funds. To the extent that purchases and sales of Shares occur in the secondary market and not through principal transactions directly between a Fund of Funds and a Fund, relief from Section 17(a) would not be necessary. However, the requested relief would apply to direct sales of Shares in Creation Units by a Fund to a Fund of Funds and redemptions of those Shares. Applicants are not seeking relief from Section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an affiliated person, or an affiliated person of an affiliated person of a Fund of Funds because an Adviser or an entity controlling, controlled by or under common control with an Adviser provides investment advisory services to that Fund of Funds.

redemption of Shares directly from a Fund will be based on the NAV of the Fund.[26] Applicants believe that any proposed transactions directly between the Funds and Funds of Funds will be consistent with the policies of each Fund of Funds. The purchase of Creation Units by a Fund of Funds directly from a Fund will be accomplished in accordance with the investment restrictions of any such Fund of Funds and will be consistent with the investment policies set forth in the Fund of Funds' registration statement. Applicants also state that the proposed transactions are consistent with the general purposes of the Act and are appropriate in the public interest.

Applicants' Conditions:

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

A. ETF Relief

1. The requested relief to permit ETF operations will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of index-based ETFs.

2. As long as a Fund operates in reliance on the requested order, the Shares of such Fund will be listed on an Exchange.

3. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that Shares are not individually redeemable and that owners of Shares may acquire those Shares from the Fund and tender those Shares for redemption to a Fund in Creation Units only.

4. The Web site, which is and will be publicly accessible at no charge, will contain, on a per Share basis for each Fund, the prior Business Day's NAV and the market closing price or the midpoint of the bid/ask spread at the time of the calculation of such NAV (''Bid/Ask Price''), and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV.

5. Each Self-Indexing Fund, Long/Short Fund and 130/30 Fund will post on the Web site on each Business Day, before commencement of trading of Shares on the Exchange, the Fund's Portfolio Holdings.

6. No Adviser or any Sub-Adviser to a Self-Indexing Fund, directly or indirectly, will cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Self-Indexing Fund) to acquire any Deposit Instrument for a Self-Indexing Fund through a transaction in which the Self-Indexing Fund could not engage directly.

B. Section 12(d)(1) Relief

1. The members of a Fund of Funds' Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The members of a Fund of Funds' Sub-Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of a Fund, the Fund of Funds' Advisory Group or the Fund of Funds' Sub-Advisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of a Fund, it will vote its Shares of the Fund in the same proportion as the vote of all other holders of the Fund's Shares. This condition does not apply to the Fund of Funds' Sub-Advisory Group with respect to a Fund for which the Fund of Funds' Sub-Adviser or a person controlling, controlled by or under common control with the Fund of Funds' Sub-Adviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

2. No Fund of Funds or Fund of Funds Affiliate will cause any existing or potential investment by the Fund of Funds in a Fund to influence the terms of any services or transactions between the Fund of Funds or Fund of Funds Affiliate and the Fund or a Fund Affiliate.

3. The board of directors or trustees of an Investing Management Company, including a majority of the disinterested directors or trustees, will adopt procedures reasonably designed to ensure that the Fund of Funds Adviser and Fund of Funds Sub-Adviser are conducting the investment program of the Investing Management Company without taking into account any consideration received by the Investing Management Company or a Fund of Funds Affiliate from a Fund or Fund Affiliate in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the securities of a Fund exceeds the limits in section 12(d)(1)(A)(i) of the Act, the Board of the Fund, including a majority of the directors or trustees who are not ''interested persons'' within the meaning of Section 2(a)(19) of the Act (''non-interested Board members''), will determine that any consideration paid by the Fund to the Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (i) is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund; (ii) is within the range of consideration that the Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund and its investment adviser(s), or any person controlling, controlled by or under common control with such investment adviser(s).

5. The Fund of Funds Adviser, or trustee or Sponsor of an Investing Trust, as applicable, will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under rule 12b–l under the Act) received from a Fund by the Fund of Funds Adviser, or trustee or Sponsor of the Investing Trust, or an affiliated person of the Fund of Funds Adviser, or trustee or Sponsor of the Investing Trust, other than any advisory fees paid to the Fund of Funds Adviser, or trustee or Sponsor of an Investing Trust, or its affiliated person by the Fund, in connection with the investment by the Fund of Funds in the Fund. Any Fund of Funds Sub-Adviser will waive fees otherwise payable to the Fund of Funds Sub-Adviser, directly or indirectly, by the Investing Management Company in an amount at least equal to any compensation received from a Fund by the Fund of Funds Sub-Adviser, or an affiliated person of the Fund of Funds Sub-Adviser, other than any advisory fees paid to the Fund of Funds Sub-Adviser or its affiliated person by the Fund, in connection with the investment by the Investing Management Company in the Fund made at the direction of the Fund of Funds Sub-Adviser. In the event that the Fund of Funds Sub-Adviser waives fees, the benefit of the waiver will be passed through to the Investing Management Company.

6. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to

[26] Applicants acknowledge that the receipt of compensation by (a) an affiliated person of a Fund of Funds, or an affiliated person of such person, for the purchase by the Fund of Funds of Shares of a Fund or (b) an affiliated person of a Fund, or an affiliated person of such person, for the sale by the Fund of its Shares to a Fund of Funds, may be prohibited by Section 17(e)(1) of the Act. The FOF Participation Agreement also will include this acknowledgment.

purchase a security in any Affiliated Underwriting.

7. The Board of a Fund, including a majority of the non-interested Board members, will adopt procedures reasonably designed to monitor any purchases of securities by the Fund in an Affiliated Underwriting, once an investment by a Fund of Funds in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Fund. The Board will consider, among other things: (i) whether the purchases were consistent with the investment objectives and policies of the Fund; (ii) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii) whether the amount of securities purchased by the Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to ensure that purchases of securities in Affiliated Underwritings are in the best interest of shareholders of the Fund.

8. Each Fund will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings once an investment by a Fund of Funds in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

9. Before investing in a Fund in excess of the limit in section 12(d)(1)(A), a Fund of Funds and the applicable Trust will execute a FOF Participation Agreement stating, without limitation, that their respective boards of directors or trustees and their investment advisers, or trustee and Sponsor, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in Shares of a Fund in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Fund of the investment. At such time, the Fund of Funds will also transmit to the Fund a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Fund of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Fund and the Fund of Funds will maintain and preserve a copy of the order, the FOF Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

10. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Investing Management Company including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Investing Management Company may invest. These findings and their basis will be fully recorded in the minute books of the appropriate Investing Management Company.

11. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

12. No Fund will acquire securities of an investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent the Fund acquires securities of another investment company pursuant to exemptive relief from the Commission permitting the Fund to acquire securities of one or more investment companies for short-term cash management purposes.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70919; File No. S7–04–09]

Order Extending Temporary Conditional Exemption for Nationally Recognized Statistical Rating Organizations From Requirements of Rule 17g–5 Under the Securities Exchange Act of 1934 and Request for Comment

November 22, 2013.

I. Introduction

On May 19, 2010, the Securities and Exchange Commission (''Commission'') conditionally exempted, with respect to certain credit ratings and until December 2, 2010, nationally recognized statistical rating organizations (''NRSROs'') from certain requirements in Rule 17g–5(a)(3) [1] under the Securities Exchange Act of 1934 (''Exchange Act''), which had a compliance date of June 2, 2010.[2] Pursuant to the Order, an NRSRO is not required to comply with Rule 17g–5(a)(3) until December 2, 2010 with respect to credit ratings where: (1) the issuer of the structured finance product is a non-U.S. person; and (2) the NRSRO has a reasonable basis to conclude that the structured finance product will be offered and sold upon issuance, and that any arranger linked to the structured finance product will effect transactions of the structured finance product after issuance, only in transactions that occur outside the U.S. (''covered transactions'').[3] On November 23, 2010, the Commission extended the conditional temporary exemption until December 2, 2011.[4] On November 16, 2011, the Commission extended the conditional temporary exemption until December 2, 2012.[5] On November 26, 2012, the Commission extended the conditional temporary exemption until December 2, 2013.[6] The Commission is extending the temporary conditional exemption exempting NRSROs from complying with Rule 17g–5(a)(3) with respect to rating covered transactions until December 2, 2014.

[1] *See* 17 CFR 240.17g–5(a)(3).

[2] *See* Exchange Act Release No. 62120 (May 19, 2010), 75 FR 28825 (May 24, 2010) (''Order'').

[3] *See id.* at 28827–28 (setting forth conditions of relief).

[4] *See* Exchange Act Release No. 63363 (Nov. 23, 2010), 75 FR 73137 (Nov. 29, 2010) (''First Extension Order'').

[5] *See* Exchange Act Release No. 65765 (Nov. 16, 2011), 76 FR 72227 (Nov. 22, 2011) (''Second Extension Order'').

[6] *See* Exchange Act Release No. 34–68286 (Nov. 26, 2012), 77 FR 71201 (Nov. 29, 2012) (''Third Extension Order'').

II. Background

Rule 17g–5 identifies, in paragraphs (b) and (c) of the rule, a series of conflicts of interest arising from the business of determining credit ratings.[7] Paragraph (a) of Rule 17g–5 [8] prohibits an NRSRO from issuing or maintaining a credit rating if it is subject to the conflicts of interest identified in paragraph (b) of Rule 17g–5 unless the NRSRO has taken the steps prescribed in paragraph (a)(1) (*i.e.,* disclosed the type of conflict of interest in Exhibit 6 to Form NRSRO in accordance with Section 15E(a)(1)(B)(vi) of the Exchange Act [9] and Rule 17g–1) [10] and paragraph (a)(2) (*i.e.,* established and is maintaining and enforcing written policies and procedures to address and manage conflicts of interest in accordance with Section 15E(h) of the Exchange Act).[11] Paragraph (c) of Rule 17g–5 specifically prohibits seven types of conflicts of interest. Consequently, an NRSRO is prohibited from issuing or maintaining a credit rating when it is subject to these conflicts regardless of whether it had disclosed them and established procedures reasonably designed to address them.

In December 2009, the Commission adopted subparagraph (a)(3) to Rule 17g–5. This provision requires an NRSRO that is hired by an arranger to determine an initial credit rating for a structured finance product to take certain steps designed to allow an NRSRO that is not hired by the arranger to nonetheless determine an initial credit rating—and subsequently monitor that credit rating—for the structured finance product.[12] In particular, under Rule 17g–5(a)(3), an NRSRO is prohibited from issuing or maintaining a credit rating when it is subject to the conflict of interest identified in paragraph (b)(9) of Rule 17g–5 (*i.e.,* being hired by an arranger to determine a credit rating for a structured finance product) [13] unless it has taken the steps prescribed in paragraphs (a)(1) and (2) of Rule 17g–5 (discussed above) and the steps prescribed in new paragraph (a)(3) of Rule 17g–5.[14] Rule 17g–5(a)(3), among other things, requires that the NRSRO must:

- Maintain on a password-protected Internet Web site a list of each structured finance product for which it currently is in the process of determining an initial credit rating in chronological order and identifying the type of structured finance product, the name of the issuer, the date the rating process was initiated, and the Internet Web site address where the arranger represents the information provided to the hired NRSRO can be accessed by other NRSROs;
- Provide free and unlimited access to such password-protected Internet Web site during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in paragraph (e) of Rule 17g–5 that covers that calendar year; [15] and
- Obtain from the arranger a written representation that can reasonably be relied upon that the arranger will, among other things, disclose on a password-protected Internet Web site the information it provides to the hired NRSRO to determine the initial credit rating (and monitor that credit rating) and provide access to the Web site to an NRSRO that provides it with a copy of the certification described in paragraph (e) of Rule 17g–5.[16]

The Commission stated in the Adopting Release that subparagraph Rule 17g–5(a)(3) is designed to address conflicts of interest and improve the quality of credit ratings for structured finance products by making it possible for more NRSROs to rate structured finance products.[17] For example, the Commission noted that when an NRSRO is hired to rate a structured finance product, some of the information it relies on to determine the rating is generally not made public.[18] As a result, structured finance products frequently are issued with ratings from only the one or two NRSROs that have been hired by the arranger, with the attendant conflict of interest that creates.[19] The Commission stated that subparagraph Rule 17g–5(a)(3) was designed to increase the number of credit ratings extant for a given structured finance product and, in particular, to promote the issuance of credit ratings by NRSROs that are not hired by arrangers.[20] The Commission's goal in adopting the rule was to provide users of credit ratings with more views on the creditworthiness of structured finance

[7] 17 CFR 240.17g–5(b) and (c).

[8] 17 CFR 240.17g–5(a).

[9] 15 U.S.C. 78o–7(a)(1)(B)(vi).

[10] 17 CFR 240.17g–1.

[11] 15 U.S.C. 78o–7(h).

[12] *See* 17 CFR 240.17g–5(a)(3); *see also* Exchange Act Release No. 61050 (Nov. 23, 2009), 74 FR 63832 (Dec. 4, 2009) (''Adopting Release'') at 63844–45.

[13] Paragraph (b)(9) of Rule 17g–5 identifies the following conflict of interest: issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument. 17 CFR 240.17g–5(b)(9).

[14] 17 CFR 240.17g–5(a)(3).

[15] Paragraph (e) of Rule 17g–5 requires that an NRSRO seeking to access the hired NRSRO's Internet Web site during the applicable calendar year must furnish the Commission with the following certification: The undersigned hereby certifies that it will access the Internet Web sites described in 17 CFR 240.17g–5(a)(3) solely for the purpose of determining or monitoring credit ratings. Further, the undersigned certifies that it will keep the information it accesses pursuant to 17 CFR 240.17g–5(a)(3) confidential and treat it as material nonpublic information subject to its written policies and procedures established, maintained, and enforced pursuant to section 15E(g)(1) of the Act (15 U.S.C. 78o–7(g)(1)) and 17 CFR 240.17g–4. Further, the undersigned certifies that it will determine and maintain credit ratings for at least 10% of the issued securities and money market instruments for which it accesses information pursuant to 17 CFR 240.17g–5(a)(3)(iii), if it accesses such information for 10 or more issued securities or money market instruments in the calendar year covered by the certification. Further, the undersigned certifies one of the following as applicable: in the most recent calendar year during which it accessed information pursuant to 17 CFR 240.17g–5(a)(3), the undersigned accessed information for [Insert Number] issued securities and money market instruments through Internet Web sites described in 17 CFR 240.17g–5(a)(3) and determined and maintained credit ratings for [Insert Number] of such securities and money market instruments; or the undersigned previously has not accessed information pursuant to 17 CFR 240.17g–5(a)(3) 10 or more times during the most recently ended calendar year.

[16] In particular, under paragraph (a)(3)(iii) of Rule 17g–5, the arranger must represent to the hired NRSRO that it will: maintain the information described in paragraphs (a)(3)(iii)(C) and (a)(3)(iii)(D) of Rule 17g–5 available at an identified password-protected Internet Web site that presents the information in a manner indicating which information currently should be relied on to determine or monitor the credit rating; provide access to such password-protected Internet Web site during the applicable calendar year to any NRSRO that provides it with a copy of the certification described in paragraph (e) of Rule 17g–5 that covers that calendar year, provided that such certification indicates that the nationally recognized statistical rating organization providing the certification either: determined and maintained credit ratings for at least 10% of the issued securities and money market instruments for which it accessed information pursuant to paragraph (a)(3)(iii) of Rule 17g–5 in the calendar year prior to the year covered by the certification, if it accessed such information for 10 or more issued securities or money market instruments; or has not accessed information pursuant to paragraph (a)(3) of Rule 17g–5 10 or more times during the most recently ended calendar year; post on such password-protected Internet Web site all information the arranger provides to the NRSRO, or contracts with a third party to provide to the NRSRO, for the purpose of determining the initial credit rating for the security or money market instrument, including information about the characteristics of the assets underlying or referenced by the security or money market instrument, and the legal structure of the security or money market instrument, at the same time such information is provided to the NRSRO; and post on such password-protected Internet Web site all information the arranger provides to the NRSRO, or contracts with a third party to provide to the NRSRO, for the purpose of undertaking credit rating surveillance on the security or money market instrument, including information about the characteristics and performance of the assets underlying or referenced by the security or money market instrument at the same time such information is provided to the NRSRO.

[17] Adopting Release at 63844.

[18] *Id.*

[19] *Id.*

[20] *Id.*

products.[21] In addition, the Commission stated that Rule 17g–5(a)(3) was designed to reduce the ability of arrangers to obtain better than warranted ratings by exerting influence over NRSROs hired to determine credit ratings for structured finance products.[22] Specifically, by opening up the rating process to more NRSROs, the Commission intended to make it easier for the hired NRSRO to resist such pressure by increasing the likelihood that any steps taken to inappropriately favor the arranger could be exposed to the market through the credit ratings issued by other NRSROs.[23]

Rule 17g–5(a)(3) became effective on February 2, 2010, and the compliance date for Rule 17g–5(a)(3) was June 2, 2010.

III. Extension of Conditional Temporary Extension

In the Order, the Commission requested comment generally, but also on a number of specific issues.[24] The Commission received six comment letters in response to this solicitation of comment.[25] The commenters expressed concern that the extraterritorial application of Rule 17g–5(a)(3) could, in the commenter's view, among other things, disrupt local securitization markets,[26] inhibit the ability of local firms to raise capital,[27] and conflict with local laws.[28] Several commenters also requested that the conditional temporary exemption be extended or made permanent.[29] The First Extension Order again solicited public comment on issues raised in connection with the extra-territorial application of Rule 17g–5(a)(3).[30] One commenter requested that the Order be made permanent, citing many of the same reasons set forth in prior comment letters.[31] The Second Extension Order again solicited public comment on issues raised in connection with the extra-territorial application of Rule 17g–5(a)(3).[32] Commenters supported the exemption regarding the extra-territorial application of the Rule,[33] with one of those commenters again requesting that the Order be made permanent.[34] The Third Extension Order again solicited public comment on issues raised in connection with the extra-territorial application of Rule 17g–5(a)(3). No comments were received.

Given the continued concerns about potential disruptions of local securitization markets, and because the Commission's consideration of the issues raised will benefit from additional time to engage in further dialogue with interested parties and to monitor market and regulatory developments, the Commission believes extending the conditional temporary exemption until December 2, 2014 is necessary or appropriate in the public interest, and is consistent with the protection of investors.

IV. Request for Comment

The Commission believes that it would be useful to continue to provide interested parties opportunity to comment. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/exorders.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–04–09 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F St. NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–04–09. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/exorders.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F St. NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

V. Conclusion

For the foregoing reasons, the Commission believes it would be necessary or appropriate in the public interest and consistent with the protection of investors to extend the conditional temporary exemption exempting NRSROs from complying with Rule 17g–5(a)(3) with respect to rating covered transactions until December 2, 2014.

Accordingly,

It is hereby ordered, pursuant to Section 36 of the Exchange Act, that a nationally recognized statistical rating organization is exempt until December 2, 2014 from the requirements in Rule 17g–5(a)(3) (17 CFR 240.17g–5(a)(3)) for credit ratings where:

(1) The issuer of the security or money market instrument is not a U.S. person (as defined under Securities Act Rule 902(k)); and

(2) The nationally recognized statistical rating organization has a reasonable basis to conclude that the structured finance product will be offered and sold upon issuance, and that any arranger linked to the structured finance product will effect transactions of the structured finance product after issuance, only in transactions that occur outside the U.S.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–28464 Filed 11–26–13; 8:45 am]

BILLING CODE 8011–01–P

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *See* Order at 28828.

[25] Letter from Masamichi Kono, Vice Commissioner for International Affairs, Financial Services Agency, Japan, dated Nov. 12, 2010 (''Japan FSA Letter''); Letter from Masaru Ono, Executive Director, Securitization Forum of Japan, dated Nov. 12, 2010 (''SFJ Letter''); Letter from Rick Watson, Managing Director, Association for Financial Markets in Europe/European Securitisation Forum, dated Nov. 11, 2010 (''AFME Letter''); Letter from Jack Rando, Director, Capital Markets, Investment Industry Association of Canada, dated Sep. 22, 2010 (''IIAC Letter''); Letter from Christopher Dalton, Chief Executive Officer, Australian Securitisation Forum, dated Jun. 27, 2010 (''AuSF Letter''); Letter from Takefumi Emori, Managing Director, Japan Credit Rating Agency, Ltd. (''JCR''), dated Jun. 25, 2010 (''JCR Letter'').

[26] *See* Japan FSA Letter; SFJ Letter; AFME Letter; JCR Letter; AuSF Letter.

[27] *See* AFME Letter; JCR Letter; AuSF Letter.

[28] *See* Japan FSA Letter; AFME Letter; JCR Letter; AuSF Letter; IIAC Letter. With respect to local laws, we note that the European Commission in recent months has issued a relevant proposal for amendments to the European Union Regulation on Credit Ratings. *See* ''Regulation of the European Parliament and of the Counsel on amending Regulation (EC) No 1060/2009 on credit rating agencies'' (available at *http://ec.europa.eu/internal_market/securities/docs/agencies/100602_proposal_en.pdf*).

[29] *See* Japan FSA Letter; SFJ Letter; AFME Letter; JCR Letter.

[30] *See* Letter from Tom Deutsch, Executive Director, American Securitization Forum, and Chris Dalton, Chief Executive Officer, Australian Securitization Forum, dated Aug. 9, 2011 (''ASF/AuSF Letter 1''); Letter from Jack Rando, Director, Capital Markets, Investment Industry Association of Canada, dated Nov. 2, 2011 (''IIAC Letter 2'').

[31] *See* ASF/AuSF Letter 1.

[32] Letter from Chris Barnard to the Commission, dated Nov. 23, 2011 (''Barnard Letter''); Letter from Tom Deutsch, Executive Director, American Securitization Forum and Chris Dalton, Chief Executive Officer, Australian Securitisation Forum, dated Aug. 28, 2012 (''ASF/AuSF Letter 2'').

[33] *See* Barnard Letter; ASF/AuSF Letter 2.

[34] *See* ASF/AuSF Letter 2.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70929; IA–3721; File No. 4–670]

Proxy Advisory Firm Roundtable

AGENCY: Securities and Exchange Commission.

ACTION: Notice of roundtable discussion; request for comment.

SUMMARY: The Securities and Exchange Commission will host a roundtable about proxy advisory firms. The panel will be asked to discuss topics including the current state of proxy advisory firm use by investment advisers and institutional investors and potential changes that have been suggested by market participants. Panelists will also be invited to discuss any new ideas.

The roundtable discussion will be held in the multi-purpose room of the Securities and Exchange Commission headquarters at 100 F Street NE., Washington, DC, on December 5, 2013 from 9:30 a.m. to approximately 1:30 p.m. The public is invited to observe the roundtable discussion. Seating will be available on a first-come, first-serve basis. The roundtable discussion will also be available via webcast on the Commission's Web site at *www.sec.gov.*

DATES: The roundtable discussion will take place on December 5, 2013. The Commission will accept comments regarding issues addressed at the roundtable until January 10, 2014.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://sec.gov/rules/other.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number x–xxx on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number 4–670. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please only use one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/other.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Sara Cortes, Senior Special Counsel, Division of Investment Management, at 202–551–6700, or Raymond Be, Special Counsel, Division of Corporation Finance, at 202–551–3500, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

By the Commission.

Dated: November 22, 2013.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–28501 Filed 11–26–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70913; File No. SR–NYSE–2013–74]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the New York Stock Exchange Price List Related to Co-Location Services

November 21, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 12, 2013, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List related to co-location services in order to provide further specification regarding the fees applicable to cabinets for which power is not utilized (''PNU cabinets''). The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Price List related to co-location services in order to provide further specification regarding the fees applicable to PNU cabinets.[4] The Exchange proposes to implement the change immediately.

A User is currently able to obtain one or more PNU cabinets in the data center.[5] A PNU cabinet is an unused cabinet in proximity to a User's existing cabinet(s), which the User reserves for future use, i.e., a cabinet that the User

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Securities and Exchange Commission (''Commission'') initially approved the Exchange's co-location services in Securities Exchange Act Release No. 62960 (September 21, 2010), 75 FR 59310 (September 27, 2010) (SR–NYSE–2010–56) (the ''Original Co-location Approval''). The Exchange operates a data center in Mahwah, New Jersey (the ''data center'') from which it provides co-location services to Users. The Exchange's co-location services allow Users to rent space in the data center so they may locate their electronic servers in close physical proximity to the Exchange's trading and execution system. *See id.* at 59310.

[5] For purposes of the Exchange's co-location services, the term ''User'' includes (i) member organizations, as that term is defined in NYSE Rule 2(b); (ii) Sponsored Participants, as that term is defined in NYSE Rule 123B.30(a)(ii)(B); and (iii) non-member organization broker-dealers and vendors that request to receive co-location services directly from the Exchange. *See, e.g.,* Securities Exchange Act Release No. 65973 (December 15, 2011), 76 FR 79232 (December 21, 2011) (SR–NYSE–2011–53). As specified in the Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE MKT LLC and NYSE Arca, Inc. *See* Securities Exchange Act Release No. 70206 (August 15, 2013), 78 FR 51765 (August 21, 2013) (SR–NYSE–2013–59).

does not anticipate using until some point in the future and therefore is reserved but not currently utilized. Although PNU cabinets do not use power, when the Exchange establishes a PNU cabinet, it includes wiring, circuitry, and hardware and allocates either four kilowatts (''kW'') or eight kWs of unused power capacity, depending on the User's requirements, as it does for all cabinets.[6] This allows the PNU cabinet to be powered and used promptly upon the User's request.

The applicable monthly fee for PNU cabinets (the ''PNU Fee'') was described within the Original Co-location Approval as 40% of the applicable per kW monthly fee.[7] Accordingly, since the Exchange began offering co-location services in the data center, the amount of the PNU Fee charged for a cabinet per month depended on the number of kWs of power allocated to that PNU cabinet. The Exchange subsequently specified that the PNU Fee would be $360 per month, which is 40% of the lowest per kW monthly cabinet fee specified in the Price List for cabinets in use (i.e., 40% of $900).[8] The Exchange continued to charge the PNU Fee on a per kW basis. To provide greater specificity with respect to the PNU Fee and better align the Price List with the Exchange's billing practice, the Exchange proposes to amend the Price List to explicitly provide that the applicable monthly PNU Fee is $360 per kW of power allocated to the PNU cabinet.[9]

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (e.g., a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;[10] and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of its affiliates.[11]

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[13] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

Overall, the Exchange believes that the proposed change is consistent with the Act because the Exchange offers the co-location services described herein (i.e., PNU cabinets) as a convenience to Users, but in doing so incurs certain costs, including costs related to the data center facility, including maintaining an adequate level of power so that PNU cabinets can be available and powered on promptly at the request of a User. As such, the proposed fees relate to the level of services provided by the Exchange and, in turn, received by the User.

The Exchange believes that the proposal is reasonable because it would better align the Price List with the Exchange's billing practices and provide further specificity in the Price List regarding such fees. The proposal is further reasonable because pricing for PNU cabinets is comparable to pricing for the ''Cabinet Proximity Option'' available to users of co-location facilities of The NASDAQ Stock Market LLC (''NASDAQ''), which varies based on the power capacity of the cabinet.[14]

As with fees for existing co-location services, the PNU cabinet fees are charged only to those Users that voluntarily select the related services, which are available to all Users. The Exchange therefore believes that the proposed change is equitable and not unfairly discriminatory because it would continue to result in fees being charged only to Users that voluntarily select to receive the corresponding services and because those services are available to all Users. As such, the proposed change would not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[15] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because any market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange could have access to the co-location services provided in the data center. This is also true because, in addition to the services being completely voluntary, they are available to all Users on an equal basis (i.e., the same range of products and services are available to all Users).

The Exchange further believes that the proposal would not impose any burden

[6] A User is generally able to determine an approximate amount of power that it will typically consume in its cabinet. A User would request either a four or eight kW cabinet based on its anticipated peak power consumption.

[7] *See* Original Co-location Approval at 59310–11, n. 5. Users pay a monthly per kW fee for cabinets in use, which is based on the number of kWs allocated to the User's cabinets. The fee ranges from $1,200 per kW, for Users utilizing four to eight kWs, to $900 per kW, for Users utilizing more than 41 kW.

[8] *See* Securities Exchange Act Release No. 67666 (August 15, 2012), 77 FR 50742, 50743 (August 22, 2012) (SR–NYSE–2012–18).

[9] For example, if a User has a PNU cabinet allocated four kWs of power, the Exchange would charge the User $1,440 per month (i.e., $360 × four). If a User has a PNU cabinet allocated eight kWs of power, the Exchange would charge the User $2,880 per month (i.e., $360 × eight). Users are not otherwise charged for PNU cabinets until power is activated, at which point the fees applicable to other cabinets are charged (i.e., the $5,000 initial fee per cabinet and the full, monthly fee per kW).

[10] As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

[11] *See* SR–NYSE–2013–59, *supra* note 5 at 51766. The Exchange's affiliates have also submitted the same proposed rule change to provide further specification regarding the fees applicable to PNU cabinets. *See* SR–NYSEMKT–2013–93 and SR–NYSEArca–2013–124.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4) and (5).

[14] *See* NASDAQ Rule 7034. Fees for NASDAQ's Cabinet Proximity Option are $1,000 per medium or low density cabinet or $1,500 per medium/high or high density cabinet. The Exchange understands that NASDAQ's Cabinet Proximity Option gives its co-location customers the ability to reserve contiguous or near contiguous cabinets and power at a reduced rate, similar to manner in which Users are able to request PNU cabinets in the Exchange's data center for future use.

[15] 15 U.S.C. 78f(b)(8).

on competition that is not necessary or appropriate in furtherance of the purposes of the Act because it would result in further specification in the Price List regarding the fees applicable to PNU cabinets. Although PNU cabinets do not use power, when the Exchange establishes a PNU cabinet, it includes wiring, circuitry, and hardware and allocates either four kWs or eight kWs of unused power capacity, depending on the User's requirements, as it does for all cabinets. This allows the cabinet to be powered and used promptly upon the User's request. The proposed amendment to the Price List would therefore specify that the applicable monthly PNU Fee is $360 per kW of power allocated to the PNU cabinet.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if, for example, they deem fee levels at a particular venue to be excessive or if they determine that another venue's products and services are more competitive than on the Exchange. In such an environment, the Exchange must continually review, and consider adjusting, the services it offers as well as any corresponding fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [16] of the Act and subparagraph (f)(2) of Rule 19b–4 [17] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [18] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2013–74 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2013–74. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2013–74 and should be submitted on or before December 18, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28418 Filed 11–26–13; 8:45 am]

BILLING CODE 8011–01–P

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(2).

[18] 15 U.S.C. 78s(b)(2)(B).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70916; File No. SR–NYSEARCA–2013–124]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NYSE Arca Options Fee Schedule and the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services Related to Co-Location Services

November 21, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 8, 2013, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule and, through its wholly owned subsidiary NYSE Arca Equities, Inc. (''NYSE Arca Equities''), the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services (the ''Equities Fee Schedule'' and, together with the Options Fee Schedule, the ''Fee Schedules'') related to co-location services in order to provide further specification regarding the fees applicable to cabinets for which power is not utilized (''PNU cabinets''). The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedules related to co-location services in order to provide further specification regarding the fees applicable to PNU cabinets.[4] The Exchange proposes to implement the change immediately.

A User is currently able to obtain one or more PNU cabinets in the data center.[5] A PNU cabinet is an unused cabinet in proximity to a User's existing cabinet(s), which the User reserves for future use, i.e., a cabinet that the User does not anticipate using until some point in the future and therefore is reserved but not currently utilized. Although PNU cabinets do not use power, when the Exchange establishes a PNU cabinet, it includes wiring, circuitry, and hardware and allocates either four kilowatts (''kW'') or eight kWs of unused power capacity, depending on the User's requirements, as it does for all cabinets.[6] This allows the PNU cabinet to be powered and used promptly upon the User's request.

The applicable monthly fee for PNU cabinets (the ''PNU Fee'') was described within the Original Co-location Approval as 40% of the applicable per kW monthly fee.[7] Accordingly, since the Exchange began offering co-location services in the data center, the amount of the PNU Fee charged for a cabinet per month depended on the number of kWs of power allocated to that PNU cabinet. The Exchange subsequently specified that the PNU Fee would be $360 per month, which is 40% of the lowest per kW monthly cabinet fee specified in the Fee Schedules for cabinets in use (i.e., 40% of $900).[8] The Exchange continued to charge the PNU Fee on a per kW basis. To provide greater specificity with respect to the PNU Fee and better align the Fee Schedules with the Exchange's billing practice, the Exchange proposes to amend the Fee Schedules to explicitly provide that the applicable monthly PNU Fee is $360 per kW of power allocated to the PNU cabinet.[9]

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is an ETP Holder, an OTP Holder or OTP Firm, a Sponsored Participant or an agent thereof (e.g., a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;[10] and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of its affiliates.[11]

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[13] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

Overall, the Exchange believes that the proposed change is consistent with the Act because the Exchange offers the co-location services described herein (i.e., PNU cabinets) as a convenience to Users, but in doing so incurs certain costs, including costs related to the data center facility, including maintaining an adequate level of power so that PNU cabinets can be available and powered on promptly at the request of a User. As such, the proposed fees relate to the level of services provided by the Exchange and, in turn, received by the User.

The Exchange believes that the proposal is reasonable because it would

[4] The Securities and Exchange Commission (''Commission'') initially approved the Exchange's co-location services in Securities Exchange Act Release No. 63275 (November 8, 2010), 75 FR 70048 (November 16, 2010) (SR–NYSEArca–2010–100) (the ''Original Co-location Approval''). The Exchange operates a data center in Mahwah, New Jersey (the ''data center'') from which it provides co-location services to Users. The Exchange's co-location services allow Users to rent space in the data center so they may locate their electronic servers in close physical proximity to the Exchange's trading and execution system. *See id.* at 70049.

[5] For purposes of the Exchange's co-location services, the term ''User'' includes (i) ETP Holders and Sponsored Participants that are authorized to obtain access to the NYSE Arca Marketplace pursuant to NYSE Arca Equities Rule 7.29 (*see* NYSE Arca Equities Rule 1.1(yy)); (ii) OTP Holders, OTP Firms and Sponsored Participants that are authorized to obtain access to the NYSE Arca System pursuant to NYSE Arca Options Rule 6.2A (*see* NYSE Arca Options Rule 6.1A(a)(19)); and (iii) non-ETP Holder, non-OTP Holder and non-OTP Firm broker-dealers and vendors that request to receive co-location services directly from the Exchange. *See, e.g.,* Securities Exchange Act Release Nos. 65970 (December 15, 2011), 76 FR 79242 (December 21, 2011) (SR–NYSEArca–2011–74) and 65971 (December 15, 2011), 76 FR 79267 (December 21, 2011) (SR–NYSEArca–2011–75). As specified in the Fee Schedules, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE MKT LLC and New York Stock Exchange LLC. *See* Securities Exchange Act Release No. 70173 (August 13, 2013), 78 FR 50459 (August 19, 2013) (SR–NYSEArca–2013–80).

[6] A User is generally able to determine an approximate amount of power that it will typically consume in its cabinet. A User would request either a four or eight kW cabinet based on its anticipated peak power consumption.

[7] *See* Original Co-location Approval at 70049, n. 7. Users pay a monthly per kW fee for cabinets in use, which is based on the number of kWs allocated to the User's cabinets. The fee ranges from $1,200 per kW, for Users utilizing four to eight kWs, to $900 per kW, for Users utilizing more than 41 kW.

[8] *See* Securities Exchange Act Release Nos. 67669 (August 15, 2012), 77 FR 50746, 50747 (August 22, 2012) (SR–NYSEArca–2012–62) and 67667 (August 15, 2012), 77 FR 50743, 50744 (August 22, 2012) (SR–NYSEArca–2012–63).

[9] For example, if a User has a PNU cabinet allocated four kWs of power, the Exchange would charge the User $1,440 per month (i.e., $360 x four). If a User has a PNU cabinet allocated eight kWs of power, the Exchange would charge the User $2,880 per month (i.e., $360 x eight). Users are not otherwise charged for PNU cabinets until power is activated, at which point the fees applicable to other cabinets are charged (i.e., the $5,000 initial fee per cabinet and the full, monthly fee per kW).

[10] As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

[11] *See* SR–NYSEArca–2013–80, *supra* note 5 at 50459. The Exchange's affiliates have also submitted the same proposed rule change to provide further specification regarding the fees applicable to PNU cabinets. *See* SR–NYSEMKT–2013–93 and SR–NYSE–2013–74.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4) and (5).

better align the Fee Schedules with the Exchange's billing practices and provide further specificity in the Fee Schedules regarding such fees. The proposal is further reasonable because pricing for PNU cabinets is comparable to pricing for the ''Cabinet Proximity Option'' available to users of co-location facilities of The NASDAQ Stock Market LLC (''NASDAQ''), which varies based on the power capacity of the cabinet.[14]

As with fees for existing co-location services, the PNU cabinet fees are charged only to those Users that voluntarily select the related services, which are available to all Users. The Exchange therefore believes that the proposed change is equitable and not unfairly discriminatory because it would continue to result in fees being charged only to Users that voluntarily select to receive the corresponding services and because those services are available to all Users. As such, the proposed change would not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[15] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because any market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange could have access to the co-location services provided in the data center. This is also true because, in addition to the services being completely voluntary, they are available to all Users on an equal basis (i.e., the same range of products and services are available to all Users).

The Exchange further believes that the proposal would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because it would result in further specification in the Fee Schedules regarding the fees applicable to PNU cabinets. Although PNU cabinets do not use power, when the Exchange establishes a PNU cabinet, it includes wiring, circuitry, and hardware and allocates either four kWs or eight kWs of unused power capacity, depending on the User's requirements, as it does for all cabinets. This allows the cabinet to be powered and used promptly upon the User's request. The proposed amendment to the Fee Schedules would therefore specify that the applicable monthly PNU Fee is $360 per kW of power allocated to the PNU cabinet.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if, for example, they deem fee levels at a particular venue to be excessive or if they determine that another venue's products and services are more competitive than on the Exchange. In such an environment, the Exchange must continually review, and consider adjusting, the services it offers as well as any corresponding fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[16] of the Act and subparagraph (f)(2) of Rule 19b–4[17] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[18] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEARCA–2013–124 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEARCA–2013–124. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal

[14] *See* NASDAQ Rule 7034. Fees for NASDAQ's Cabinet Proximity Option are $1,000 per medium or low density cabinet or $1,500 per medium/high or high density cabinet. The Exchange understands that NASDAQ's Cabinet Proximity Option gives its co-location customers the ability to reserve contiguous or near contiguous cabinets and power at a reduced rate, similar to manner in which Users are able to request PNU cabinets in the Exchange's data center for future use.

[15] 15 U.S.C. 78f(b)(8).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(2).

[18] 15 U.S.C. 78s(b)(2)(B).

identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEARCA–2013–124 and should be submitted on or before December 18, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28421 Filed 11–26–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70910; File No. SR–NYSEMKT–2013–91]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change to Establish an Institutional Liquidity Program on a One-Year Pilot Basis

November 21, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 7, 2013, NYSE MKT LLC (''NYSE MKT'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes a one-year pilot program that would add new Rule 107D—Equities to establish an Institutional Liquidity Program (''Program'' or ''proposed rule change'') to attract buying and selling interest in greater size to the Exchange for Exchange-listed or traded securities (including but not limited to Exchange-listed securities and securities traded pursuant to unlisted trading privileges) by facilitating interactions between institutional customers (and others with block trading interest) and providers of liquidity exceeding minimum size requirements. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing a one-year pilot program that would add new NYSE MKT Rule 107D—Equities to establish an Institutional Liquidity Program to attract buying and selling interest in greater size to the Exchange for Exchange-listed and traded securities by facilitating interactions between institutional customers and others with block trading interest (collectively, ''Institutional Interest'') and providers of liquidity to service this type of order flow.[4] The Program offers a targeted size discovery mechanism that would enable consumers and suppliers of such liquidity to execute trades larger than the average size currently occurring on the Exchange or in most dark pools.

As set forth in more detail below, the Program at its core would depend on the interaction between two new proposed order types, the ''Institutional Liquidity Order'' (''ILO'') and the ''Oversize Liquidity Order'' (''OLO''). In summary terms, ILOs would express non-displayed Institutional Interest (5,000 or more shares with $50,000 or more market value), and OLOs would express liquidity of at least 500 shares [5] seeking to interact with an ILO. The presence of OLOs in Exchange systems would be reflected in a new liquidity indicator, the Liquidity Identifier (''LI''), to be disseminated through the Consolidated Quotation System (''CQS''). The Program is a targeted size discovery mechanism designed to attract Institutional Interest through a balanced set of requirements and incentives. The Exchange believes that the size requirements, described more fully below, will stimulate the expression of Institutional Interest in Exchange systems, and will ensure that liquidity suppliers seeking to interact with such interest commit meaningful size to the effort, thereby reducing the incidence of ''pinging'' or probing orders. The dissemination of LIs, in effect, requires oversize liquidity suppliers and Institutional Interest to communicate the fact, but not the details, of their trading interest and is designed to stimulate further the expression of both types of interest. The Program's minimum size requirements on OLOs and optional use of Minimum Triggering Volume (''MTV'') restrictions with ILOs, as described below, will reduce the incentives of using such order anticipation strategies. The Exchange believes that the incentives offered by the Program, in particular the balanced and limited segmentation of Institutional Interest and the Program's incorporation of price-size-time priority, have the potential to enhance the discovery of size on the Exchange, to thereby reduce the transaction costs of investors, and, more broadly, to offer a competitive response to serious market structure concerns held by both the Exchange and the Commission.

In particular, the Program has the potential to address three such concerns. First, the Exchange has expressed increasing concern about the migration of orders entered by investors who are less informed as to short term price movements toward dark venues and away from the public markets. At the same time, increasingly small orders entered by technology-enabled, short-term liquidity suppliers have become concentrated on exchanges.[6] Similarly,

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange will submit a separate proposal to amend its Price List in connection with the proposed Institutional Liquidity Program. Under that proposal, the Exchange expects to initially charge member organizations a fee for executions of their ILOs against OLOs and in turn would initially provide a credit or free executions to member organizations for executions of their OLOs against the ILOs of other member organizations. The Exchange expects to charge both member organizations a fee for an execution of an ILO against another ILO. The fees and credits for member organizations submitting orders to the Program will be determined based on experience with the Program in the first several months.

[5] As noted below, OLOs may have a minimum size of 300 shares for securities with an Average Daily Volume of less than one million shares. The 500 (or 300) minimum size requirement of OLOs significantly betters the dark pool average trade size of 210 shares in January 2013. Rosenblatt Securities, *Trading Talk,* dated March 25, 2013.

[6] *See* Testimony of Joseph Mecane, EVP & Head of U.S. Equities, NYSE Euronext before the Subcommittee on Securities, Insurance and Investment of the Senate Committee on Banking, Housing and Urban Affairs (December 18, 2012)

the Commission has remained sharply focused on the potential degradation of prices and price discovery as a result of the growth of non-displayed venues and the isolation of displayed liquidity.[7] The size discovery mechanism and incentives of the ILP have the potential to address this development by attracting the trading interest of investors back to the Exchange. Second and related, the investor orders that have been diverted to dark pools and broker internalization venues are, in an important sense, isolated from the displayed liquidity elsewhere in the market system. That is, unless a displayed limit order is both superior in price and a protected quote at the top of an exchange book, the likelihood that an investor order in a dark pool or internalization venue would interact with it is negligible. The danger, of course, is two-fold: the isolated order may be denied a price improved execution, and, more systemically important, the displayed limit order may receive no execution at all, undermining the critical incentive to display limit orders.[8] In contrast, liquidity attracted to the Exchange pursuant to the Program, while segmented in a balanced and limited way, would be integrated into the priority rules of the Exchange and would interact according to those rules with displayed limit orders on the Exchange.[9] Finally, the Exchange and the Commission have pointedly noted the selective pre-trade transparency of dark pools and the inadequacy of dark pool transaction reporting.[10] As discussed below, the ILP would bring enhanced pre-trade transparency to the trading interest attracted to the Program through a new liquidity indicator, as well as the more robust post-trade transparency of exchanges.

Definitions

The Exchange proposes to adopt the following definitions under proposed NYSE MKT Rule 107D(a)—Equities.

Institutional Liquidity Order

First, the term ''Institutional Liquidity Order'' is defined as a limit order for Exchange-listed or traded securities (including but not limited to Exchange-listed securities and securities traded pursuant to unlisted trading privileges) of 5,000 or more shares with a market value of at least $50,000,[11] or a child order of a recorded instruction that meets such size requirements.[12] An ILO, whether it constitutes a child order or an entire order, must be one establishing, increasing, liquidating, or decreasing a position in the subject security and may not be part of an expression of two-sided interest on the part of the account originating the order. An ILO, or the recorded parent order instruction from which it is derived, must satisfy the size requirement above independently, and size may not be aggregated across multiple member

(''Exchanges find themselves competing more directly with Alternative Trading Systems (ATSs or dark pools) and broker internalization, which are able to employ different practices than exchanges with far less oversight and disclosure. Some of this competition is through cost, some through order handling practices, and much of it is through client segmentation whereby non-exchange venues are able to incentivize their own or third party liquidity provisions based on the nature of the person they are trading against. As a result of this advantage, large broker-dealers continue to move more order flow into their own private trading venues for a ''first look'' before routing on to the lit public markets. Since the implementation of Reg. NMS, we've seen two markets evolve—the lit public, regulated and accessible market versus the dark, selective and private non-transparent market.''); Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3613 (January 21, 2010) (''Equity Market Structure Concept Release'') (''It appears that a significant percentage of the orders of long-term investors are executed either in dark pools or at OTC market makers, while a large percentage of the trading volume in displayed trading centers is attributable to proprietary firms executing short-term trading strategies.'').

[7] *See* Securities Exchange Act Release No. 60997 (Nov. 13, 2009), 74 FR 61208, 61233 (Nov. 23, 2009) (''Dark Pool Release'') (''Increasing the volume of order flow routed to public quoting markets could reward market participants for displaying their trading interest, thus leading to an increase in the display of trading interest. Such a result would be consistent with the Commission's emphasis on the need to encourage displayed liquidity—a critical reference point for investors. Moreover, increasing the volume of order flow directed to public quotations could increase the incentives for markets to compete by displaying the quotations that would attract such order flow.''); Securities Exchange Act Release No. 42450 (Feb. 23, 2000), 65 FR 10577, 10578 (Feb. 28, 2000) (''Fragmentation Concept Release) (''These order flow arrangements may discourage quote competition by isolating investor order flow from investor limit orders and dealer quotes displayed in other market centers. Even when wholesale and internalizing broker-dealers execute trades at prices better than the national best bid and offer (''NBBO''), these superior transaction prices are often in part determined by formulas dependent on the NBBO.''); *see also* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Reg. NMS Adopting Release'') (''The importance of competition among orders has long been recognized. Indeed, when Congress mandated the establishment of an NMS, it well stated this basic principle: 'Investors must be assured that they are participants in a system which maximizes the opportunities for the most willing seller to meet the most willing buyer.' To the extent that competition among orders is lessened, the quality of price discovery for all sizes of orders can be compromised.''); Fragmentation Concept Release at 10580 (''[T]he existence of multiple market centers competing for order flow in the same security may isolate orders and hence reduce the opportunity for interaction of all buying and selling interest in that security. This may reduce competition *on price,* which is one of the most important benefits of greater interaction of buying and selling interest in an individual security.'').

[8] *See* Dark Pool Release at 61211; *see also* Reg. NMS Adopting Release at 37527 (''The Commission believes, however, that the long-term strength of the NMS as a whole is best promoted by fostering greater depth and liquidity, and it follows from this that the Commission should examine the extent to which it can encourage the limit orders that provide this depth and liquidity to the market at the best prices.''); Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290, 48293 (September 12, 1996) (''Order Handling Rules Release'') (''[T]he display of customer limit orders advances the national market system goal of the public availability of quotation information, as well as fair competition, market efficiency, best execution, and disintermediation.'').

[9] Additionally, the Exchange believes that the Program will address complaints from buy-side firms about a lack of transparency around the rules and operations of ATSs. Unlike the Exchange's extensive rule filing requirements, ATSs are only required to file an initial operation report on Form ATS and an amendment on Form ATS when implementing a material change to the operation of the ATS or when any information on Form ATS is inaccurate. *See* 17 CFR § 242.301(b)(2). The Exchange environment, however, offers buy-side firms the desired regulatory and operational transparency while also minimizing the transaction costs associated with the trading of block-sized trading interest.

[10] *See* Dark Pool Release at 61219 (''The public, however, does not have access to this valuable information concerning the best prices and sizes for NMS stocks. Rather, dark pools transmit this information only to selected market participants. In this regard, actionable IOIs can create a two-tiered level of access to information about the best prices and sizes for NMS stocks that undermines the Exchange Act objectives for a national market system. The consolidated quotation data is intended to provide a single source of information on the best prices for a listed security across all markets, rather than force the public to obtain data from many different exchanges and other markets to learn the best prices. This objective is not met when dark pools or other trading venues disseminate information that is functionally quite similar to quotations, yet is not included in the consolidated quotation data. . . . The lack of information concerning the ATS on which trades are executed makes it difficult, if not impossible, for the public to assess ATS trading in real-time, and to reliably identify the volume of executions in particular stocks on individual ATSs. The Commission preliminarily believes that the current level of post-trade transparency for ATSs is inadequate.'').

[11] The Exchange notes that the size requirement is similar to other SEC and exchange rules defining block-sized trading interest. *See* 17 CFR § 240.10b–18(a)(5)(ii) (including in the definition of block a quantity of stock that is at least 5,000 shares and has a purchase price of at least $50,000); CBOE Stock Exchange Rule 52.11 (permitting the cross of two original orders at the established bid or offer irrespective of existing interest so long as the cross transaction is (i) for at least 5,000 shares, (ii) is for a principal amount of at least $100,000, and (iii) is greater in size than any single public customer order resting on the CBSX Book at the proposed cross price).

[12] If an ILO represents a child order of a recorded parent order instruction, the Program does not require that the recorded parent order instruction be fully executed in the Program. The recorded parent order instruction may be executed in the Program, on the Exchange outside of the Program, or at other venues, as long as the recorded parent order instruction and the ILO meet the Program's requirements.

organizations[13] to satisfy the above size requirement.[14]

An ILO, or recorded parent order instruction, that meets the minimum size requirement and receives a partial execution that reduces its size to below the minimum size requirement will not become size ineligible. Even though a member organization receives a partial execution, and then later cancels the remaining unexecuted ILO or parent order instruction, the member organization has satisfied the size requirement as long as its intent at the time of execution was to fill the 5,000 share ILO or recorded parent order instruction.[15] If a member organization no longer intends to seek a position that satisfies the above size requirements, the member organization must take appropriate steps to ensure that it cancels any unexecuted ILOs in the Program.

An ILO may be designated Immediate-or-Cancel, or entered as a Reserve Order, in which case the order or any residual unexecuted portion will remain executable against contra-side interest in accordance with this Rule. An ILO may be designated with an MTV requirement that must be met before the order is executed. The MTV will be an optional parameter designating a minimum amount of shares of a security for which the ILO will attempt to execute if there is sufficient contra-side OLO and/or ILO interest available at the ILO's limit price or better. Depending on its designation, an ILO will consider the volume on the Exchange book and/or away markets in order to satisfy its MTV requirement.[16] If the MTV requirement cannot be met by contra-side OLO and/or ILO interest, the ILO so designated will not participate in an execution, and may be cancelled or rest non-displayed on the Exchange book, pursuant to Rule 107D(c)—Equities. However, an ILO will execute even though the execution size is less than the MTV provided the MTV was met by available contra-side interest at the time the ILO attempted to execute. An execution between an ILO and an OLO or between two ILOs cannot trade through, but may trade at, a protected quotation, and cannot trade through or trade at displayed liquidity on the Exchange.

Under the Program, a member organization submitting ILOs must maintain policies and procedures reasonably designed to ensure that the above requirements are satisfied and maintain records sufficient to reconstruct in a time-sequenced manner all orders routed to the Exchange as an ILO, including how recorded parent order instructions that meet the minimum size requirement relate to child order ILOs. For example, if a member organization is sending ILOs for its own account, it must have written policies and procedures that reflect how it documents that it has a recorded parent order that meets the above requirements. In addition, a member organization may presume that an account's intent to establish, increase, liquidate, or decrease a position is bona fide absent concrete indications to the contrary. Where circumstances indicate that an account does not intend to establish the required position, member organizations should make reasonable inquiry and follow up appropriately. For instance, the following circumstances may indicate that an account does not intend to establish, increase, liquidate, or decrease a position consistent with the Program:

- The account attempts to enter contemporaneous orders in the same security on both sides of the market;
- The account enters a pattern of orders and cancellations apparently designed to implement a market-making or spread-trading strategy; or
- The account enters a pattern of cancellations that consistently produces positions of a size that are less than the size requirements of the Program.

Member organizations receiving size ineligible child orders may rely on the member organization holding the recorded parent order instruction with respect to the size eligibility of the recorded parent order instruction from which the child order is derived. The member organization receiving the child order will not be responsible for the failure of the recorded parent order instruction to meet the requirements of the Program absent circumstances indicating the reliance was unreasonable. For example, if a member organization receiving the child orders knew that its customer member organization primarily engaged in a pattern and practice of trading the same security on both sides of the market, it would not be reasonable to assume that size ineligible child orders received from such member organization would comply with the Program's rules, unless they had information that such trading did not follow the customer member organization's general trading strategy. The Exchange, with FINRA, will review activity indicative of non-compliance with the Program's rules. The Exchange will exclude non-compliant member organizations when necessary to ensure a proper functioning of the Program.

Oversize Liquidity Order

Second, the term ''Oversize Liquidity Order'' is defined as a non-displayed limit order for Exchange-listed or traded securities (including but not limited to Exchange-listed securities and securities traded pursuant to unlisted trading privileges) with a minimum size of 500 shares.[17] An OLO that meets the minimum size requirement and receives a partial execution that reduces its size to below the applicable minimum size requirements will still be eligible to interact with incoming ILOs. An OLO will become size ineligible if the size of the OLO is reduced below the minimum size requirement because of a partial cancellation. An OLO may be priced at, inside, or outside the PBBO, or as non-displayed Primary Pegging Interest pursuant to Rule 13—Equities. OLOs will be ranked according to price-size-time priority. OLOs may interact only with ILOs.

As discussed below, OLOs and ILOs will be ranked and allocated according to price then size then time of entry into Exchange systems[18] and therefore

[13] The term ''member organization'' is defined in NYSE MKT Rule 2(b)—Equities and includes Floor brokers acting as agents.

[14] In other words, a size-eligible recorded parent order instruction, from which child orders are derived, must be held by a single member organization. A member organization may not rely on the representation from a non-member that the non-member holds a recorded parent order instruction sufficient to meet the size requirements of the Program. But if a single member organization has a size-eligible recorded parent order instruction, the member organization may send child orders to other member organizations to be submitted into the Program as ILOs. Member organizations receiving such size ineligible child orders may rely on the member organization holding the recorded parent order instruction with respect to the size eligibility of the recorded parent order instruction from which the child order is derived.

[15] A member organization may partially cancel an ILO; however, an ILO, or recorded parent order instruction, will become size ineligible if the size of the ILO or recorded parent order instruction is reduced to below the minimum size requirement because of a partial cancellation. A partially cancelled ILO will maintain its time priority.

[16] As explained below, an ILO may be designated as Type 1 or Type 2. A Type 1-designated ILO will consider volume on the Exchange book in order to satisfy its MTV requirement. A Type 2-designated ILO will consider volume on the Exchange book and away markets in order to satisfy its MTV requirement.

[17] OLOs may have a minimum size of 300 shares for securities with an Average Daily Volume of less than one million shares.

[18] As noted below, the Commission has previously found the integration of price-size-time priority into an SRO-sponsored execution venue that also offered price-time priority to be consistent with the Act. *See* Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020, 8038 (January 26, 2001) (''SuperMontage Approval Order'') (approving Nasdaq's proposal to give market participants that enter non-directed orders three options as to how their orders will interact with quotes/orders in Nasdaq: price-time; price-size-time; and price-time that accounts for ECN access fees).

without regard to whether the size entered is an odd lot, round lot or part of round lot. Executions between an ILO and an OLO will take into account displayed liquidity available at the same price on the Exchange book, such that displayed liquidity will have priority over equally priced ILOs and OLOs. OLOs and ILOs priced inside the PBBO will have priority over inferior-priced displayed interest, but OLOs and ILOs may not be priced in sub-penny increments. Consequently, OLOs and ILOs may only be priced inside the PBBO when the spread is greater than $0.01. Finally, ILOs may be designated as Type 1 or Type 2 (explained below).

Program

Third, the term ''Program'' would be defined as the Institutional Liquidity Program as described in Rule 107D—Equities.

Liquidity Identifier

Under proposed NYSE MKT Rule 107D(b)—Equities, the Exchange proposes to disseminate an identifier initially through an Exchange proprietary data feed, and as soon as practicable, the Exchange would disseminate the identifier through the CQS when an OLO or ILO resides in Exchange systems. The LI will reflect the symbol for the particular security, but will not include the price, side (buy or sell), or size of the OLO or ILO interest.

Institutional Liquidity Order Designations

Under proposed NYSE MKT Rule 107D(c)—Equities, a member organization can designate how an ILO would interact with available contra-side interest as follows. As proposed, a Type 1-designated ILO will interact, at each price level, first with displayed interest in Exchange systems, then available contra-side OLOs and/or ILOs in size-time priority, and then with any remaining non-displayed interest in Exchange systems, except a Type 1-designated ILO will not trade through a protected quotation. Any remaining portion of the ILO will be cancelled if designated as a Regulation NMS-compliant Immediate or Cancel Order pursuant to Rule 13—Equities, or if designated as a Reserve Order, rest on the Exchange book and be available to interact with other incoming contra-side OLOs, ILOs, and other available interest in Exchange systems but will not trade through a protected quotation. Accordingly, a Type 1-designated ILO may interact with other interest in Exchange systems, but will not route to other markets.[19] A Type 2-designated ILO will interact, at each price level, first with displayed interest in Exchange systems, then available contra-side OLOs and/or ILOs in size-time priority, and then with any remaining non-displayed interest in Exchange systems and will route to away markets as necessary to avoid trading through a protected quotation. Any remaining portion of the ILO will be cancelled if designated as an Exchange Immediate or Cancel Order pursuant to Rule 13—Equities, or if designated as a Reserve Order, rest on the Exchange book and be available to interact with other incoming contra-side OLOs, ILOs, and other available interest in Exchange systems. Accordingly, a Type 2-designated ILO may interact with other interest in Exchange systems, and may route to away markets. A non-displayed, Type 2-designated ILO resting on the Exchange book will route to away markets as necessary to avoid trading through a protected quotation.

Priority and Order Allocation

Under proposed NYSE MKT Rule 107D(d)—Equities, the Exchange proposes that competing OLOs and ILOs will be ranked and allocated according to price, then size, then time of entry into Exchange systems. The size priority of OLOs and ILOs will be based upon their initial size at time of entry; however, any partial cancels of OLOs or ILOs will reduce their original size for priority purposes by an equal amount. As such, when an ILO or OLO is partially cancelled, its size priority will be redetermined based on its new size; however, the ILO or OLO will maintain its time priority. Displayed liquidity will have priority over equally priced ILOs and OLOs. An incoming ILO will execute first against displayed interest, then against contra-side ILOs and OLOs, and finally against any non-displayed interest in Exchange systems. Any remaining unexecuted ILO interest will remain available to interact with other incoming OLOs and/or ILOs if such interest is at an eligible price unless the order is designated IOC. The following examples illustrate this proposed method:

Example 1—
PBBO for security ABC is $9.99–$10.05
OLO 1 is entered to buy ABC at $10.00 for 5,000
OLO 2 is then entered to buy ABC at $10.00 for 5,000
OLO 3 is then entered to buy ABC at $10.00 for 4,000

An incoming Type 1 ILO to sell ABC for 10,000 executes first against OLO 1's bid for 5,000, because it is the largest best-priced bid entered first in time, then against OLO 2's bid for 5,000, because it is the next largest best-priced bid. OLO 3 is not filled because the entire size of the ILO to sell 10,000 is depleted.

Assume the same facts as above. An incoming Type 1 ILO to sell ABC for 13,800 with an MTV of 10,000 will execute first against OLO 1's bid for 5,000, because it is the largest best-priced bid entered first in time, then against OLO 2's bid for 5,000, because it is the next largest best-priced bid. OLO 3 then receives an execution for 3,800 of its 4,000, at which point the entire size of the ILO to sell 13,800 is depleted. Note that the MTV requirement is met by the aggregate level of contra-side interest, even though no individual OLO satisfied the ILO's MTV requirement. Additionally, OLO 3 will still be available to interact with an incoming ILO since its original quantity was above the minimum size requirements.

Assume the same facts above, except that OLO 2's bid to buy ABC at $10.00 is for 2,000. An incoming Type 1 ILO to sell 10,000 executes first against OLO 1's bid for 5,000, because it is the largest best-priced bid, then against OLO 3's bid for 4,000, because it is the next largest best-priced bid. OLO 2 then receives an execution for 1,000 of its 2,000, at which point the entire size of the ILO to sell 10,000 is depleted.

Additionally, assume the same facts above, except that OLO 3's bid to buy 4,000 is priced at $10.01 and there is also an additional OLO entered to buy at $10.00 for 4,000 (OLO 4). An incoming Type 1 ILO to sell 11,000 executes first against OLO 3's bid for 4,000, because it is the best-priced bid. OLO 1 then receives an execution for 5,000, because it is the largest next-best-priced bid, and was entered ahead of OLO 2. OLO 2 then receives an execution for 2,000, leaving 3,000 unexecuted shares, at which point the entire size of the ILO is depleted. Next, another incoming Type 1 ILO to sell 3,000 executes against OLO 2 for 3,000 since its original quantity was 5,000, which is greater than the size of OLO 4 at 4,000. Using this same example, assume prior to the second ILO arriving, a partial cancel was sent in for OLO 2 to reduce its quantity by 2,000. The second arriving ILO would execute against OLO 4, since by partially

[19] As discussed below, the Type 1 designation creates multiple and substantial possibilities for ILOs to be matched with displayed limit orders on the Exchange. In addition to enhancing the execution opportunities for Institutional Interest, therefore, the Type 1 designation directly supports the all-important incentive to display limit orders.

canceling 2,000, OLO 2 would have its original quantity decremented to 3,000, making OLO 4 larger.

Finally, assume the same facts above, except that after OLO 3 is entered, ILO 1 is entered to buy ABC at $10.00 for 10,000 with an MTV of 5,000. An incoming Type 1 ILO to sell 15,000 executes first against ILO 1 because it is the largest best-priced bid and the number of shares available exceeds ILO 1's MTV of 5,000. OLO 1 then receives an execution for 5,000, because it is the next largest best-priced bid, and was entered ahead of OLO 2, at which point the entire size of the ILO to sell 15,000 is depleted.

Example 2—
PBBO for security ABC is $10.00–10.05
O1 is a limit order and the Exchange Best Bid at $10.00 for 1,000
OLO 1 is entered to buy ABC at $10.01 for 5,000
OLO 2 is then entered to buy ABC at $10.00 for 5,000

An incoming Type 1 ILO to sell ABC for 6,000 executes first against OLO 1 because it is the best-priced bid, then against O1's bid for 1,000. O1 receives priority over OLO 2 because O1 is a displayed order on the Exchange. OLO 2 remains available to interact with incoming ILOs.

Example 3—
PBBO for security ABC is $10.00–10.05
O1 is a limit order and is the Exchange Best Bid quoted at $10.00 for 1,000
O2 is a limit order to buy and is dark at $10.00 for 4,000
O3 is a limit order to buy and is displayable at $9.99 for 2,000
OLO 1 is entered to buy ABC at $10.00 for 4,000
OLO 2 is then entered to buy ABC at $9.99 for 4,000
There is a 100 share away market Bid at $10.00

An incoming Type 2 ILO to sell ABC for 12,000 executes first against O1, the Exchange Best Bid, for 1,000 at $10.00 because it is the best-priced displayed liquidity, then against OLO 1 for 4,000 because it is the best-priced bid in the Program and liquidity in the Program has priority over nondisplayed liquidity, then against O2 for 4,000 because it is the best-priced nondisplayed liquidity. The ILO then sweeps to $9.99, first routing 100 shares to the away market bid at $10.00. At $9.99, the ILO executes first against O3 for 2,000 because it is the best-priced displayed liquidity, then against OLO 2 for 900 because it is the best-priced bid in the Program.

Implementation

The Exchange proposes that all Exchange-listed or traded securities (including but not limited to Exchange-listed securities and securities traded pursuant to unlisted trading privileges) will be eligible for inclusion in the Institutional Liquidity Program. In order to provide for an efficient implementation, the Institutional Liquidity Program will initially cover only a certain specified list of Exchange-listed or traded securities, as announced by the Exchange via a Trader Update. The Exchange anticipates that the securities included within the Institutional Liquidity Program will be expanded periodically based on experience with the Program.[20]

The Program Would Assist Investors in Facing the Challenge of Seeking Counterparties While Minimizing Transaction Costs

The Commission has consistently recognized the challenges faced by large investors seeking to interact with counterparties without adversely impacting the price of the stock they seek to trade.[21] The Commission has noted the difficult trade-off that size traders face in deciding how much of their trading interest to reveal—prematurely revealing trading interest can produce market impact and increased transaction costs, while concealing trading interest reduces opportunities to trade—and the ''perennial challenge'' that investors, brokers, and markets face in ''finding effective and innovative ways to trade in large sizes with minimized transaction costs.'' [22]

Non-displayed liquidity in general, and dark pools in particular, have been viewed as useful tools to address those challenges. The Commission noted specifically in 2009, however, that dark pools differ starkly in their contribution to size discovery. While block crossing networks were producing at that time average trade sizes as large as 50,000 shares, most dark pools were executing trades with average sizes comparable to those on exchanges.[23] According to current data from Rosenblatt Securities, institutional block trading venues such as Liquidnet continue to produce large average trade sizes of almost 44,000 shares; on the other hand, dark pool average trade size generally declined from 443 shares in March 2009 to 210 shares in January 2013.[24] Additionally, a recent white paper from the SEC highlights similar facts and found that ''The five ATSs with average order sizes exceeding 1,000 shares collectively comprise 2.94% of ATS dollar volume and 3.01% of ATS share volume.[25] It is essential to keep firmly in mind the apparently limited contribution most non-displayed venues provide in the discovery of size.

Moreover, it is equally important to consider the side effects of the diversion of a large percentage of investor order flow away from displayed markets.[26] The Commission has squarely raised the question in the Equity Market Structure Concept Release of whether the growth of non-displayed liquidity has begun to degrade the public price discovery process by widening spreads, reducing depth, and increasing short term volatility.[27] The Commission noted then that the percentage of volume between non-displayed trading centers and

[20] The Exchange will announce any such expansions via a Trader Update.

[21] *See* Fragmentation Concept Release at 10581 (''Consequently, large investors often seek ways to interact with order flow and participate in price competition without submitting a limit order that would display the full extent of their trading interest to the market.'').

[22] Equity Market Structure Concept Release at 3612 (''Market participants that need to trade in large size, such as institutional investors, always have faced a difficult trading dilemma. On the one hand, if they prematurely reveal the full extent of their large trading interest to the market, then market prices are likely to run away from them (a price rise for those seeking to buy and a price decline for those seeking to sell), which would greatly increase their transaction costs and reduce their overall investment returns. On the other hand, if an institutional investor that wants to trade in large size does nothing, then it will not trade at all. Finding effective and innovative ways to trade in large size with minimized transaction costs is a perennial challenge for institutional investors, the brokers that represent their orders in the marketplace, and the trading centers that seek to execute their orders.'').

[23] *See* Dark Pool Release at 61209 (''Most dark pools, though they may handle large orders, primarily execute trades with small sizes that are more comparable to the average size of trades in the public markets, which was less than 300 shares in August 2009.'').

[24] Rosenblatt Securities, *Trading Talk,* dated March 25, 2013.

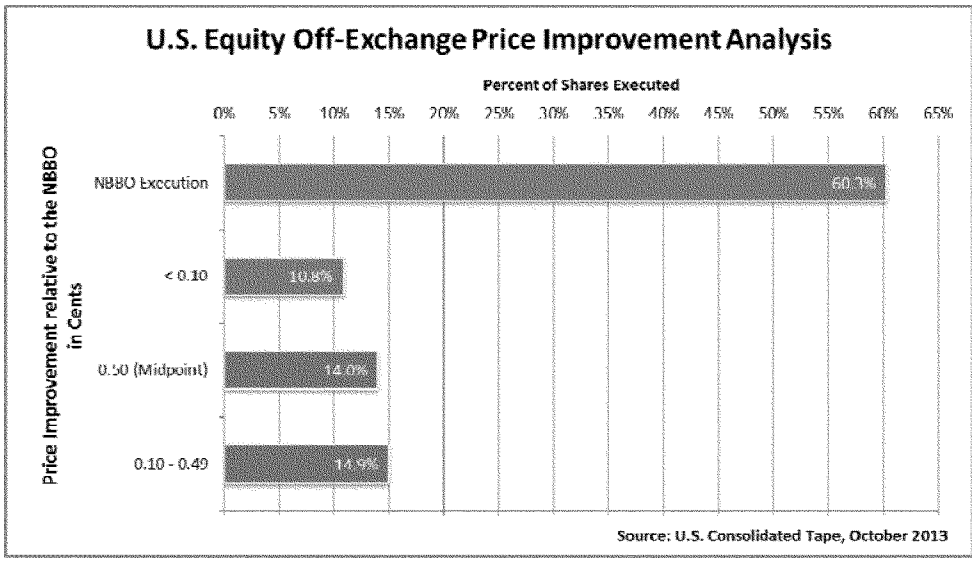
[25] *See* Alternative Trading Systems: Description of ATS Trading in National Market System Stocks. October 2013. SEC ATS White Paper.

[26] The Commission has recognized the migration of non-displayed liquidity away from the Exchange toward dark pools. *See* Equity Market Structure Concept Release at 3612 (''One consequence of the decline in market share of the NYSE floor in recent years is that this historically large undisplayed liquidity pool in NYSE-listed stocks appears to have largely migrated to other types of venues. As discussed [] above, a recent form of undisplayed liquidity is the dark pool—an ATS that does not display quotations in the consolidated quotation data.'').

[27] *See* Equity Market Structure Concept Release at 3613 (''Comment is requested on whether the trading volume of undisplayed liquidity has reached a sufficiently significant level that it has detracted from the quality of public price discovery and execution quality. For example, has the level of undisplayed liquidity led to increased spreads, reduced depth, or increased short-term volatility in the displayed trading centers? If so, has such harm to public price discovery led to a general worsening of execution quality for investors in undisplayed markets that execute trades with reference to prices in the displayed markets?'').

displayed centers had remained relatively constant between 70% and 80%.[28]

There are important indicators that this perceived static distribution of lit and dark liquidity is no longer in line with the facts, particularly when accounting for the growth in off-exchange volume. For example, the number of securities with greater than 40% TRF share has more than doubled in the past year to over 56.3% of total stocks.[29] As the chart below shows, over 70% of executions occurring in dark venues is executed at the NBBO or with less than $0.001 in price improvement or $0.10 per round lot. The Exchange believes that these and other data points raise serious questions about the value liquidity in non-displayed venues is providing to the market.



The Exchange also believes that the data strongly indicate emerging threats to the public price discovery process. The Program has the potential to leverage competition to address, in a limited way, these important concerns.

Exchange Interaction Between Displayed and Non-Displayed Liquidity

In considering the potential of the Program to address the possible degradation of the public price discovery process, it is worth underscoring the following basic point: The priority rules of the Exchange (and exchanges generally) offer a higher level of interaction between displayed and non-displayed liquidity than dark pools and broker internalization venues.[30] Consider, by way of illustration, an example where the PBBO was 10.01 by 10.03 with a displayed limit order one penny above the PBO at 10.04. An incoming discretionary limit order to buy with a displayed price of 10.02 and a discretionary price of 10.05 would not only interact with the interest at the PBO but would also interact with the displayed limit order one penny above the PBO at 10.04, once again supporting the display incentive. In contrast, there is no reason to expect that a non-displayed investor order residing in a dark pool would be matched with any displayed limit order or otherwise contribute in any way to the fundamentally important incentive to display. Similarly, consider a Floor broker who finds a counterparty of a size trade two pennies below the PBBO, while there is a public limit order one penny below the PBBO in the book. Prior to the Floor broker completing the trade, the Exchange would protect the PBBO, the same way a dark pool would be required to respect the PBBO; however, the Exchange takes the additional step of protecting the displayed orders away from the PBBO but priced better than the manual trade. Therefore, in the above example, the public limit order one penny below the PBBO also would be protected by the Exchange, and the incentive to display thereby strengthened.

Unlike a dark pool or internalization venue, the Program's ILOs would bolster the display incentive. Example 3, as described above, demonstrates such support. As stated in the above example, the PBBO for the security is $10.00 by $10.05 with OLOs within the program to buy at both $10.00 and $9.99. Furthermore, there is displayed interest on the book at $10.00 and $9.99. After the incoming ILO to sell executes against all interest priced at the PBB ($10.00), the ILO then interacts with a displayed limit order priced one penny away from the PBB. Having received an execution, the market participant who placed the limit order has been rewarded and incentivized to display in the future.

The Program's Use of Minimum Size Requirements Encourages the Price Discovery Mechanism by Lowering the Benefits of Certain Order Anticipation Strategies

As part of the Equity Market Structure Concept Release, the Commission questioned whether the use of ''pinging'' orders by all or some traders to assess non-displayed liquidity should be prohibited or restricted.[31] However,

[28] *See id.* (''In this regard, it appears that the overall percentage of trading volume between undisplayed trading centers and displayed trading centers has remained fairly steady for many years between 70% and 80%.''). The Commission estimated that 25.4% of share volume in NMS stocks was executed in undisplayed trading centers in September 2009. *Id.* at n. 85.

[29] Calculation based on Consolidated Tape data as of October 2013.

[30] The Commission, in the Regulation NMS Adopting Release, expressed concern regarding the display incentives of limit orders below the top of book. *See* NMS Adopting Release at 37527 (''The Commission believes, however, that the long-term strength of the NMS as a whole is best promoted by fostering greater depth and liquidity, and it follows from this that the Commission should examine the extent to which it can encourage the limit orders that provide this depth and liquidity to the market at the best prices.'')

[31] *See* Equity Market Structure Concept Release at 3607. A ''pinging'' order is an immediate-or-cancel order that can be used to search for and access all types of non-displayed liquidity, including dark

Continued

in raising the issue, the Commission noted a distinction between the use of pinging orders as the normal search for liquidity versus using pinging to detect and trade in front of large trading interest.[32] While some directional strategies contribute to the quality of price discovery in a stock,[33] order anticipation strategies which seek to trade ahead of large buyers or sellers in an attempt to capture price movement in the direction of the large trade interest do not enhance the price discovery process, detract from market quality, and harm institutional investors. The Program limits the deleterious effects that order anticipation strategies may have on the quality of price discovery by imposing minimum size requirements on OLOs and permitting ILOs to be entered with MTV restrictions, as discussed above. These size requirements are designed to shift the economics of order anticipation strategies by ensuring that users of ILOs are given a meaningful opportunity to interact with contra-side interest prior to its own interest being revealed and by increasing the costs to those using order anticipation strategies, through the use of a minimum size requirement, prior to learning about the existence of large contra-side interest.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[34] in general, and furthers the objectives of Section 6(b)(5),[35] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change is consistent with these principles because it would increase competition among execution venues, encourage additional liquidity, and make available additional liquidity to Institutional Interest.

The proposal arises out of the competition between the Exchange and non-exchange venues for block trading interest and the growth of institutional trading on less-regulated and less-transparent execution venues. As the Commission has previously noted, broker-dealers acting as over-the-counter market makers and block positioners provide liquidity directly to Institutional Interest.[36] The Program has the potential to attract additional institutional and block trading interest to the Exchange environment, and thereby improve transparency of access arrangements, priority and allocation, and fees as compared to internalizing non-exchange venues. Specifically, the ILO and OLO order types give members handling Institutional Interest tools to limit their interactions to counterparties who have committed to provide oversize liquidity, and thereby to better control information about their institutional customers' trading interest. If successful, the Program would at the same time add to the information in the consolidated quotation data by including the Oversize Liquidity Indicator in CQS. The ILO and OLO order types, the inclusion of the LI in the CQS, and the Program's priority rules rewarding size have the potential to stimulate price competition within an exchange environment for institutional-sized orders, to increase size interactions, reduce market impact, and reduce the trading costs of institutional investors.

The Exchange understands that Section 6(b)(5) of the Act prohibits an exchange from establishing rules that treat market participants in an unfairly discriminatory manner. However, Section 6(b)(5) of the Act does not prohibit exchange members or other broker-dealers from discriminating, so long as their activities are otherwise consistent with the federal securities laws. Nor does Section 6(b)(5) of the Act require exchanges to preclude discrimination by broker-dealers. Broker-dealers commonly differentiate between customers based on the nature and profitability of their business. The Program will simply replicate these trading dynamics that already exist in the OTC markets and will present another competitive venue for institutional and block order flow execution.

The differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around block trading interest such that Institutional Interest would receive additional liquidity options than they receive in the current market. The Exchange believes that the transparency and competitiveness of an exchange-sponsored program such as the Institutional Liquidity Program would enhance the liquidity available to institutional investors and thereby reduce their trading costs. As the Commission has previously recognized, institutional investors seek to trade efficiently in large sizes without having a significant impact on market prices.[37] And the ability to interact with significant amounts of liquidity is crucial to Institutional Interest looking to effect transactions while reducing market impact and transaction costs. As such, with the knowledge that contra-side interest must satisfy minimum size requirements and the ability of ILOs to remain non-displayed within the Program, Institutional Interest would be more willing to send their orders to a public market.

Additionally, the Exchange believes that the Program will promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because it will create additional competition for institutional and block order flow, attract institutional and block order flow to the exchange environment, and ensure that Institutional Interest benefit from a larger pool of liquidity and potentially receive better prices than they currently receive through bilateral internalization agreements. As a result, the Program is designed to provide a relative enhancement of the incentive to display than currently exists. The Exchange also notes that the LI will be disseminated through the consolidated public market data stream, and thus be widely viewable by market participants, and as such, would increase the amount of pricing information available to the marketplace. Therefore, the Program is reasonably designed to increase market transparency, thus removing impediments to and perfecting the mechanism of a free and open market and a national market system.

The Exchange believes that the Program will remove impediments to and perfect the mechanism of a free and open market and a national market

pools and non-displayed order types at exchanges and ECNs.

[32] *Id.* at n. 70.

[33] *See id.* at 3608 (''Some 'directional' strategies may be as straightforward as concluding that a stock price temporarily has moved away from its 'fundamental value' and establishing a position in anticipation that the price will return to such value. These speculative strategies often may contribute to the quality of price discovery in a stock.'')

[34] 15 U.S.C. 78f(b).

[35] 15 U.S.C. 78f(b)(5).

[36] *See* Dark Pool Release at 61209.

[37] *See* Dark Pool Release at 61212 (''The Commission recognizes that some trading venues, such as block crossing networks, may use actionable IOIs as part of a trading mechanism that offers significant size discovery benefits (that is, finding contra-side trading interest for large size without affecting prices). These benefits may be particularly valuable for institutional investors that need to trade efficiently in sizes much larger than those that are typically available in the public quoting markets.'').

system by incentivizing the display of public limit orders and promoting the price discovery mechanism. The increasing concentration of ''toxic,'' or highly informed, high frequency order flow, and the corresponding diversion of more benign flow to off-exchange venues, are evident today, and have been acknowledged with concern by the Commission.[38] The Exchange's recent competitive initiatives seek to arrest and reverse this unsettling dynamic by attracting a more diverse population of buyers and sellers to the public markets.[39] The current proposal to establish an Institutional Liquidity Program reflects a continuation of these efforts.

Further, the Exchange believes that the Program will remove impediments to and perfect the mechanism of a free and open market and a national market system by promoting order interaction. Specifically, the functionality of ILOs in the Program provides publicly displayed liquidity in general, particularly publicly displayed limit orders below the top of book, the potential to interact with Institutional Interest, thus incentivizing the display of public limit orders in such a way that dark pools do not.

The Exchange believes that the price-size priority of OLOs and ILOs within the Program proposed herein is consistent with the Act. The priority is meant to reward liquidity providers willing to display greater size, an incentive that the Commission has previously approved.[40] Requiring that orders within the Program be executed based on price-time priority would undermine the effectiveness of the Program because it would reduce the willingness of investors to reveal large trading interest. By placing a premium on size, the Program incentivizes large investors to move away from dark pools and back towards displayed public markets.

The Exchange believes that the Program is designed to protect investors and the public interest because the Program has the potential to lower volatility in a given security by increasing liquidity and depth at, inside, and outside the PBBO. The Commission has previously acknowledged the relationship between transaction costs, short-term price volatility, and temporary imbalances in trading interest.[41] Additionally, investors are more likely than professional traders to be on the wrong side of short-term price swings.[42] The increased liquidity made available through the Program will decrease the temporary imbalances in trading interest due to a large incoming order, reducing short-term price volatility and investor trading costs.

Further, the Exchange believes the Program is designed to protect investors and the public interest because the Program has the potential to increase price improvement and size improvement opportunities for institutional investors. Because of the priority provided to equally-priced displayed interest outside the Program, member organizations must submit OLOs and ILOs priced within the PBBO in order to receive priority or else risk receiving a partial or no fill. Additionally, the size priority applied to OLOs or ILOs similarly incentivizes member organizations to submit large orders into the Program, offering size improvement opportunities to institutional investors.

Finally, the Exchange proposes that the Commission approve the proposed rule for a pilot period of twelve months from the date of implementation, which will occur no later than 90 days after Commission approval of Rule 107D—Equities. The Program will expire on [Date will be determined upon adoption of Rule 107D—Equities]. The Exchange believes that this pilot period is of sufficient length to permit both the Exchange and the Commission to assess the impact of the rule change described herein. During the pilot period, the Exchange will submit certain data, periodically as required by the Commission, including: Summary statistics on the operation of the Program along with the meaning of the summary statistics; raw data relating to the operation of the Program; reports and data monitoring the Program's participants along with their activity; and the Exchange's assessment of the impact of the Program.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change will increase competition among execution venues and encourage additional liquidity. The Exchange notes that a significant percentage of the orders of institutional investors are executed over-the-counter. The Exchange believes that it is appropriate to create a financial incentive to bring more institutional order flow to a public market.

Additionally, as previously stated, the differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around block trading such that Institutional Interest would receive better prices and greater access to liquidity than they currently do through bilateral internalization arrangements. The Exchange believes that the transparency and competitiveness of operating a program such as the Institutional Liquidity Program on an exchange market would result in better prices for Institutional Interest while reducing their market impact.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

[38] *See* Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3613 (January 21, 2010) (''Equity Market Structure Concept Release'') (''It appears that a significant percentage of the orders of long-term investors are executed either in dark pools or at OTC market makers, while a large percentage of the trading volume in displayed trading centers is attributable to proprietary firms executing short-term trading strategies.'').

[39] *See* Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (''By creating additional competition for retail order flow, the Program is reasonably designed to attract retail order flow to the exchange environment, while helping to ensure that retail investors benefit from the better price that liquidity providers are willing to give their orders.'').

[40] *See* SuperMontage Approval Order at 8038 (''The Commission also concludes that the NASD's algorithm based on price/size/time priority is consistent with the statute.'').

[41] *See* Dark Pool Release at 61209, n. 4 (''Another type of implicit transaction cost reflected in the price of a security is short-term price volatility caused by temporary imbalances in trading interest. For example, a significant implicit cost for large investors (who often represent the consolidated investments of many individuals) is the price impact that their large trades can have on the market.'')

[42] *See id.*

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2013–91 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR– NYSEMKT–2013–91. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSEMKT–2013–91 and should be submitted on or before December 18, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority. [43]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28415 Filed 11–26–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70914; File No. SR–NYSEMKT–2013–93]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NYSE MKT Equities Price List and the NYSE Amex Options Fee Schedule Related to Co-Location Services

November 21, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 8, 2013, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE MKT Equities Price List (''Price List'') and the NYSE Amex Options Fee Schedule (''Fee Schedule'') related to co-location services in order to provide further specification regarding the fees applicable to cabinets for which power is not utilized (''PNU cabinets''). The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Price List and the Fee Schedule related to co-location services in order to provide further specification regarding the fees applicable to PNU cabinets.[4] The Exchange proposes to implement the change immediately.

A User is currently able to obtain one or more PNU cabinets in the data center.[5] A PNU cabinet is an unused cabinet in proximity to a User's existing cabinet(s), which the User reserves for future use, i.e., a cabinet that the User does not anticipate using until some point in the future and therefore is reserved but not currently utilized. Although PNU cabinets do not use power, when the Exchange establishes a PNU cabinet, it includes wiring, circuitry, and hardware and allocates either four kilowatts (''kW'') or eight

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[43] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Securities and Exchange Commission (''Commission'') initially approved the Exchange's co-location services in Securities Exchange Act Release No. 62961 (September 21, 2010), 75 FR 59299 (September 27, 2010) (SR–NYSEAmex–2010–80) (the ''Original Co-location Approval''). The Exchange operates a data center in Mahwah, New Jersey (the ''data center'') from which it provides co-location services to Users. The Exchange's co-location services allow Users to rent space in the data center so they may locate their electronic servers in close physical proximity to the Exchange's trading and execution system. *See id.* at 59299.

[5] For purposes of the Exchange's co-location services, the term ''User'' includes (i) member organizations, as that term is defined in the definitions section of the General and Floor Rules of the NYSE MKT Equities Rules, and ATP Holders, as that term is defined in NYSE Amex Options Rule 900.2NY(5); (ii) Sponsored Participants, as that term is defined in Rule 123B.30(a)(ii)(B)—Equities and NYSE Amex Options Rule 900.2NY(77); and (iii) non-member organization and non-ATP Holder broker-dealers and vendors that request to receive co-location services directly from the Exchange. *See, e.g.,* Securities Exchange Act Release Nos. 65974 (December 15, 2011), 76 FR 79249 (December 21, 2011) (SR–NYSEAmex–2011–81) and 65975 (December 15, 2011), 76 FR 79233 (December 21, 2011) (SR–NYSEAmex–2011–82). As specified in the Price List and the Fee Schedule, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates New York Stock Exchange LLC and NYSE Arca, Inc. *See* Securities Exchange Act Release No. 70176 (August 13, 2013), 78 FR 50471 (August 19, 2013) (SR–NYSEMKT–2013–67).

kWs of unused power capacity, depending on the User's requirements, as it does for all cabinets.[6] This allows the PNU cabinet to be powered and used promptly upon the User's request.

The applicable monthly fee for PNU cabinets (the ''PNU Fee'') was described within the Original Co-location Approval as 40% of the applicable per kW monthly fee.[7] Accordingly, since the Exchange began offering co-location services in the data center, the amount of the PNU Fee charged for a cabinet per month depended on the number of kWs of power allocated to that PNU cabinet. The Exchange subsequently specified that the PNU Fee would be $360 per month, which is 40% of the lowest per kW monthly cabinet fee specified in the Price List and Fee Schedule for cabinets in use (i.e., 40% of $900).[8] The Exchange continued to charge the PNU Fee on a per kW basis. To provide greater specificity with respect to the PNU Fee and better align the Price List and Fee Schedule with the Exchange's billing practice, the Exchange proposes to amend the Price List and Fee Schedule to explicitly provide that the applicable monthly PNU Fee is $360 per kW of power allocated to the PNU cabinet.[9]

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, an ATP Holder, a Sponsored Participant or an agent thereof (e.g., a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;[10] and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of its affiliates.[11]

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[13] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

Overall, the Exchange believes that the proposed change is consistent with the Act because the Exchange offers the co-location services described herein (i.e., PNU cabinets) as a convenience to Users, but in doing so incurs certain costs, including costs related to the data center facility, including maintaining an adequate level of power so that PNU cabinets can be available and powered on promptly at the request of a User. As such, the proposed fees relate to the level of services provided by the Exchange and, in turn, received by the User.

The Exchange believes that the proposal is reasonable because it would better align the Price List and Fee Schedule with the Exchange's billing practices and provide further specificity in the Price List and Fee Schedule regarding such fees. The proposal is further reasonable because pricing for PNU cabinets is comparable to pricing for the ''Cabinet Proximity Option'' available to users of co-location facilities of The NASDAQ Stock Market LLC (''NASDAQ''), which varies based on the power capacity of the cabinet.[14]

As with fees for existing co-location services, the PNU cabinet fees are charged only to those Users that voluntarily select the related services, which are available to all Users. The Exchange therefore believes that the proposed change is equitable and not unfairly discriminatory because it would continue to result in fees being charged only to Users that voluntarily select to receive the corresponding services and because those services are available to all Users. As such, the proposed change would not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[15] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because any market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange could have access to the co-location services provided in the data center. This is also true because, in addition to the services being completely voluntary, they are available to all Users on an equal basis (i.e., the same range of products and services are available to all Users).

The Exchange further believes that the proposal would not impose any burden on competition that is not necessary or

[6] A User is generally able to determine an approximate amount of power that it will typically consume in its cabinet. A User would request either a four or eight kW cabinet based on its anticipated peak power consumption.

[7] *See* Original Co-location Approval at 59299, n. 5. Users pay a monthly per kW fee for cabinets in use, which is based on the number of kWs allocated to the User's cabinets. The fee ranges from $1,200 per kW, for Users utilizing four to eight kWs, to $900 per kW, for Users utilizing more than 41 kW.

[8] *See* Securities Exchange Act Release Nos. 67664 (August 15, 2012), 77 FR 50733, 50734 (August 22, 2012) (SR–NYSEMKT–2012–10) and 67665 (August 15, 2012), 77 FR 50734, 50735 (August 22, 2012) (SR–NYSEMKT–2012–11).

[9] For example, if a User has a PNU cabinet allocated four kWs of power, the Exchange would charge the User $1,440 per month (i.e., $360 × four). If a User has a PNU cabinet allocated eight kWs of power, the Exchange would charge the User $2,880 per month (i.e., $360 × eight). Users are not otherwise charged for PNU cabinets until power is activated, at which point the fees applicable to other cabinets are charged (i.e., the $5,000 initial fee per cabinet and the full, monthly fee per kW).

[10] As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

[11] *See* SR–NYSEMKT–2013–67, *supra* note 5 at 50471. The Exchange's affiliates have also submitted the same proposed rule change to provide further specification regarding the fees applicable to PNU cabinets. *See* SR–NYSE–2013–74 and SR–NYSEArca–2013–124.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4) and (5).

[14] *See* NASDAQ Rule 7034. Fees for NASDAQ's Cabinet Proximity Option are $1,000 per medium or low density cabinet or $1,500 per medium/high or high density cabinet. The Exchange understands that NASDAQ's Cabinet Proximity Option gives its co-location customers the ability to reserve contiguous or near contiguous cabinets and power at a reduced rate, similar to manner in which Users are able to request PNU cabinets in the Exchange's data center for future use.

[15] 15 U.S.C. 78f(b)(8).

appropriate in furtherance of the purposes of the Act because it would result in further specification in the Price List and Fee Schedule regarding the fees applicable to PNU cabinets. Although PNU cabinets do not use power, when the Exchange establishes a PNU cabinet, it includes wiring, circuitry, and hardware and allocates either four kWs or eight kWs of unused power capacity, depending on the User's requirements, as it does for all cabinets. This allows the cabinet to be powered and used promptly upon the User's request. The proposed amendment to the Price List and Fee Schedule would therefore specify that the applicable monthly PNU Fee is $360 per kW of power allocated to the PNU cabinet.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if, for example, they deem fee levels at a particular venue to be excessive or if they determine that another venue's products and services are more competitive than on the Exchange. In such an environment, the Exchange must continually review, and consider adjusting, the services it offers as well as any corresponding fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [16] of the Act and subparagraph (f)(2) of Rule 19b–4 [17] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [18] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2013–93 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2013–93. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2013–93 and should be submitted on or before December 18, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28419 Filed 11–26–13; 8:45 am]

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[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(2).

[18] 15 U.S.C. 78s(b)(2)(B).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70909; File No. SR–NYSE–2013–72]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Establish an Institutional Liquidity Program on a One-Year Pilot Basis

November 21, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on November 7, 2013, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes a one-year pilot program that would add new Rule 107D to establish an Institutional Liquidity Program (''Program'' or ''proposed rule change'') to attract buying and selling interest in greater size to the Exchange for NYSE-listed securities by facilitating interactions between institutional customers (and others with block trading interest) and providers of liquidity exceeding minimum size requirements. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing a one-year pilot program that would add new NYSE Rule 107D to establish an Institutional Liquidity Program to attract buying and selling interest in greater size to the Exchange for NYSE-listed securities by facilitating interactions between institutional customers and others with block trading interest (collectively, ''Institutional Interest'') and providers of liquidity to service this type of order flow.[4] The Program offers a targeted size discovery mechanism that would enable consumers and suppliers of such liquidity to execute trades larger than the average size currently occurring on the Exchange or in most dark pools.

As set forth in more detail below, the Program at its core would depend on the interaction between two new proposed order types, the ''Institutional Liquidity Order'' (''ILO'') and the ''Oversize Liquidity Order'' (''OLO''). In summary terms, ILOs would express non-displayed Institutional Interest (5,000 or more shares with $50,000 or more market value), and OLOs would express liquidity of at least 500 shares[5] seeking to interact with an ILO. The presence of OLOs in Exchange systems would be reflected in a new liquidity indicator, the Liquidity Identifier (''LI''), to be disseminated through the Consolidated Quotation System (''CQS''). The Program is a targeted size discovery mechanism designed to attract Institutional Interest through a balanced set of requirements and incentives. The Exchange believes that the size requirements, described more fully below, will stimulate the expression of Institutional Interest in Exchange systems, and will ensure that liquidity suppliers seeking to interact with such interest commit meaningful size to the effort, thereby reducing the incidence of ''pinging'' or probing orders. The dissemination of LIs, in effect, requires oversize liquidity suppliers and Institutional Interest to communicate the fact, but not the details, of their trading interest and is designed to stimulate further the expression of both types of interest. The Program's minimum size requirements on OLOs and optional use of Minimum Triggering Volume (''MTV'') restrictions with ILOs, as described below, will reduce the incentives of using such order anticipation strategies. The Exchange believes that the incentives offered by the Program, in particular the balanced and limited segmentation of Institutional Interest and the Program's incorporation of price-size-time priority, have the potential to enhance the discovery of size on the Exchange, to thereby reduce the transaction costs of investors, and, more broadly, to offer a competitive response to serious market structure concerns held by both the Exchange and the Commission.

In particular, the Program has the potential to address three such concerns. First, the Exchange has expressed increasing concern about the migration of orders entered by investors who are less informed as to short term price movements toward dark venues and away from the public markets. At the same time, increasingly small orders entered by technology-enabled, short-term liquidity suppliers have become concentrated on exchanges.[6] Similarly, the Commission has remained sharply focused on the potential degradation of prices and price discovery as a result of the growth of non-displayed venues and the isolation of displayed liquidity.[7] The size discovery mechanism and incentives of the ILP have the potential to address this development by attracting the trading interest of investors back to the Exchange. Second and related, the investor orders that have been diverted to dark pools and broker internalization venues are, in an important sense, isolated from the

[4] The Exchange will submit a separate proposal to amend its Price List in connection with the proposed Institutional Liquidity Program. Under that proposal, the Exchange expects to initially charge member organizations a fee for executions of their ILOs against OLOs and in turn would initially provide a credit or free executions to member organizations for executions of their OLOs against the ILOs of other member organizations. The Exchange expects to charge both member organizations a fee for an execution of an ILO against another ILO. The fees and credits for member organizations submitting orders to the Program will be determined based on experience with the Program in the first several months.

[5] As noted below, OLOs may have a minimum size of 300 shares for securities with an Average Daily Volume of less than one million shares. The 500 (or 300) minimum size requirement of OLOs significantly betters the dark pool average trade size of 210 shares in January 2013. Rosenblatt Securities, *Trading Talk,* dated March 25, 2013.

[6] *See* Testimony of Joseph Mecane, EVP & Head of U.S. Equities, NYSE Euronext before the Subcommittee on Securities, Insurance and Investment of the Senate Committee on Banking, Housing and Urban Affairs (December 18, 2012) (''Exchanges find themselves competing more directly with Alternative Trading Systems (ATSs or dark pools) and broker internalization, which are able to employ different practices than exchanges with far less oversight and disclosure. Some of this competition is through cost, some through order handling practices, and much of it is through client segmentation whereby non-exchange venues are able to incentivize their own or third party liquidity provisions based on the nature of the person they are trading against. As a result of this advantage, large broker-dealers continue to move more order flow into their own private trading venues for a ''first look'' before routing on to the lit public markets. Since the implementation of Reg. NMS, we've seen two markets evolve—the lit public, regulated and accessible market versus the dark, selective and private non-transparent market.''); Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3613 (January 21, 2010) (''Equity Market Structure Concept Release'') (''It appears that a significant percentage of the orders of long-term investors are executed either in dark pools or at OTC market makers, while a large percentage of the trading volume in displayed trading centers is attributable to proprietary firms executing short-term trading strategies.'').

[7] *See* Securities Exchange Act Release No. 60997 (Nov. 13, 2009), 74 FR 61208, 61233 (Nov. 23, 2009) (''Dark Pool Release'') (''Increasing the volume of order flow routed to public quoting markets could reward market participants for displaying their trading interest, thus leading to an increase in the display of trading interest. Such a result would be consistent with the Commission's emphasis on the need to encourage displayed liquidity—a critical reference point for investors. Moreover, increasing the volume of order flow directed to public quotations could increase the incentives for markets to compete by displaying the quotations that would attract such order flow.''); Securities Exchange Act Release No. 42450 (Feb. 23, 2000), 65 FR 10577, 10578 (Feb. 28, 2000) (''Fragmentation Concept Release) (''These order flow arrangements may discourage quote competition by isolating investor order flow from investor limit orders and dealer quotes displayed in other market centers. Even when wholesale and internalizing broker-dealers execute trades at prices better than the national best bid and offer (''NBBO''), these superior transaction prices are often in part determined by formulas dependent on the NBBO.''); *see also* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Reg. NMS Adopting Release'') (''The importance of competition among orders has long been recognized. Indeed, when Congress mandated the establishment of an NMS, it well stated this basic principle: 'Investors must be assured that they are participants in a system which maximizes the opportunities for the most willing seller to meet the most willing buyer.' To the extent that competition among orders is lessened, the quality of price discovery for all sizes of orders can be compromised.''); Fragmentation Concept Release at 10580 (''[T]he existence of multiple market centers competing for order flow in the same security may isolate orders and hence reduce the opportunity for interaction of all buying and selling interest in that security. This may reduce competition *on price,* which is one of the most important benefits of greater interaction of buying and selling interest in an individual security.'').

displayed liquidity elsewhere in the market system. That is, unless a displayed limit order is both superior in price and a protected quote at the top of an exchange book, the likelihood that an investor order in a dark pool or internalization venue would interact with it is negligible. The danger, of course, is two-fold: the isolated order may be denied a price improved execution, and, more systemically important, the displayed limit order may receive no execution at all, undermining the critical incentive to display limit orders.[8] In contrast, liquidity attracted to the Exchange pursuant to the Program, while segmented in a balanced and limited way, would be integrated into the priority rules of the Exchange and would interact according to those rules with displayed limit orders on the Exchange.[9] Finally, the Exchange and the Commission have pointedly noted the selective pre-trade transparency of dark pools and the inadequacy of dark pool transaction reporting.[10] As discussed below, the ILP would bring enhanced pre-trade transparency to the trading interest attracted to the Program through a new liquidity indicator, as well as the more robust post-trade transparency of exchanges.

Definitions

The Exchange proposes to adopt the following definitions under proposed NYSE Rule 107D(a).

Institutional Liquidity Order

First, the term ''Institutional Liquidity Order'' is defined as a limit order for NYSE-listed securities of 5,000 or more shares with a market value of at least $50,000,[11] or a child order of a recorded instruction that meets such size requirements.[12] An ILO, whether it constitutes a child order or an entire order, must be one establishing, increasing, liquidating, or decreasing a position in the subject security and may not be part of an expression of two-sided interest on the part of the account originating the order. An ILO, or the recorded parent order instruction from which it is derived, must satisfy the size requirement above independently, and size may not be aggregated across multiple member organizations [13] to satisfy the above size requirement.[14]

An ILO, or recorded parent order instruction, that meets the minimum size requirement and receives a partial execution that reduces its size to below the minimum size requirement will not become size ineligible. Even though a member organization receives a partial execution, and then later cancels the remaining unexecuted ILO or parent order instruction, the member organization has satisfied the size requirement as long as its intent at the time of execution was to fill the 5,000 share ILO or recorded parent order instruction.[15] If a member organization no longer intends to seek a position that satisfies the above size requirements, the member organization must take appropriate steps to ensure that it cancels any unexecuted ILOs in the Program.

An ILO may be designated Immediate-or-Cancel, or entered as a Reserve Order, in which case the order or any residual unexecuted portion will remain executable against contra-side interest in accordance with this Rule. An ILO may be designated with an MTV requirement that must be met before the order is executed. The MTV will be an optional parameter designating a minimum amount of shares of a security for which the ILO will attempt to execute if there is sufficient contra-side OLO and/or ILO interest available at the ILO's limit price or better. Depending on its designation, an ILO will consider the volume on the Exchange book and/or away markets in order to satisfy its MTV requirement.[16] If the MTV requirement cannot be met by contra-side OLO and/or ILO interest, the ILO so designated will not participate in an execution, and may be cancelled or rest non-displayed on the Exchange book, pursuant to Rule 107D(c). However, an ILO will execute even though the execution size is less than the MTV provided the MTV was met by available contra-side interest at the time the ILO attempted to execute. An execution between an ILO and an

[8] *See* Dark Pool Release at 61211; *see also* Reg. NMS Adopting Release at 37527 (''The Commission believes, however, that the long-term strength of the NMS as a whole is best promoted by fostering greater depth and liquidity, and it follows from this that the Commission should examine the extent to which it can encourage the limit orders that provide this depth and liquidity to the market at the best prices.''); Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290, 48293 (September 12, 1996) (''Order Handling Rules Release'') (''[T]he display of customer limit orders advances the national market system goal of the public availability of quotation information, as well as fair competition, market efficiency, best execution, and disintermediation.'').

[9] Additionally, the Exchange believes that the Program will address complaints from buy-side firms about a lack of transparency around the rules and operations of ATSs. Unlike the Exchange's extensive rule filing requirements, ATSs are only required to file an initial operation report on Form ATS and an amendment on Form ATS when implementing a material change to the operation of the ATS or when any information on Form ATS is inaccurate. *See* 17 CFR 242.301(b)(2). The Exchange environment, however, offers buy-side firms the desired regulatory and operational transparency while also minimizing the transaction costs associated with the trading of block-sized trading interest.

[10] *See* Dark Pool Release at 61219 (''The public, however, does not have access to this valuable information concerning the best prices and sizes for NMS stocks. Rather, dark pools transmit this information only to selected market participants. In this regard, actionable IOIs can create a two-tiered level of access to information about the best prices and sizes for NMS stocks that undermines the Exchange Act objectives for a national market system. The consolidated quotation data is intended to provide a single source of information on the best prices for a listed security across all markets, rather than force the public to obtain data from many different exchanges and other markets to learn the best prices. This objective is not met when dark pools or other trading venues disseminate information that is functionally quite similar to quotations, yet is not included in the consolidated quotation data. . . . The lack of information concerning the ATS on which trades are executed makes it difficult, if not impossible, for the public to assess ATS trading in real-time, and to reliably identify the volume of executions in particular stocks on individual ATSs. The Commission preliminarily believes that the current level of post-trade transparency for ATSs is inadequate.'').

[11] The Exchange notes that the size requirement is similar to other SEC and exchange rules defining block-sized trading interest. *See* 17 CFR 240.10b–18(a)(5)(ii) (including in the definition of block a quantity of stock that is at least 5,000 shares and has a purchase price of at least $50,000); CBOE Stock Exchange Rule 52.11 (permitting the cross of two original orders at the established bid or offer irrespective of existing interest so long as the cross transaction is (i) for at least 5,000 shares, (ii) is for a principal amount of at least $100,000, and (iii) is greater in size than any single public customer order resting on the CBSX Book at the proposed cross price).

[12] If an ILO represents a child order of a recorded parent order instruction, the Program does not require that the recorded parent order instruction be fully executed in the Program. The recorded parent order instruction may be executed in the Program, on the Exchange outside of the Program, or at other venues, as long as the recorded parent order instruction and the ILO meet the Program's requirements.

[13] The term ''member organization'' is defined in NYSE Rule 2(b) and includes Floor brokers acting as agents.

[14] In other words, a size-eligible recorded parent order instruction, from which child orders are derived, must be held by a single member organization. A member organization may not rely on the representation from a non-member that the non-member holds a recorded parent order instruction sufficient to meet the size requirements of the Program. But if a single member organization has a size-eligible recorded parent order instruction, the member organization may send child orders to other member organizations to be submitted into the Program as ILOs. Member organizations receiving such size ineligible child orders may rely on the member organization holding the recorded parent order instruction with respect to the size eligibility of the recorded parent order instruction from which the child order is derived.

[15] A member organization may partially cancel an ILO; however, an ILO, or recorded parent order instruction, will become size ineligible if the size of the ILO or recorded parent order instruction is reduced to below the minimum size requirement because of a partial cancellation. A partially cancelled ILO will maintain its time priority.

[16] As explained below, an ILO may be designated as Type 1 or Type 2. A Type 1-designated ILO will consider volume on the Exchange book in order to satisfy its MTV requirement. A Type 2-designated ILO will consider volume on the Exchange book and away markets in order to satisfy its MTV requirement.

OLO or between two ILOs cannot trade through, but may trade at, a protected quotation, and cannot trade through or trade at displayed liquidity on the Exchange.

Under the Program, a member organization submitting ILOs must maintain policies and procedures reasonably designed to ensure that the above requirements are satisfied and maintain records sufficient to reconstruct in a time-sequenced manner all orders routed to the Exchange as an ILO, including how recorded parent order instructions that meet the minimum size requirement relate to child order ILOs. In particular, if a member organization is sending ILOs for its own account, it must have written policies and procedures that reflect how it documents that it has a recorded parent order that meets the above requirements. In addition, a member organization may presume that an account's intent to establish, increase, liquidate, or decrease a position is bona fide absent concrete indications to the contrary. Where circumstances indicate that an account does not intend to establish the required position, member organizations should make reasonable inquiry and follow up appropriately. For instance, the following circumstances may indicate that an account does not intend to establish, increase, liquidate, or decrease a position consistent with the Program:

- The account attempts to enter contemporaneous orders in the same security on both sides of the market;
- The account enters a pattern of orders and cancellations apparently designed to implement a market-making or spread-trading strategy; or
- The account enters a pattern of cancellations that consistently produces positions of a size that are less than the size requirements of the Program.

Member organizations receiving size ineligible child orders may rely on the member organization holding the recorded parent order instruction with respect to the size eligibility of the recorded parent order instruction from which the child order is derived. The member organization receiving the child order will not be responsible for the failure of the recorded parent order instruction to meet the requirements of the Program absent circumstances indicating the reliance was unreasonable. For example, if a member organization receiving the child orders knew that its customer member organization primarily engaged in a pattern and practice of trading the same security on both sides of the market, it would not be reasonable to assume that size ineligible child orders received from such member organization would comply with the Program's rules, unless they had information that such trading did not follow the customer member organization's general trading strategy. The Exchange, with FINRA, will monitor activity indicative of non-compliance with the Program's rules and will exclude non-compliant member organizations when necessary to ensure a proper functioning of the Program.

Oversize Liquidity Order

Second, the term ''Oversize Liquidity Order'' is defined as a non-displayed limit order for NYSE-listed securities with a minimum size of 500 shares.[17] An OLO that meets the minimum size requirement and receives a partial execution that reduces its size to below the applicable minimum size requirements will still be eligible to interact with incoming ILOs. An OLO will become size ineligible if the size of the OLO is reduced below the minimum size requirement because of a partial cancellation. An OLO may be priced at, inside, or outside the PBBO, or as non-displayed Primary Pegging Interest pursuant to Rule 13. OLOs will be ranked according to price-size-time priority. OLOs may interact only with ILOs.

As discussed below, OLOs and ILOs will be ranked and allocated according to price then size then time of entry into Exchange systems [18] and therefore without regard to whether the size entered is an odd lot, round lot or part of round lot. Executions between an ILO and an OLO will take into account displayed liquidity available at the same price on the Exchange book, such that displayed liquidity will have priority over equally priced ILOs and OLOs. OLOs and ILOs priced inside the PBBO will have priority over inferior-priced displayed interest, but OLOs and ILOs may not be priced in sub-penny increments. Consequently, OLOs and ILOs may only be priced inside the PBBO when the spread is greater than $0.01. Finally, ILOs may be designated as Type 1 or Type 2 (explained below).

Program

Third, the term ''Program'' would be defined as the Institutional Liquidity Program as described in Rule 107D.

Liquidity Identifier

Under proposed NYSE Rule 107D(b), the Exchange proposes to disseminate an identifier initially through an Exchange proprietary data feed, and as soon as practicable, the Exchange would disseminate the identifier through the CQS when an OLO or ILO resides in Exchange systems. The LI will reflect the symbol for the particular security, but will not include the price, side (buy or sell), or size of the OLO or ILO interest.

Institutional Liquidity Order Designations

Under proposed NYSE Rule 107D(c), a member organization can designate how an ILO would interact with available contra-side interest as follows. As proposed, a Type 1-designated ILO will interact, at each price level, first with displayed interest in Exchange systems, then available contra-side OLOs and/or ILOs in size-time priority, and then with any remaining non-displayed interest in Exchange systems, except a Type 1-designated ILO will not trade through a protected quotation. Any remaining portion of the ILO will be cancelled if designated as a Regulation NMS-compliant Immediate or Cancel Order pursuant to Rule 13, or if designated as a Reserve Order, rest on the Exchange book and be available to interact with other incoming contra-side OLOs, ILOs, and other available interest in Exchange systems but will not trade through a protected quotation. Accordingly, a Type 1-designated ILO may interact with other interest in Exchange systems, but will not route to other markets.[19] A Type 2-designated ILO will interact, at each price level, first with displayed interest in Exchange systems, then available contra-side OLOs and/or ILOs in size-time priority, and then with any remaining non-displayed interest in Exchange systems and will route to away markets as necessary to avoid trading through a protected quotation. Any remaining portion of the ILO will be cancelled if designated as an NYSE Immediate or

[17] OLOs may have a minimum size of 300 shares for securities with an Average Daily Volume of less than one million shares.

[18] As noted below, the Commission has previously found the integration of price-size-time priority into an SRO-sponsored execution venue that also offered price-time priority to be consistent with the Act. *See* Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020, 8038 (January 26, 2001) (''SuperMontage Approval Order'') (approving Nasdaq's proposal to give market participants that enter non-directed orders three options as to how their orders will interact with quotes/orders in Nasdaq: price-time; price-size-time; and price-time that accounts for ECN access fees).

[19] As discussed below, the Type 1 designation creates multiple and substantial possibilities for ILOs to be matched with displayed limit orders on the Exchange. In addition to enhancing the execution opportunities for Institutional Interest, therefore, the Type 1 designation directly supports the all-important incentive to display limit orders.

Cancel Order pursuant to Rule 13, or if designated as a Reserve Order, rest on the Exchange book and be available to interact with other incoming contra-side OLOs, ILOs, and other available interest in Exchange systems. Accordingly, a Type 2-designated ILO may interact with other interest in Exchange systems, and may route to away markets. A non-displayed, Type 2-designated ILO resting on the Exchange book will route to away markets as necessary to avoid trading through a protected quotation.

Priority and Order Allocation

Under proposed NYSE Rule 107D(d), the Exchange proposes that competing OLOs and ILOs will be ranked and allocated according to price, then size, then time of entry into Exchange systems. The size priority of OLOs and ILOs will be based upon their initial size at time of entry; however, any partial cancels of OLOs or ILOs will reduce their original size for priority purposes by an equal amount. As such, when an ILO or OLO is partially cancelled, its size priority will be redetermined based on its new size; however, the ILO or OLO will maintain its time priority. Displayed liquidity will have priority over equally priced ILOs and OLOs. An incoming ILO will execute first against displayed interest, then against contra-side ILOs and OLOs, and finally against any non-displayed interest in Exchange systems. Any remaining unexecuted ILO interest will remain available to interact with other incoming OLOs and/or ILOs if such interest is at an eligible price unless the order is designated IOC. The following examples illustrate this proposed method:

Example 1— PBBO for security ABC is $9.99–$10.05

OLO 1 is entered to buy ABC at $10.00 for 5,000

OLO 2 is then entered to buy ABC at $10.00 for 5,000

OLO 3 is then entered to buy ABC at $10.00 for 4,000

An incoming Type 1 ILO to sell ABC for 10,000 executes first against OLO 1's bid for 5,000, because it is the largest best-priced bid entered first in time, then against OLO 2's bid for 5,000, because it is the next largest best-priced bid. OLO 3 is not filled because the entire size of the ILO to sell 10,000 is depleted.

Assume the same facts as above. An incoming Type 1 ILO to sell ABC for 13,800 with an MTV of 10,000 will execute first against OLO 1's bid for 5,000, because it is the largest best-priced bid entered first in time, then against OLO 2's bid for 5,000, because it is the next largest best-priced bid. OLO 3 then receives an execution for 3,800 of its 4,000, at which point the entire size of the ILO to sell 13,800 is depleted. Note that the MTV requirement is met by the aggregate level of contra-side interest, even though no individual OLO satisfied the ILO's MTV requirement. Additionally, OLO 3 will still be available to interact with an incoming ILO since its original quantity was above the minimum size requirements.

Assume the same facts above, except that OLO 2's bid to buy ABC at $10.00 is for 2,000. An incoming Type 1 ILO to sell 10,000 executes first against OLO 1's bid for 5,000, because it is the largest best-priced bid, then against OLO 3's bid for 4,000, because it is the next largest best-priced bid. OLO 2 then receives an execution for 1,000 of its 2,000, at which point the entire size of the ILO to sell 10,000 is depleted.

Additionally, assume the same facts above, except that OLO 3's bid to buy 4,000 is priced at $10.01 and there is also an additional OLO entered to buy at $10.00 for 4,000 (OLO 4). An incoming Type 1 ILO to sell 11,000 executes first against OLO 3's bid for 4,000, because it is the best-priced bid. OLO 1 then receives an execution for 5,000, because it is the largest next-best-priced bid, and was entered ahead of OLO 2. OLO 2 then receives an execution for 2,000, leaving 3,000 unexecuted shares, at which point the entire size of the ILO is depleted. Next, another incoming Type 1 ILO to sell 3,000 executes against OLO 2 for 3,000 since its original quantity was 5,000, which is greater than the size of OLO 4 at 4,000. Using this same example, assume prior to the second ILO arriving, a partial cancel was sent in for OLO 2 to reduce its quantity by 2,000. The second arriving ILO would execute against OLO 4, since by partially canceling 2,000, OLO 2 would have its original quantity decremented to 3,000, making OLO 4 larger.

Finally, assume the same facts above, except that after OLO 3 is entered, ILO 1 is entered to buy ABC at $10.00 for 10,000 with an MTV of 5,000. An incoming Type 1 ILO to sell 15,000 executes first against ILO 1 because it is the largest best-priced bid and the number of shares available exceeds ILO 1's MTV of 5,000. OLO 1 then receives an execution for 5,000, because it is the next largest best-priced bid, and was entered ahead of OLO 2, at which point the entire size of the ILO to sell 15,000 is depleted.

Example 2—PBBO for security ABC is $10.00–10.05 O1 is a limit order and the Exchange Best Bid at $10.00 for 1,000

OLO 1 is entered to buy ABC at $10.01 for 5,000

OLO 2 is then entered to buy ABC at $10.00 for 5,000

An incoming Type 1 ILO to sell ABC for 6,000 executes first against OLO 1 because it is the best-priced bid, then against O1's bid for 1,000. O1 receives priority over OLO 2 because O1 is a displayed order on the Exchange. OLO 2 remains available to interact with incoming ILOs.

Example 3— PBBO for security ABC is $10.00–10.05

O1 is a limit order and is the Exchange Best Bid quoted at $10.00 for 1,000

O2 is a limit order to buy and is dark at $10.00 for 4,000

O3 is a limit order to buy and is displayable at $9.99 for 2,000

OLO 1 is entered to buy ABC at $10.00 for 4,000

OLO 2 is then entered to buy ABC at $9.99 for 4,000

There is a 100 share away market Bid at $10.00

An incoming Type 2 ILO to sell ABC for 12,000 executes first against O1, the Exchange Best Bid, for 1,000 at $10.00 because it is the best-priced displayed liquidity, then against OLO 1 for 4,000 because it is the best-priced bid in the Program and liquidity in the Program has priority over nondisplayed liquidity, then against O2 for 4,000 because it is the best-priced nondisplayed liquidity. The ILO then sweeps to $9.99, first routing 100 shares to the away market bid at $10.00. At $9.99, the ILO executes first against O3 for 2,000 because it is the best-priced displayed liquidity, then against OLO 2 for 900 because it is the best-priced bid in the Program.

Implementation

The Exchange proposes that all NYSE-listed securities will be eligible for inclusion in the Institutional Liquidity Program. In order to provide for an efficient implementation, the Institutional Liquidity Program will initially cover only a certain specified list of NYSE-listed securities, as announced by the Exchange via a Trader Update. The Exchange anticipates that the securities included within the Institutional Liquidity Program will be expanded periodically based on experience with the Program.[20]

The Program Would Assist Investors in Facing the Challenge of Seeking Counterparties While Minimizing Transaction Costs

The Commission has consistently recognized the challenges faced by large

[20] The Exchange will announce any such expansions via a Trader Update.

investors seeking to interact with counterparties without adversely impacting the price of the stock they seek to trade.[21] The Commission has noted the difficult trade-off that size traders face in deciding how much of their trading interest to reveal—prematurely revealing trading interest can produce market impact and increased transaction costs, while concealing trading interest reduces opportunities to trade—and the ''perennial challenge'' that investors, brokers, and markets face in ''finding effective and innovative ways to trade in large sizes with minimized transaction costs.'' [22]

Non-displayed liquidity in general, and dark pools in particular, have been viewed as useful tools to address those challenges. The Commission noted specifically in 2009, however, that dark pools differ starkly in their contribution to size discovery. While block crossing networks were producing at that time average trade sizes as large as 50,000 shares, most dark pools were executing trades with average sizes comparable to those on exchanges.[23] According to current data from Rosebay Securities, institutional block trading venues such as Liquidnet continue to produce large average trade sizes of almost 44,000 shares; on the other hand, dark pool average trade size generally declined from 443 shares in March 2009 to 210 shares in January 2013.[24] Additionally, a recent white paper from the SEC highlights similar facts and found that ''The five ATSs with average order sizes exceeding 1,000 shares collectively comprise 2.94% of ATS dollar volume and 3.01% of ATS share volume.[25] It is essential to keep firmly in mind the apparently limited contribution most non-displayed venues provide in the discovery of size.

Moreover, it is equally important to consider the side effects of the diversion of a large percentage of investor order flow away from displayed markets.[26] The Commission has squarely raised the question in the Equity Market Structure Concept Release of whether the growth of non-displayed liquidity has begun to degrade the public price discovery process by widening spreads, reducing depth, and increasing short term volatility.[27] The Commission noted then that the percentage of volume between non-displayed trading centers and displayed centers had remained relatively constant between 70% and 80%.[28]

There are important indicators that this perceived static distribution of lit and dark liquidity is no longer in line with the facts, particularly when accounting for the growth in off-exchange volume. For example, the number of securities with greater than 40% TRF share has more than doubled in the past year to over 56.3% of total stocks.[29] As the chart below shows, over 70% of executions occurring in dark venues is executed at the NBBO or with less than $0.001 in price improvement or $0.10 per round lot. The Exchange believes that these and other data points raise serious questions about the value liquidity in non-displayed venues is providing to the market.

[21] *See* Fragmentation Concept Release at 10581 (''Consequently, large investors often seek ways to interact with order flow and participate in price competition without submitting a limit order that would display the full extent of their trading interest to the market.'').

[22] Equity Market Structure Concept Release at 3612 (''Market participants that need to trade in large size, such as institutional investors, always have faced a difficult trading dilemma. On the one hand, if they prematurely reveal the full extent of their large trading interest to the market, then market prices are likely to run away from them (a price rise for those seeking to buy and a price decline for those seeking to sell), which would greatly increase their transaction costs and reduce their overall investment returns. On the other hand, if an institutional investor that wants to trade in large size does nothing, then it will not trade at all. Finding effective and innovative ways to trade in large size with minimized transaction costs is a perennial challenge for institutional investors, the brokers that represent their orders in the marketplace, and the trading centers that seek to execute their orders.'').

[23] *See* Dark Pool Release at 61209 (''Most dark pools, though they may handle large orders, primarily execute trades with small sizes that are more comparable to the average size of trades in the public markets, which was less than 300 shares in August 2009.'').

[24] Rosenblatt Securities, *Trading Talk,* dated March 25, 2013.

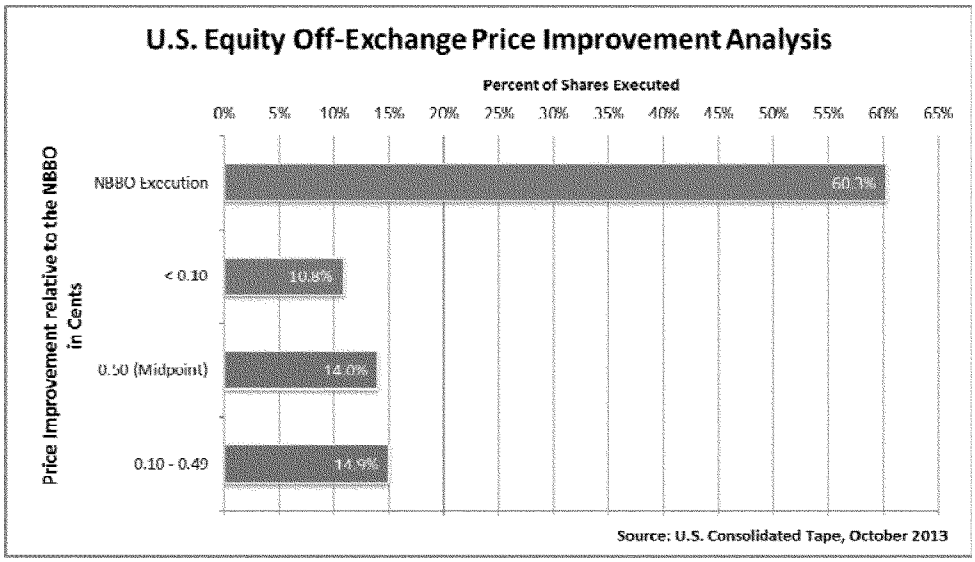
[25] *See* Alternative Trading Systems: Description of ATS Trading in National Market System Stocks. October 2013. SEC ATS White Paper.

[26] The Commission has recognized the migration of non-displayed liquidity away from the Exchange toward dark pools. *See* Equity Market Structure Concept Release at 3612 (''One consequence of the decline in market share of the NYSE floor in recent years is that this historically large undisplayed liquidity pool in NYSE-listed stocks appears to have largely migrated to other types of venues. As discussed [] above, a recent form of undisplayed liquidity is the dark pool—an ATS that does not display quotations in the consolidated quotation data.'').

[27] *See* Equity Market Structure Concept Release at 3613 (''Comment is requested on whether the trading volume of undisplayed liquidity has reached a sufficiently significant level that it has detracted from the quality of public price discovery and execution quality. For example, has the level of undisplayed liquidity led to increased spreads, reduced depth, or increased short-term volatility in the displayed trading centers? If so, has such harm to public price discovery led to a general worsening of execution quality for investors in undisplayed markets that execute trades with reference to prices in the displayed markets?'').

[28] *See id.* (''In this regard, it appears that the overall percentage of trading volume between undisplayed trading centers and displayed trading centers has remained fairly steady for many years between 70% and 80%.''). The Commission estimated that 25.4% of share volume in NMS stocks was executed in undisplayed trading centers in September 2009. *Id.* at n. 85.

[29] Calculation based on Consolidated Tape data as of October 2013.



The Exchange also believes that the data strongly indicate emerging threats to the public price discovery process. The Program has the potential to leverage competition to address, in a limited way, these important concerns.

Exchange Interaction Between Displayed and Non-Displayed Liquidity

In considering the potential of the Program to address the possible degradation of the public price discovery process, it is worth underscoring the following basic point: the priority rules of the Exchange (and exchanges generally) offer a higher level of interaction between displayed and non-displayed liquidity than dark pools and broker internalization venues.[30] Consider, by way of illustration, an example where the PBBO was 10.01 by 10.03 with a displayed limit order one penny above the PBO at 10.04. An incoming discretionary limit order to buy with a displayed price of 10.02 and a discretionary price of 10.05 would not only interact with the interest at the PBO but would also interact with the displayed limit order one penny above the PBO at 10.04, once again supporting the display incentive. In contrast, there is no reason to expect that a non-displayed investor order residing in a dark pool would be matched with any displayed limit order or otherwise contribute in any way to the fundamentally important incentive to display. Similarly, consider a Floor broker who finds a counterparty of a size trade two pennies below the PBBO, while there is a public limit order one penny below the PBBO in the book. Prior to the Floor broker completing the trade, the Exchange would protect the PBBO, the same way a dark pool would be required to respect the PBBO; however, the Exchange takes the additional step of protecting the displayed orders away from the PBBO but priced better than the manual trade. Therefore, in the above example, the public limit order one penny below the PBBO also would be protected by the Exchange, and the incentive to display thereby strengthened.

Unlike a dark pool or internalization venue, the Program's ILOs would bolster the display incentive. Example 3, as described above, demonstrates such support. As stated in the above example, the PBBO for the security is $10.00 by $10.05 with OLOs within the program to buy at both $10.00 and $9.99. Furthermore, there is displayed interest on the book at $10.00 and $9.99. After the incoming ILO to sell executes against all interest priced at the PBB ($10.00), the ILO then interacts with a displayed limit order priced one penny away from the PBB. Having received an execution, the market participant who placed the limit order has been rewarded and incentivized to display in the future.

The Program's Use of Minimum Size Requirements Encourages the Price Discovery Mechanism by Lowering the Benefits of Certain Order Anticipation Strategies

As part of the Equity Market Structure Concept Release, the Commission questioned whether the use of ''pinging'' orders by all or some traders to assess non-displayed liquidity should be prohibited or restricted.[31] However, in raising the issue, the Commission noted a distinction between the use of pinging orders as the normal search for liquidity versus using pinging to detect and trade in front of large trading interest.[32] While some directional strategies contribute to the quality of price discovery in a stock,[33] order anticipation strategies which seek to trade ahead of large buyers or sellers in an attempt to capture price movement in the direction of the large trade interest do not enhance the price discovery process, detract from market quality, and harm institutional investors. The Program limits the deleterious effects that order anticipation strategies may have on the quality of price discovery by imposing minimum size requirements on OLOs and permitting ILOs to be entered with MTV restrictions, as discussed above. These size requirements are designed to shift the economics of order anticipation strategies by ensuring that users of ILOs are given a meaningful opportunity to interact with contra-side interest prior to its own interest being revealed and by increasing the costs to those using order

[30] The Commission, in the Regulation NMS Adopting Release, expressed concern regarding the display incentives of limit orders below the top of book. *See* NMS Adopting Release at 37527 (''The Commission believes, however, that the long-term strength of the NMS as a whole is best promoted by fostering greater depth and liquidity, and it follows from this that the Commission should examine the extent to which it can encourage the limit orders that provide this depth and liquidity to the market at the best prices.'')

[31] *See* Equity Market Structure Concept Release at 3607. A ''pinging'' order is an immediate-or-cancel order that can be used to search for and access all types of non-displayed liquidity, including dark pools and non-displayed order types at exchanges and ECNs.

[32] *Id.* at n. 70.

[33] *See id.* at 3608 (''Some 'directional' strategies may be as straightforward as concluding that a stock price temporarily has moved away from its 'fundamental value' and establishing a position in anticipation that the price will return to such value. These speculative strategies often may contribute to the quality of price discovery in a stock.'')

anticipation strategies, through the use of a minimum size requirement, prior to learning about the existence of large contra-side interest.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[34] in general, and furthers the objectives of Section 6(b)(5),[35] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change is consistent with these principles because it would increase competition among execution venues, encourage additional liquidity, and make available additional liquidity to Institutional Interest.

The proposal arises out of the competition between the Exchange and non-exchange venues for block trading interest and the growth of institutional trading on less-regulated and less-transparent execution venues. As the Commission has previously noted, broker-dealers acting as over-the-counter market makers and block positioners provide liquidity directly to Institutional Interest.[36] The Program has the potential to attract additional institutional and block trading interest to the Exchange environment, and thereby improve transparency of access arrangements, priority and allocation, and fees as compared to internalizing non-exchange venues. Specifically, the ILO and OLO order types give members handling Institutional Interest tools to limit their interactions to counterparties who have committed to provide oversize liquidity, and thereby to better control information about their institutional customers' trading interest. If successful, the Program would at the same time add to the information in the consolidated quotation data by including the Oversize Liquidity Indicator in CQS. The ILO and OLO order types, the inclusion of the LI in the CQS, and the Program's priority rules rewarding size have the potential to stimulate price competition within an exchange environment for institutional-sized orders, to increase size interactions, reduce market impact, and reduce the trading costs of institutional investors.

The Exchange understands that Section 6(b)(5) of the Act prohibits an exchange from establishing rules that treat market participants in an unfairly discriminatory manner. However, Section 6(b)(5) of the Act does not prohibit exchange members or other broker-dealers from discriminating, so long as their activities are otherwise consistent with the federal securities laws. Nor does Section 6(b)(5) of the Act require exchanges to preclude discrimination by broker-dealers. Broker-dealers commonly differentiate between customers based on the nature and profitability of their business. The Program will simply replicate these trading dynamics that already exist in the OTC markets and will present another competitive venue for institutional and block order flow execution.

The differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around block trading interest such that Institutional Interest would receive additional liquidity options than they receive in the current market. The Exchange believes that the transparency and competitiveness of an exchange-sponsored program such as the Institutional Liquidity Program would enhance the liquidity available to institutional investors and thereby reduce their trading costs. As the Commission has previously recognized, institutional investors seek to trade efficiently in large sizes without having a significant impact on market prices.[37] And the ability to interact with significant amounts of liquidity is crucial to Institutional Interest looking to effect transactions while reducing market impact and transaction costs. As such, with the knowledge that contra-side interest must satisfy minimum size requirements and the ability of ILOs to remain non-displayed within the Program, Institutional Interest would be more willing to send their orders to a public market.

Additionally, the Exchange believes that the Program will promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because it will create additional competition for institutional and block order flow, attract institutional and block order flow to the exchange environment, and ensure that Institutional Interest benefit from a larger pool of liquidity and potentially receive better prices than they currently receive through bilateral internalization agreements. As a result, the Program is designed to provide a relative enhancement of the incentive to display than currently exists. The Exchange also notes that the LI will be disseminated through the consolidated public market data stream, and thus be widely viewable by market participants, and as such, would increase the amount of pricing information available to the marketplace. Therefore, the Program is reasonably designed to increase market transparency, thus removing impediments to and perfecting the mechanism of a free and open market and a national market system.

The Exchange believes that the Program will remove impediments to and perfect the mechanism of a free and open market and a national market system by incentivizing the display of public limit orders and promoting the price discovery mechanism. The increasing concentration of ''toxic,'' or highly informed, high frequency order flow, and the corresponding diversion of more benign flow to off-exchange venues, are evident today, and have been acknowledged with concern by the Commission.[38] The Exchange's recent competitive initiatives seek to arrest and reverse this unsettling dynamic by attracting a more diverse population of buyers and sellers to the public markets.[39] The current proposal to establish an Institutional Liquidity Program reflects a continuation of these efforts.

Further, the Exchange believes that the Program will remove impediments to and perfect the mechanism of a free and open market and a national market system by promoting order interaction. Specifically, the functionality of ILOs in

[34] 15 U.S.C. 78f(b).

[35] 15 U.S.C. 78f(b)(5).

[36] *See* Dark Pool Release at 61209.

[37] *See* Dark Pool Release at 61212 (''The Commission recognizes that some trading venues, such as block crossing networks, may use actionable IOIs as part of a trading mechanism that offers significant size discovery benefits (that is, finding contra-side trading interest for large size without affecting prices). These benefits may be particularly valuable for institutional investors that need to trade efficiently in sizes much larger than those that are typically available in the public quoting markets.'').

[38] *See* Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3613 (January 21, 2010) (''Equity Market Structure Concept Release'') (''It appears that a significant percentage of the orders of long-term investors are executed either in dark pools or at OTC market makers, while a large percentage of the trading volume in displayed trading centers is attributable to proprietary firms executing short-term trading strategies.'').

[39] *See* Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (''By creating additional competition for retail order flow, the Program is reasonably designed to attract retail order flow to the exchange environment, while helping to ensure that retail investors benefit from the better price that liquidity providers are willing to give their orders.'').

the Program provides publicly displayed liquidity in general, particularly publicly displayed limit orders below the top of book, the potential to interact with Institutional Interest, thus incentivizing the display of public limit orders in such a way that dark pools do not.

The Exchange believes that the price-size priority of OLOs and ILOs within the Program proposed herein is consistent with the Act. The priority is meant to reward liquidity providers willing to display greater size, an incentive that the Commission has previously approved.[40] Requiring that orders within the Program be executed based on price-time priority would undermine the effectiveness of the Program because it would reduce the willingness of investors to reveal large trading interest. By placing a premium on size, the Program incentivizes large investors to move away from dark pools and back towards displayed public markets.

The Exchange believes that the Program is designed to protect investors and the public interest because the Program has the potential to lower volatility in a given security by increasing liquidity and depth at, inside, and outside the PBBO. The Commission has previously acknowledged the relationship between transaction costs, short-term price volatility, and temporary imbalances in trading interest.[41] Additionally, investors are more likely than professional traders to be on the wrong side of short-term price swings.[42] The increased liquidity made available through the Program will decrease the temporary imbalances in trading interest due to a large incoming order, reducing short-term price volatility and investor trading costs.

Further, the Exchange believes the Program is designed to protect investors and the public interest because the Program has the potential to increase price improvement and size improvement opportunities for institutional investors. Because of the priority provided to equally-priced displayed interest outside the Program, member organizations must submit OLOs and ILOs priced within the PBBO in order to receive priority or else risk receiving a partial or no fill. Additionally, the size priority applied to OLOs or ILOs similarly incentivizes member organizations to submit large orders into the Program, offering size improvement opportunities to institutional investors.

Finally, the Exchange proposes that the Commission approve the proposed rule for a pilot period of twelve months from the date of implementation, which will occur no later than 90 days after Commission approval of Rule 107D. The Program will expire on [Date will be determined upon adoption of Rule 107D]. The Exchange believes that this pilot period is of sufficient length to permit both the Exchange and the Commission to assess the impact of the rule change described herein. During the pilot period, the Exchange will submit certain data, periodically as required by the Commission, including: summary statistics on the operation of the Program along with the meaning of the summary statistics; raw data relating to the operation of the Program; reports and data monitoring the Program's participants along with their activity; and the Exchange's assessment of the impact of the Program.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change will increase competition among execution venues and encourage additional liquidity. The Exchange notes that a significant percentage of the orders of institutional investors are executed over-the-counter. The Exchange believes that it is appropriate to create a financial incentive to bring more institutional order flow to a public market.

Additionally, as previously stated, the differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around block trading such that Institutional Interest would receive better prices and greater access to liquidity than they currently do through bilateral internalization arrangements. The Exchange believes that the transparency and competitiveness of operating a program such as the Institutional Liquidity Program on an exchange market would result in better prices for Institutional Interest while reducing their market impact.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2013–72 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR- NYSE–2013–72. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the

[40] *See* SuperMontage Approval Order at 8038 (''The Commission also concludes that the NASD's algorithm based on price/size/time priority is consistent with the statute.'').

[41] *See* Dark Pool Release at 61209, n. 4 (''Another type of implicit transaction cost reflected in the price of a security is short-term price volatility caused by temporary imbalances in trading interest. For example, a significant implicit cost for large investors (who often represent the consolidated investments of many individuals) is the price impact that their large trades can have on the market.'')

[42] *See id.*

Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSE–2013–72 and should be submitted on or before December 18, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28414 Filed 11–26–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70911; File No. SR–NASDAQ–2013–143]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend NASDAQ Rule 4120(c)(7)(C) To Modify the Parameters for Releasing Securities for Trading Upon the Termination of a Trading Halt

November 21, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on November 14, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NASDAQ Rule 4120(c)(7)(C) to modify the parameters for releasing securities for trading upon the termination of a trading halt. NASDAQ will implement the proposed change immediately.

The text of the proposed rule change is below.[3] Proposed new language is italicized; proposed deletions are in brackets.

* * * * *

4120. Limit Up-Limit Down Plan and Trading Halts

(a)–(b) No change.

(c) Procedure for Initiating and Terminating a Trading Halt

(1)–(6) No change.

(7)

(A)–(B) No change.

(C) If at the end of a Display Only Period *or during the subsequent process to release the security for trading,* Nasdaq detects an order imbalance in the security, Nasdaq will extend the Display Only Period as permitted under subparagraph (A). In the case of subparagraph (B), any order imbalance during the Pre-Launch Period *or during the subsequent process to release the security for trading* will result in a delay of the release for trading of the IPO until the end of the order imbalance and satisfaction of the other requirements for release of the IPO contained in subparagraph (B). *Order imbalances are established as follows:*

(1) Order imbalances under subparagraph (A) shall be established when (i) the *last available* Current Reference Price[s], as defined in Rule 4753(a)(2)(A), disseminated [15 seconds and]immediately prior to the end of the Display Only Period *and any of the three preceding Current Reference Prices* differ by more than the greater of 5 percent or 50 cents, or (ii) all buy or sell market orders will not be executed in the cross.

(2) Order imbalances under subparagraph (B) shall be established when (i) the Current Reference Price[s], as defined in Rule 4753(a)(2)(A), disseminated [15 seconds and]immediately prior to commencing the release of the IPO for trading during the Pre-Launch Period *and any of the three preceding Current Reference Prices* differ by more than the greater of 5 percent or 50 cents, or (ii) all buy or sell market orders will not be executed in the cross.

(3) Order imbalances under both subparagraphs (A) and (B) shall be established during the subsequent process to release a security for trading, which occurs at the termination of either a Display Only Period under subparagraph (A) or a Pre-Launch Period under subparagraph (B), if, upon completion of the cross calculation, (i) the calculated price at which the security would be released for trading and any of the three preceding Current Reference Prices disseminated immediately prior to the initiation of the cross calculation differ by more than the greater of 5 percent or 50 cents, or (ii) all buy or sell market orders would not be executed in the cross.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 4120(c)(7)(C) to strengthen the price volatility comparison of the order imbalance tests done at the conclusion of the Display Only Period and Pre-Launch Period by increasing the number of Current Reference Prices that are compared. The Exchange is also proposing to extend the order imbalance tests of the rule to also include the process by which a company's securities are released for trading after a halt. Securities subject to a halt under Rule 4120(a) cannot be released when there is an order imbalance in the security. Historically, order imbalances were defined uniformly under Rule 4120(c)(7)(C) for all halts under Rule 4120(a) as: (i) the Current Reference Prices, as defined in Rule

[43] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The text of the rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

4753(a)(2)(A),[4] disseminated 15 seconds and immediately prior to the end of the Display Only Period differ by more than the greater of 5 percent or 50 cents (the ''Price Volatility Test''), or (ii) all buy or sell market orders will not be executed in the cross (the ''Imbalance Test''). During the Display Only Period, NASDAQ disseminates an Order Imbalance Indicator every five seconds,[5] which includes a Current Reference Price along with the then-current imbalance information.[6] The Order Imbalance Indicator allows market participants insight into the likely price at which a security will emerge from a halt.

NASDAQ recently adopted a new process for releasing securities approved for listing on NASDAQ in an initial public offering (''IPO'').[7] The changes were adopted to improve the IPO release process by increasing NASDAQ's flexibility to commence trading when appropriate while retaining a transparent process that has been the hallmark of the rule. To this end, NASDAQ eliminated the former rule requirement that limited the number of extensions of the Display Only Period to six five-minute periods, and instead adopted a ''Pre-Launch Period'' at the conclusion of the initial 15-minute Display Only Period that is not of a fixed duration. Unlike other halts under Rule 4120(a), NASDAQ does not apply the order imbalance tests at the conclusion of an IPO launch Display Only Period, but rather thereafter transitions to the Pre-Launch Period. Under the new rule, the Pre-Launch Period will continue until:

(1) the IPO is released when the following two conditions are simultaneously met:

- NASDAQ receives notice from the underwriter of the IPO that the security is ready to trade, and
- there is no order imbalance in the security (as discussed below); *or*

(2) the underwriter, with concurrence of NASDAQ, determines at any point during the IPO Halt Cross process up through the Pre-Launch Period to postpone and reschedule the IPO.

The Exchange adopted the condition that there be no order imbalance, as defined in Rule 4120(c)(7)(C), in a halted security prior to its release for trading to ensure that the security price is reasonably stable and trading interest is balanced at the time trading commences. With the changes to the IPO release process discussed above, NASDAQ adopted a new definition of order imbalance applicable only to IPO halt securities, while retaining the same definition of an order imbalance for all other halts under Rule 4120(a). NASDAQ defines an order imbalance in an IPO security as occurring when (1) the Current Reference Price, as defined in Rule 4753(a)(2)(A), disseminated 15 seconds and immediately prior to commencing the release of the IPO for trading during the Pre-Launch Period differs by more than the greater of 5 percent or 50 cents, or (2) all buy or sell market orders will not be executed in the cross. This protection is designed to prevent circumstances where a misunderstanding by the underwriter as to the state of the order book risks launching trading at a time of material volatility in the book for the security. As a consequence, if an underwriter gives notice to launch the IPO security, it must also be free of an order imbalance prior to release for price calculation and trading.

All order imbalances are calculated by the Halt Cross system, which automatically prevents launch of a halted security when an order imbalance exists. For halts under Rule 4120(a) other than IPO halts, at the conclusion of the Display Only Period and any extensions thereof permitted by the rule, the Halt Cross system determines if an order imbalance exists by performing the two order imbalance tests. If there is not an order imbalance, the system calculates the release price of the security based on the trading interest at the conclusion of the Display Only Period and releases the halted security for trading. The conclusion of all halts under Rule 4120(a) other than IPO halts is initiated by the Halt Cross system automatically, resulting in the release of a security immediately after the issuance of a Current Reference Price. IPO halts, however, do not necessarily conclude in synch with the dissemination of a Current Reference Price because the underwriter initiates the conclusion of the Pre-Launch Period without consideration to the dissemination of the Current Reference Price.

Enhanced Volatility Test

The Exchange proposes to strengthen the Price Volatility Test applied to all halts under Rule 4120(a) by increasing the number of prices to which the last disseminated Current Reference Price is compared. The current rule text provides that NASDAQ compares the Current Reference Price available immediately prior to the conclusion of either the Display Only Period[8] or Pre-Launch Period,[9] as applicable, to the Current Reference Price issued 15 seconds prior to the conclusion of these periods. This calculation results in a single comparison of prices, notwithstanding that there are two additional Current Reference Prices disseminated between the Current Reference Prices compared by the test. For example, in the case of a Display Only Period that concludes pursuant to Rule 4120(c)(7)(A) at 10:00:00 with the last disseminated Current Reference Price occurring at 10:00:00, the Halt Cross system will compare the last disseminated Current Reference Price to the Current Reference Price issued at 09:59:45. Because Current Reference Prices are disseminated every five seconds, two additional Current Reference Prices were disseminated at 09:59:50 and 09:59:55, between the two Current Reference Prices used by the Price Volatility Test. Either of the two intermediate Current Reference Prices may reflect volatile pricing that would not be considered by the current Price Volatility Test.

NASDAQ is proposing to amend Rule 4120(c)(7)(C) to reflect that the Price Volatility Test will compare the last available Current Reference Price to each of the three preceding Current Reference Prices. As a consequence, the Price Volatility Test will more robustly detect price volatility at the conclusion of a Display Only Period or Pre-Launch Period by conducting three price comparisons of the most recent Current Reference Prices as compared to the single comparison done now. The order imbalance tests are designed to ensure that the security price is reasonably stable at the time trading commences. NASDAQ believes that testing against the three prior Current Reference Prices increases the likelihood that instability will be detected and, as a consequence, trading in the security will be afforded additional time to stabilize, resulting in a launch that is more reflective of all the trading interest in the security.

[4] The Current Reference Price is defined in Rule 4753(a)(2)(A) as the price at which the maximum number of shares can be paired. In situations where more than one price exists, the rule establishes the Current Reference Price in a number of scenarios.

[5] Rule 4753(b)(1).

[6] The Order Imbalance Indicator provides market participants with the Current Reference Price, the number of shares matched for execution at the Current Reference Price, the total number of shares that cannot be matched for execution and side of executable shares, and the indicative prices at which the Halt Cross would occur if it were to occur at that time. *See* Rule 4753(a)(2).

[7] Securities Exchange Act Release No. 69897 (July 1, 2013), 78 FR 40782 (July 8, 2013) (SR–NASDAQ–2013–092).

[8] For halts concluded pursuant to Rule 4120(c)(7)(A).

[9] For halts concluded pursuant to Rule 4120(c)(7)(B).

Extension of the Order Imbalance Tests

NASDAQ is also proposing to extend the order imbalance tests to the release process, which occurs after the conclusion of a Display Only Period or Pre-Launch Period, as applicable, and before the release of the security. During this release process period, the Halt Cross system closes the order book, and then calculates the price at which the security will be opened. As noted above, the release price of an IPO is calculated at the conclusion of the Pre-Launch Period, which is not systematically determined by the expiration of a set time period, but rather is initiated by the underwriter to the IPO. The time between the dissemination of the last Current Reference Price and the close of the Pre-Launch Period may be as long as nearly five seconds, during which market participants may continue to enter and cancel orders. NASDAQ notes that, for a halt concluded pursuant to Rule 4120(c)(7)(A), there is a very brief time after the dissemination of the Current Reference Price and the closing of the order book during which market participants may continue to enter and cancel orders. As a result, the orders in the order book may not be reflected in the last disseminated Order Imbalance Indicator.

Under both launch processes, at the conclusion of the applicable period the Halt Cross system performs the order imbalance tests using an Order Imbalance Indicator that, as noted, may not be reflective of the most recent orders entered during the period after its dissemination. It is possible that a market participant may enter an order that is materially different in price from the last available Current Reference Price disseminated and of an adequate size to significantly distort the security's price during the cross price calculation. Under such a scenario, the halted security could be released at a price significantly different from market expectations based on the indicative price of the Order Imbalance Indicator disseminated just prior to the launch. Moreover, an order entered or canceled during the period between the last dissemination of the Order Imbalance Indicator and the closing of the order book may cause an order imbalance in the number of buy and sell interest resulting in a certain number of shares remaining unmatched at the conclusion of the cross.

NASDAQ is proposing to extend the order imbalance tests to the process for releasing a security for trading applicable to halts concluded pursuant to both Rules 4120(c)(7)(A) and (B). Specifically, the requirement would apply to both the process following the conclusion of the Display Only Period for halts under Rule 4120(a) other than IPOs, and to the process following the conclusion of the Pre-Launch Period for IPO halt securities. NASDAQ has amended the definition of an order imbalance under Rule 4120(c)(7)(C) to reflect the addition of the order imbalance tests to this period. Under the new definition of order imbalance, the Halt Cross system will compare the calculated price at which the security would be released to each of the three preceding Current Reference Prices disseminated immediately prior to initiation of the cross calculation. An order imbalance under this calculation would be present if the prices differ by more than the greater of 5 percent or 50 cents. The Halt Cross system will also apply the Imbalance Test to determine whether all orders were executed in the cross.

Under the amended rule, should a security be subject to an order imbalance during the subsequent process to release the security for trading by failing either the new Price Volatility Test or Imbalance Test, it would return to either a Display Only Period for a one minute extension period, in the case of Rule 4120(a) halts other than IPOs, or in the case of an IPO halt, return to the Pre-Launch Period. Once in the returned state, the security would repeat the process for release until such time that the security may be priced.[10] Accordingly, NASDAQ believes extension of the order imbalance tests to the release process will ensure that the price at which a security is released for trading is reflective of the general interest in the security, unaltered by aberrant order activity. NASDAQ notes that the proposed modification to the rule is not designed to substantively modify how order imbalances are handled in the release of securities halted under Rule 4120(a). It is instead designed to apply the same principles to the brief price calculation process just prior to the release of a security for regular trading.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[11] in general, and with Section 6(b)(5) of the Act,[12] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transaction in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposed rule change promotes this goal by strengthening tests that must be passed for a security to be released from a halt, and extending the protections of all such tests to include the brief period after a security is released for pricing and the pricing process concludes. Although unlikely, it is possible, particularly with regard to the IPO release process, for a disruptive order to skew the release price far from what was anticipated by market participants based on the indicative prices published by the Exchange prior to the calculation. The proposed change is designed to protect market participants from receiving what would appear from their perspective to be erroneous pricing of securities for resumption of trading. Accordingly, NASDAQ believes that enhancing and strengthening the process is in the interest of protecting investors as it will serve to avoid confusion among market participants. NASDAQ notes that the criteria it applies in releasing halted securities pursuant to the rule are applied consistently to every release, and therefore do not permit NASDAQ to discriminate in any manner.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The Exchange believes that the proposal is irrelevant to competition because it is not driven by, and will have no impact on, competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

[10] In the case of a Pre-Launch Period, all conditions to conclude the period must be met, including a new indication that the underwriter is ready to launch. Consistent with Rule 4120(c)(7)(B), during this time the underwriter, with the concurrence of NASDAQ, may also determine to postpone and reschedule the IPO.

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act [13] and Rule 19b–4(f)(6) thereunder.[14] Because the proposed rule change does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6) [16] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(ii),[17] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange stated that this proposal establishes rules that enhance an existing test, which is designed to ensure that securities in a halted state are released in an orderly manner and that there are no order imbalances in a security emerging from a halt. In addition, the Exchange stated that the proposal is designed to protect market participants from seemingly erroneous pricing of securities for resumption of trading. Thus, the Exchange believes that it is in the interest of protecting investors to provide the amended process, which will eliminate the possibility of such a disruption, at the earliest time possible. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission designates the proposed rule change to be operative upon filing.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [19] of the Act to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2013–143 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2013–143. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2013–143 and should be submitted on or before December 18, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28416 Filed 11–26–13; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[15] 17 CFR 240.19b–4(f)(6)(ii).

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(ii).

[18] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] 15 U.S.C. 78s(b)(2)(B).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70918; File No. SR–NYSEArca–2013–42]

Self-Regulatory Organizations; NYSEArca, Inc.; Notice of Withdrawal of Proposed Rule Change Amending NYSE Arca Rule 6.72 To Make the Penny Pilot Program for Options Permanent

November 21, 2013.

I. Introduction

On August 20, 2013, NYSEArca, Inc. (''NYSEArca'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSEArca Rule 6.72 to make permanent the penny quoting program for options (''Penny Trading Program'' or ''Program''). The proposed rule change was published for comment in the **Federal Register** on September 10, 2013.[3] The Commission received 11 comment letters on this proposal.[4] On

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 70317 (September 4, 2013), 78 FR 55312.

[4] *See* Position Paper from Michael J. Simon, Secretary, International Securities Exchange, LLC, dated September 19, 2013; and letters to Elizabeth M. Murphy, Secretary, Commission, from John M. Liftin, Managing Director and General Counsel, D.E. Shaw & Co., L.P., dated September 30, 2013; Michael J. Simon, Secretary, ISE, dated October 1, 2013; Benjamin R. Londergan, Chief Executive Officer, Group One Trading, L.P., dated October 1, 2013; Jenny L. Golding, Senior Attorney, Legal Division, Chicago Board Options Exchange, Incorporated, dated October 7, 2013; John C. Nagel,

October 22, 2013, the Commission extended to December 9, 2013, the time period in which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5]

On November 20, 2013, NYSEArca withdrew the proposed rule change (SR–NYSEArca–2013–42).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28423 Filed 11–26–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70917; File No. SR–CME–2013–24]

Self-Regulatory Organizations; Chicago Mercantile Exchange Inc.; Notice of Filing of Proposed Rule Change Regarding the Designation of a Primary Backup Data Center

November 21, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 15, 2013, Chicago Mercantile Exchange Inc. (''CME'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I, II and III, below, which items have been prepared primarily by CME. The Commission is publishing this notice to solicit comments on the proposed rule change for interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CME proposes to activate its New York Data Center (''1NE Data Center'') as its primary backup data center. The 1NE Data Center currently operates in part as a tertiary data center for CME. The 1NE Data Center will be redesigned and become the primary backup data center in place of CME's current backup data center, the Remote Data Center (''RDC''). The proposed change does not involve any changes to CME's rulebook.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CME included statements concerning the purpose and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CME has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

As a derivatives clearing organization (''DCO'') registered with the Commodity Futures Trading Commission (''CFTC''), CME has an obligation to establish and maintain a business continuity and disaster recovery plan. The procedures associated with this plan are intended to ensure that CME has sufficient physical, technological and personnel resources to enable the timely recovery and resumption of operations following disruptions. Maintaining backup data centers is one component of these procedures.

With this filing, CME proposes to activate its New York Data Center (''1NE Data Center'') as its primary backup data center. The 1NE Data Center currently operates in part as a tertiary data center for CME. The 1NE Data Center will be redesigned and will become the primary backup data center in place of CME's current backup data center, the Remote Data Center (''RDC''). The 1NE Data Center will be an ''all disaster recovery data center'' housing the primary back-up for electronic trading, clearing, and regulatory infrastructures. It will also continue to house CME's New York trading floor and office staff systems as well.

CME believes the proposed change will increase the reliability and security of its backup facilities. First, the new back-up facility is located in a distinct geographic area from CME's primary facility and therefore CME Group would have capabilities to mitigate risks associated with a large scale disruption associated with only one geographical area (for example, a weather event). In addition, because CME Group's new datacenter strategy employs single IP connectivity, customers will no longer have to change their configurations or take any additional steps to connect to the backup datacenter and therefore the switch from CME Group's production to back-up data center will be seamless for CME Group's customers.

CME believes that implementation of the proposed change will therefore allow it to continue to maintain a robust and effective business continuity program. The proposed change does not involve any changes to CME's rulebook. CME currently plans to operationalize the new 1 NE Data Center as soon as all required regulatory approvals are obtained. CME is currently making preparations to implement the change as of November 25, 2013. CME notes that it has also submitted the proposed changes to the CFTC in a separate filing, CME Submission 13–379, as an ''Advance Notice'' filing pursuant to CFTC Regulation 40.10(a).

CME believes the proposed rule changes are consistent with the requirements of the Act including Section 17A of the Act.[3] The proposed rule changes involve enhancements to CME's business continuity and disaster recovery plan procedures and, as such, are designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivatives agreements, contracts, and transactions, to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, and, in general, to protect investors and the public interest consistent with Section 17A(b)(3)(F) of the Act.[4] The proposed rule changes designate a new location as CME's primary backup data center in the event of a disruption. The area that is proposed to be designated as the new back-up area currently operates as a tertiary data center for CME. This proposed new back-up facility is not located near CME's primary facilities. This means that CME will be able to mitigate risks associated with a large scale disruption associated with only one geographical area (for example, a weather event). In addition, because CME's new datacenter strategy employs single IP connectivity, customers will no longer have to change their configurations or take any additional steps to connect to the backup datacenter and therefore the switch from CME's production to back-up data center will be seamless for CME's customers. Further, the new backup

Managing Director and General Counsel, Citadel Securities, dated October 15, 2013; Michael J. Simon, Secretary, ISE, dated October 16, 2013; Harris Bock, Chief Executive Officer, Dynamex Trading LLC, dated October 17, 2013; Jeffrey Kaufman, Managing Partner, Lakeshore Securities LP, dated October 25, 2013; Gerald D. O'Connell, Chief Compliance Officer, Susquehanna International Group, LLP, dated October 30, 2013; and Ronald M Pittelkau, MNR Executions, LLC, dated November 7, 2013.

[5] *See* Securities Exchange Act Release No. 70733, 78 FR 64257 (October 28, 2013).

[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78q–1.

[4] 15 U.S.C. 78q–1(b)(3)(F).

location will act as the primary back-up for electronic trading, clearing, and regulatory infrastructures.

For these reasons, CME believes this change will increase the reliability and security of its backup facilities. Because the change is designed to help ensure that critical business activities will be able to be performed in a timely manner even in the event of a significant disruption, CME believes the change should be seen to contribute to the safeguarding of securities and funds in CME's custody or control or for which CME is responsible and the protection of investors. As such, CME believes the proposed changes are consistent with the purposes and requirements of Section 17A(b)(3)(F) of the Act.[5]

B. Self-Regulatory Organization's Statement on Burden on Competition

CME does not believe that the proposed rule change will have any impact, or impose any burden, on competition. The designation of a new backup data center should not be seen to have any competitive effects.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

CME has not solicited comments regarding this proposed rule change. CME has not received any unsolicited written comments from interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*), or
- Send an email to *rule-comment@sec.gov*. Please include File No. SR–CME–2013–24 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC, 20549–1090.

All submissions should refer to File Number SR–CME–2013–24. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CME and on CME's Web site at *http://www.cmegroup.com/market-regulation/rule-filings.html.*

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CME–2013–24 and should be submitted on or before December 18, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28422 Filed 11–26–13; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78q–1(b)(3)(F).

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70912; File No. SR–NYSEARCA–2013–128]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services To Specify the Method of Billing When More Than One Pricing Tier Could Be Applicable

November 21, 2013.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 15, 2013, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services (the ''Fee Schedule'') to specify the method of billing when more than one pricing tier could be applicable. The Exchange proposes to implement the Fee Schedule change immediately. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to specify the method of billing when more than one pricing tier could be applicable. The Exchange proposes to implement the Fee Schedule change immediately.

An ETP Holder may qualify for several different pricing ''Tiers'' based on its level of activity during a particular month. These Tiers each have a corresponding fee or credit that applies to the ETP Holder's transactions during the month. Generally, a qualifying ETP Holder would be subject to a lower transaction fee or a higher transaction credit, depending on the particular Tier. For example, an ETP Holder that qualifies for Tape C Step Up Tier 2 receives an incremental $0.0002 per share credit for executions that provide liquidity to the Book in Tape C securities, which is in addition to the ETP Holder's Tiered or Basic Rate credit(s) (e.g., $0.0002 in addition to the $0.0030 credit under Tier 1).[4]

Due to the lower fee or higher credit that applies, certain of the pricing Tiers specify that a qualifying ETP Holder is not able to qualify to receive certain other specific Tier pricing. Continuing with the example above, Tape C Step Up Tier 2 provides that Investor Tier 1 and Cross-Asset Tier ETP Holders, among others, cannot qualify for Tape C Step Up Tier 2.[5] Without these exclusions, an ETP Holder could receive a higher credit than intended (e.g., $0.0034 under Investor Tier 1 plus $0.0002 under Tape C Step Up Tier 2 would be a total credit of $0.0036) or lower fees compared to the other fees and credits in the Fee Schedule.[6]

The Exchange determines qualifications for the Tiers after the billing month ends. If an ETP Holder or Market Maker qualifies for more than one Tier in the Fee Schedule, the Exchange applies the most favorable rate available under such Tiers. For example, if an ETP Holder or Market Maker qualifies for both the Cross-Asset Tier and the Tape C Step Up Tier 2, the Exchange will apply the single most favorable tier to the ETP Holder or Market Maker. The Exchange has consistently applied pricing in this manner and now proposes to codify this practice by adding text to the Tiers in the Fee Schedule that could be effected.

The proposed change is not otherwise intended to address any other issues and the Exchange is not aware of any problems that ETP Holders would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[8] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed change is reasonable because it specifies the Exchange's current method of billing when more than one pricing Tier could be applicable to an ETP Holder. This method of billing is reasonable because it results in the application of the most beneficial fees and credits for which an ETP Holder qualifies when an ETP Holder qualifies for more than one pricing Tier. The proposed change is equitable and not unfairly discriminatory because it applies to all ETP Holders equally. The proposed change is also equitable and not unfairly discriminatory because it eliminates the potential for an ETP Holder that qualifies for more than one pricing Tier to receive less favorable pricing than other ETP Holders that qualify for one of the same Tiers.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[9] the Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, the proposed change describes the Exchange's existing method of applying fees and credits for ETP Holders that qualify for the various Tiers within the Fee Schedule. This billing method is designed to result in the application of the most beneficial fees and credits for which an ETP Holder qualifies if such ETP Holder qualifies for more than one pricing Tier. This billing method is also designed to increase competition on the Exchange by eliminating a potential disincentive for ETP Holders to submit orders on the Exchange—i.e., if less beneficial fees and credits could apply as a result of qualifying for multiple Tiers. Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee or credit levels at a particular venue to be unattractive. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. The billing method described herein is based on objective standards that are applicable to all ETP Holders and reflects the need for the Exchange to offer significant financial incentives to attract order flow. For these reasons, the Exchange believes that the proposed rule change reflects this competitive environment and is therefore consistent with the Act.

[4] To qualify for the Tape C Step Up Tier 2 an ETP Holder must directly execute providing average daily volume (''ADV'') in Tape C securities (''Tape C Adding ADV'') during the billing month that is at least 2 million shares greater than the ETP Holder's Tape C Adding ADV during the second quarter of 2012 (''Q2 2012''), subject to the ETP Holder's combined providing ADV in Tape A, Tape B, and Tape C Securities during the billing month as a percentage of consolidated ADV (''CADV'') being no less than during Q2 2012.

To qualify for Tier 1, an ETP Holder must (1) provide liquidity an ADV per month of 0.70% or more of CADV or (2) (a) provide liquidity an ADV per month of 0.15% or more of CADV and (b) be affiliated with an Options Trading Permit (''OTP'') Holder or OTP Firm that provides an ADV of electronic posted executions (including all account types) in Penny Pilot issues on NYSE Arca Options (excluding mini options) of at least 100,000 contracts, of which at least 25,000 contracts must be for the account of a market maker.

[5] To qualify for Investor Tier 1, an ETP Holder must (1) provide liquidity of 0.60% or more of CADV per month, (2) maintain a ratio of cancelled orders to total orders of less than 30%, excluding Immediate-or-Cancel orders, and (3) maintain a ratio of executed liquidity adding volume-to-total volume of greater than 80%.

To qualify for the Cross Asset Tier, an ETP Holder must (1) provide liquidity of 0.40% or more of the CADV per month, and (2) be affiliated with an OTP Holder or OTP Firm that provides an ADV of electronic posted Customer executions in Penny Pilot issues on NYSE Arca Options (excluding mini options) of at least 0.95% of total Customer equity and exchange-traded fund option ADV, as reported by The Options Clearing Corporation.

[6] *See* Securities Exchange Act Release No. 67461 (July 18, 2012), 77 FR 43408, 43409 (July 24, 2012) (SR–NYSEArca–2012–69) in which the Exchange noted its belief that prohibiting certain ETP Holders from qualifying for the Tape C Step Up Tier 2 was reasonable, equitable and not unfairly discriminatory because the ETP Holders that qualify for certain other Tiers would already receive a higher credit for such executions.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4) and (5).

[9] 15 U.S.C. 78f(b)(8).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [10] of the Act and subparagraph (f)(2) of Rule 19b–4 [11] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [12] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEARCA–2013–128 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEARCA–2013–128. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEARCA–2013–128 and should be submitted on or before December 18, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28417 Filed 11–26–13; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(2).

[12] 15 U.S.C. 78s(b)(2)(B).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70915; File No. SR–NASDAQ–2013–140]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify NASDAQ Connectivity Options and Fees

November 21, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 8, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify NASDAQ connectivity options and fees.

The text of the proposed rule change is available from NASDAQ's Web site at *http://nasdaq.cchwallstreet.com/Filings/*, at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify Rule 7034(b) regarding connectivity to NASDAQ. Specifically, the Exchange proposes to establish connectivity and installation fees for a 1Gb Ultra low latency fiber connection option, and to adopt installation fees for subscriptions through January 31, 2014.

The Exchange currently offers various bandwidth and speed options for connectivity to NASDAQ, including copper, fiber, and wireless options in bandwidths ranging from 1Gb to 40Gb. Thus, for example, NASDAQ currently offers both a 1Gb fiber connection, and a 1Gb copper connection.[3]

In keeping with changes in technology, the Exchange now proposes to provide another 1Gb fiber connection offering, which uses new lower latency switches.[4] A switch is a type of network hardware that acts as the ''gatekeeper'' for all of a co-located client's orders sent to the System [5] at the NASDAQ co-

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Rule 7034(b).

[4] The term ''latency'' for these purposes is a measure of the time it takes for an order to enter into a switch and then exit for entry into the System.

[5] As defined by Rule 4751(a).

location facility and orders them in sequence for entry into the System for execution. Each of NASDAQ's current connection offerings (copper, fiber, wireless) uses different switches, but the switches are of uniform type within each offering (i.e., all fiber connectivity options currently use the same switches). As a consequence, all co-located client subscribers to a particular connectivity option receive the same latency in terms of the capabilities of their switches. The 1Gb Ultra offering will use a low latency switch, which provides faster processing of orders sent to it in comparison to the current 1G switch in use for co-location connectivity. As a consequence, co-located clients needing only 1Gb of bandwidth, but that seek faster processing of those orders as they enter NASDAQ's co-location facility now have the option to subscribe to a faster and more efficient connection to the Exchange.[6]

The Exchange proposes a monthly subscription fee of $2,500 for a 1Gb Ultra connection, and a one-time installation fee of $1,500. NASDAQ believes that the pricing reflects the hardware and other infrastructure and maintenance costs to NASDAQ associated with offering technology that is at the forefront of the industry. The $1,500 installation fee for the 1Gb Ultra product exceeds the $1,000 installation fee for the existing 1Gb product due to the added complexity of installing the Ultra product. In order to achieve lower latency, the Ultra product requires not only the installation of a fiber telecommunications line; it also requires the additional installation of sophisticated switching equipment.

The new low latency service will be completely optional based on whether potential users perceive sufficient value to adopt the new service. This new low latency service decreases the time individual orders are processed and market data is transmitted by these new switches. The Exchange's proposal provides the co-located client the option for faster switch processing, which is highly-valued among some market participants. NASDAQ notes that other markets have adopted low-latency connectivity options for their users. For example, the International Securities Exchange LLC (''ISE'') offers a 10Gb low latency Ethernet connectivity option to its users, which provides a ''higher speed network to access [ISE's] Optimise trading system.''[7]

The Exchange also proposes to provide a waiver of the installation fees for client orders of 1Gb Ultra fiber connectivity to NASDAQ completed between the effectiveness of this proposal and January 31, 2014. The Exchange is providing the waiver to assist its co-located clients in upgrading to lower latency connections to meet the growing needs of co-located clients' business operations.

NASDAQ is also deleting text that refers to an installation fee waiver time period for 10Gb Ultra connections, which has since expired, and replacing it with the fee waiver for the 1Gb Ultra offering.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[8] in general, and with Section 6(b)(4) of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act[10] in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest and is not designed to permit unfair discrimination between customer, issuers, brokers and dealers.

The Exchange believes that its proposal is consistent with Section 6(b)(4) of the Act because the fees assessed for 1Gb Ultra fiber connectivity allow the Exchange to cover the costs associated with the purchase of new equipment for this new offering. NASDAQ is offering 1Gb Ultra fiber connectivity at a premium to the current 1Gb offering but at a discount to the 10Gb and 40Gb fiber connectivity offerings as these provide more bandwidth available on NASDAQ, which is important for co-located clients that have high order flow and ingest large amounts of market data and demand the greatest bandwidth possible to handle such message flow. Some co-located clients, however, do not have bandwidth demands that would require 10Gb or 40Gb fiber bandwidth but rather put a premium on reducing latency. The 1Gb Ultra fiber connectivity it designed to meet this demand.

NASDAQ believes that the proposed one-time installation fee is consistent with Section 6(b)(4) of the Act because it is identical to the installation fees assessed for 40Gb fiber connectivity and 10Gb Ultra connectivity under the rule. NASDAQ notes that it will incur the same costs associated with setting up a subscriber with either 40Gb fiber or 10Gb Ultra fiber connectivity. As a consequence, NASDAQ believes that it is reasonable to assess the same installation fee as 40Gb fiber and 10Gb Ultra. The Exchange also believes that its proposal to waive temporarily the 1Gb Ultra fiber connection installation fee is reasonable because it will assist its co-located clients in upgrading to lower latency connections to meet the growing needs of the co-located clients' business operations at a time in the industry when speed continues to be a driver of the U.S. securities markets. Moreover, the Exchange notes that it has previously waived the installation fees for the 10Gb Ultra and 40Gb fiber connections for a limited time after these connectivity options were first introduced.[11]

In addition to covering costs, the proposed fees provide the Exchange a profit while providing customers the ability to reduce the latency of their orders sent via these new connections. As discussed above, ISE offers different connectivity options with respect to latency, charging higher fees for lower latency options.[12] Therefore, the Exchange believes it is reasonable also to charge higher fees for lower latency options. Also, NASDAQ's fee compares favorably to fees at NYSE Arca, Inc. NYSE Arca offers a 1Gb connection for a monthly fee of $5,000, which is double NASDAQ's proposed monthly fee for the 1Gb Ultra fiber connectivity option.[13] NASDAQ notes that the 1Gb Ultra fiber option provides connectivity to all seven of the NASDAQ OMX Group markets, whereas the offerings of

[6] The Exchange is not offering a low latency option for other bandwidth connections at this time, but may do so in the future.

[7] *See* Securities Exchange Act Release No. 66525 (March 7, 2012), 77 FR 14847 (March 13, 2012) (SR–ISE–2012–09).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78f(b)(5).

[11] See Securities Exchange Act Release No. 66428 (February 21, 2012), 77 FR 11602 (February 27, 2012) (SR–NASDAQ–2012–028).

[12] ISE offers both an Ethernet connectivity option and an Ethernet/Low Latency connectivity option. At 10Gb, the Ethernet option costs $4,000 monthly and the Ethernet/Low Latency option costs $7,000 monthly. *See http://www.ise.com/assets/documents/OptionsExchange/legal/fee/fee_schedule.pdf.*

[13] NYSE charges $5,000 per month for a 1Gb LCN (Liquidity Center Network) Connection. *See https://usequities.nyx.com/sites/usequities.nyx.com/files/nyse_price_list_9_3_13_-_corrected.pdf,* page 14.

other exchanges provide far fewer.[14] For these reasons, the Exchange believes the proposed fees for 1Gb Ultra fiber connectivity to NASDAQ are reasonable.

The Exchange also believes the proposed 1Gb Ultra fiber installation and connectivity fees are equitably allocated in that all co-located clients that voluntarily select this service option will be charged the same amount to cover the hardware, installation, testing and connection costs to maintain and manage the enhanced connection. The proposed fees allow the Exchange to recoup costs associated with providing the 1Gb Ultra fiber connection and provide the Exchange a profit while providing customers with the more efficient connection to the System in terms of latency. All co-located clients have the option to select this voluntary co-location connectivity option; however, NASDAQ is not currently eliminating any existing connectivity options. Accordingly, a co-located client may elect not to subscribe to the 1Gb Ultra fiber connectivity option and retain the option to which it is currently subscribed.

The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act[15] in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest and is not designed to permit unfair discrimination between customer, issuers, brokers and dealers. The 1Gb Ultra fiber connectivity option assists co-located clients in making their network connectivity more efficient by reducing the time orders take to reach the System once sent from their co-located server and also the time that market data takes to reach their co-located server. Speed and efficiency are important drivers of the U.S. securities markets and NASDAQ is offering a co-location connectivity solution that promotes these drivers by providing technology that is available to all co-located clients. The Exchange believes the enhanced 1Gb Ultra connection will remove impediments to and perfect the mechanism of a free and open market and a national market system because NASDAQ will provide this switching technology to market participants, which will improve the speed and efficiency of processing orders arriving at the market from clients' co-located servers.

The Exchange also believes that the reduction in latencies attributed to the enhanced 1Gb Ultra connection option serves to protect investors and the public interest. The reduction in latency will provide investors with the most efficient means of processing orders once they reach the Exchange. Not all clients require the Higher bandwidth options like NASDAQ's current 10Gb, 10Gb Ultra and 40Gb fiber connectivity, so this new option enables clients to lower their latency while not increasing the bandwidth.

The Exchange also believes the proposed installation and subscription fees for the 1Gb Ultra fiber connectivity option are not unfairly discriminatory because all users have the option to subscribe to co-locate with NASDAQ and subscribe to the 1Gb Ultra connection. There is no differentiation among co-located clients with regard to the fees charged for these services. The Exchange believes the proposal to waive the 1Gb Ultra fiber connection installation fee is not unfairly discriminatory because the waiver of fees is provided to all co-located clients that volunteer for this particular service option during the prescribed timeframe, and there is no differentiation among co-located clients with regard to the waiver of fees for this option.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, the Exchange believes that the proposed changes will promote competition by offering co-located clients an additional connectivity option that will enhance their trading operations and ultimately bring greater speed and efficiency to trading in the marketplace. NASDAQ further notes that the proposed option is voluntary in that the Exchange is not required to offer this connectivity, and the user is not required to utilize it. The competitiveness of the offering will determine whether a particular user will adopt the option or not.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[16] and Rule 19b–4(f)(6) thereunder.[17] Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[18] and Rule 19b–4(f)(6) thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6)[20] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[21] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange represented that its proposal provides co-located clients an option to enhance the efficiency of their trading through the 1Gb Ultra connectivity and believes that the benefits gained in the facilitation of trading activities warrants the waiver of the 30-day operative delay. The Exchange stated it is also providing a waiver of the installation fee for the 1Gb Ultra connection service to allow the co-located clients who select this service to receive its benefits immediately. For the above reasons, the Commission believes waiver of the operative delay is appropriate and hereby grants the Exchange's request and designates the proposal operative upon filing.[22]

[14] The ISE connectivity offering provides access to one market and the NYSE Arca connectivity offering provides connectivity to the four markets of NYSE Euronext.

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78s(b)(3)(A)(iii).

[17] 17 CFR 240.19b–4(f)(6).

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has met this requirement.

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6)(iii).

[22] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [23] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2013–140 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2013–140. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2013–140 and should be submitted on or before December 18, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28420 Filed 11–26–13; 8:45 am]

BILLING CODE 8011–01–P

[23] 15 U.S.C. 78s(b)(2)(B).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Life Stem Genetics Inc.; Order of Suspension of Trading

November 25, 2013.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Life Stem Genetics Inc. because of questions regarding the accuracy of assertions by the company, and by others, including in press releases to investors concerning, among other things, the company's operations.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EST, on November 25, 2013 through 11:59 p.m. EST, on December 9, 2013.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2013–28607 Filed 11–25–13; 11:15 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice 8530]

Certification Under the Department of State, Foreign Operations, and Related Programs Appropriations Act

Certification Pursuant to Section 7041(a) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012 (DIV. I, Pub. L. 112–74) as Carried Forward by the Full Year Continuing Appropriations Act, 2013 (DIV. F, Pub. L. 113–6)

By virtue of the authority vested in me as Secretary of State pursuant to section 7041(a) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012 (Div. I, Pub. L. 112–74), as carried forward by the Full Year Continuing Appropriations Act, 2013 (Div. F, Pub. L. 113–6), I hereby certify that the Government of Egypt is meeting its obligations under the 1979 Egypt-Israel Peace Treaty.

This determination shall be published in the **Federal Register** and, along with the accompanying Memorandum of Justification, shall be reported to Congress.

Dated: May 3, 2013.

John F. Kerry,

Secretary of State.

Editorial Note: This document arrived at the **Federal Register** on November 20, 2013.

[FR Doc. 2013–28227 Filed 11–26–13; 8:45 am]

BILLING CODE 4710–31–P

DEPARTMENT OF STATE

[Public Notice 8536]

Culturally Significant Objects Imported for Exhibition Determinations: ''Antonio Canova: The Seven Last Works''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Antonio Canova: The Seven Last Works,'' imported from abroad for temporary exhibition within the United States, are

of cultural significance. The objects are imported pursuant to loan agreements with foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Metropolitan Museum of Art, New York, NY, from on or about January 22, 2014, until on or about April 27, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: November 20, 2013.

Evan M. Ryan,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–28498 Filed 11–26–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8537]

Culturally Significant Objects Imported for Exhibition Determinations: ''Christopher Williams: The Production Line of Happiness''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Christopher Williams: The Product Line of Happiness,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Art Institute of Chicago, Chicago, IL, from on or about January 25, 2014, until on or about May 18, 2014; the Museum of Modern Art, New York, NY, from on or about August 2, 2014, until on or about November 2, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: November 21, 2013.

Evan M. Ryan,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–28502 Filed 11–26–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8535]

Culturally Significant Objects Imported for Exhibition Determinations: ''Piero della Francesca: Personal Encounters''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Piero della Francesca: Personal Encounters,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Metropolitan Museum of Art, New York, NY, from on or about January 13, 2014, until on or about March 30, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: November 20, 2013.

Evan M. Ryan,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–28497 Filed 11–26–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8534]

Defense Trade Advisory Group; Notice of Open Meeting

AGENCY: Department of State.

ACTION: Notice of meeting.

SUMMARY: The Defense Trade Advisory Group (DTAG) will meet in open session January 16, 2014, to discuss current defense trade issues and topics for further study. Specific agenda topics include: (1) Identify potential negative impacts and unintended consequences of the Export Control Reform Initiatives on industry and provide recommendation on how to overcome/minimize such impacts; (2) Review the impacts on industry for use of the exemptions authorized to support the Defense Trade Cooperation Treaties between the United States and the United Kingdom and Australia respectively; (3) Provide a proposal for an effective export control system for non-lethal, non-Category I UAVs that would facilitate their use in non-military roles; and (4) Review how various USG agencies define controlled unclassified information (CUI), including export controlled technical data, and critical program information (CPI); review the statutory, regulatory and other bases (e.g., policy or directive) for agency control; and assess how USG agencies impose potentially competing requirements on industry for protecting CUI and CPI.

The membership of this advisory committee consists of private sector defense trade representatives, appointed by the Assistant Secretary of State for Political Military Affairs, and advises the Department on policies, regulations, and technical issues affecting defense trade.

Members of the public may attend this open session and will be permitted to participate in the discussion in accordance with the DTAG Chair's instructions. Members of the public may, if they wish, submit a brief statement to the committee in writing.

As access to Department of State facilities is controlled, persons wishing to attend the meeting must notify the

DTAG Alternate Designed Federal Officer (DFO), at the address listed below, by close of business Thursday, January 9, 2014. If notified after this date, the Department's Bureau of Diplomatic security may not be able to complete the necessary processing required for the intended participant to attend the plenary session. A person requesting reasonable accommodation should notify the Alternate DFO by the same date.

Anyone who wishes to attend this plenary session should provide: His/her name; company or organizational affiliation (if any); date of birth; and identifying data such as driver's license number, U.S. Government ID, or U.S. Military ID, to the DTAG Alternate DFO, Lisa Aguirre, via email at *aguirrelv@state.gov.* A RSVP list will be provided to Diplomatic Security. One of the following forms of valid photo identification will be required for admission to the Department of State building: U.S. driver's license, passport, U.S. Government ID, or other Government-issued photo ID.

Personal data is requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Security Records System of Records Notice (State-36) at *http://www.state.gov/documents/organization/103419.pdf* for additional information.

DATES: The meeting will be held on Thursday, January 16, 2014, from 9:00 a.m. until 12:00 p.m. and 1:15 p.m. until 4:00 p.m.

ADDRESSES: The meeting will be held in Dean Acheson Auditorium, Harry S. Truman Building, U.S. Department of State, 2201 C Street NW., Washington, DC 20520. Entry and registration will begin at 8:30 a.m. Please use the building entrance located on 23rd Street between C and D Streets.

FOR FURTHER INFORMATION CONTACT: Lisa Aguirre, PM/DDTC, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political Military Affairs, U.S. Department of State, Washington, DC 20522–0112; telephone (202) 663–2830; FAX (202) 261–8199; or email *aguirrelv@state.gov.*

Dated: November 14, 2013.

Kenneth B. Handelman,

Designated Federal Officer, Defense Trade Advisory Group, Department of State.

[FR Doc. 2013–28496 Filed 11–26–13; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF STATE

[Public Notice 8531]

Determination Under the Foreign Operations, and Related Programs Appropriations Act

Determination Pursuant to Section 7041(a)(1)(C) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012 (DIV. I, Pub. L. 112–74) as Carried Forward by the Full Year Continuing Appropriations Act, 2013 (DIV. F, Pub. L. 113–6)

Pursuant to section 7041(a)(1)(C) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012 (Div. I, Pub. L. 112–74) (''the Act''), as carried forward by the Full Year Continuing Appropriations Act, 2013 (Div. F, Pub. L. 113–6), I hereby determine that it is in the national security interest of the United States to waive the requirements of section 7041(a)(1)(B) of the Act, which concern the provision of Foreign Military Financing for Egypt, and I hereby waive these requirements.

This determination shall be published in the **Federal Register** and, along with the accompanying Memorandum of Justification, shall be reported to Congress.

Dated: May 9, 2013.

John F. Kerry,

Secretary of State.

Editorial Note: This document arrived at the **Federal Register** on November 20, 2013.

[FR Doc. 2013–28214 Filed 11–26–13; 8:45 am]

BILLING CODE 4710–31–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Certification: Pilots and Flight Instructors

AGENCY: Federal Aviation Administration (FAA), DOT

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. FAA regulations prescribe certification standards for pilots, flight instructors, and ground instructors. The information collected is used to determine compliance with applicant eligibility.

DATES: Written comments should be submitted by January 27, 2014.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepe, Room 126B, Federal Aviation Administration, AES–200, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0021

Title: Certification: Pilots and Flight Instructors

Form Numbers: FAA Form 8710–1.

Type of Review: Renewal of an information collection.

Background: Title 14 of the Code of Federal Regulations part 61 (14 CFR part 61) Certification: Pilots, Flight Instructors, and Ground Instructors prescribes minimum standards and requirements for the issuance of airman certificates, and establishes procedures for applying for airman certificates. The Airman Certificate and/or Rating Application form and the required records, logbooks and statements required by the federal regulations are submitted to Federal Aviation Administration (FAA) Flight Standards District Offices or its representatives to determine qualifications of the applicant for issuance of a pilot or instructor certificate, or rating or authorization.

Respondents: Approximately 175,000 certificated pilots.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: Approximately 2.15 hours.

Estimated Total Annual Burden: 301,344 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including 1. Whether the proposed collection of information is necessary for FAA's performance; 2. The accuracy of the estimated burden; 3. Ways for FAA to enhance the quality, utility and clarity of the information collection; and 4. Ways that the burden could be

minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on November 18, 2013.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2013–28212 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Air Taxi and Commercial Operator Airport Activity Survey

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection.

DATES: Written comments should be submitted by January 27, 2014.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepe, Room 126B, Federal Aviation Administration, AES–200, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0067.

Title: Air Taxi and Commercial Operator Airport Activity Survey.

Form Numbers: FAA Form 1800–31.

Type of Review: Renewal of an information collection.

Background: Enplanement data collected from air taxi and commercial operators are required for the calculation of air carrier airport sponsor apportionments as specified by the Airport Improvement Program (AIP), and 49 U.S.C. part A, Air Commerce Safety, and part B, Airport Development and Noise. The data collected serves as the only source of data for charter and nonscheduled passenger data by Part 135 operators (air taxis). The data received on the form is then incorporated into the Air Carrier Activity Information System which is used to determine whether an airport is eligible for AIP funds and for calculating primary airport sponsor apportionment as specified by Title 49 U.S.C. The data collected on the form includes passenger enplanements by carrier and by airport.

Respondents: Approximately 300 Part 135 operators.

Frequency: Information is collected annually.

Estimated Average Burden per Response: 1.5 hours.

Estimated Total Annual Burden: 450 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including 1. Whether the proposed collection of information is necessary for FAA's performance; 2. The accuracy of the estimated burden; 3. Ways for FAA to enhance the quality, utility and clarity of the information collection; and 4. Ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on November 18, 2013.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2013–28213 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2013–54]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before December 17, 2013.

ADDRESSES: You may send comments identified by Docket Number FAA–2013–0815 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jay Turnberg, Federal Aviation Administration, Engine and Propeller Directorate, Standards Staff, ANE–111, 12 New England Executive Park, Burlington, Massachusetts 01803–5229; (781) 238–7116; facsimile: (781) 238–7199; email: *jay.turnberg@faa.gov*; or Andrea Copeland, ARM–200, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; email *andrea.copeland @faa.gov*; (202) 267–8081.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on November 21, 2013.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2013–0815

Petitioner: International Aero Engines, LLC

Section of 14 CFR Affected: § 33.94(a)(1)

Petitioner requests relief to enable it to change the fan blade failure location from the blade outermost retention groove to the blade platform for its engine model PW100G–JM in conducting the blade containment test required by Section 33.94.

[FR Doc. 2013–28397 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA–2013–0027]

Notice of Buy America Waiver for Minivans

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of Buy America Waiver.

SUMMARY: In response to North Front Range Metropolitan Planning Organization's (NFRMPO) request for a Buy America waiver for minivans based upon non-availability, the Federal Transit Administration hereby waives its Buy America final assembly requirement for NFRMPO's procurement of minivans for NFRMPO's vanpool (''VanGo'') program. This waiver is limited to a single purchase not to exceed 25 seven-passenger vehicles to take place no later than December 31, 2014.

DATES: This Buy America waiver is limited to a single purchase not to exceed 25 seven-passenger vehicles and expires on December 31, 2014.

FOR FURTHER INFORMATION CONTACT: Mary J. Lee, FTA Attorney-Advisor, at (202) 366–0985 or *mary.j.lee@dot.gov.*

SUPPLEMENTARY INFORMATION: On April 23, 2013, the North Front Range Metropolitan Planning Organization (NFRMPO) requested a Buy America waiver for the procurement of minivans. In its request, NFRMPO cited a lack of available, Buy America-compliant seven-passenger vehicles for its vanpool program located in northern Colorado and requested a Buy America waiver for its five-year procurement program. According to NFRMPO, a recently issued RFP resulted in no suitable or acceptable bids that meet the Buy America rules. In a second letter dated May 17, 2013, NFRMPO reiterated its request for a Buy America waiver and noted that the Vehicle Production Group (VPG) had ''shut down'' production of its Mobility Vehicle 1 (MV–1), a Buy America compliant vehicle.

According to NFRMPO, its VanGo Vanpool Program includes 75 vans with routes connecting, among others, Fort Collins, Loveland, Greeley, Denver, and Boulder, Colorado; it carries more than 420 commuters daily at 93 percent occupancy. The vanpools in its VanGo Vanpool Program carry between five and eight passengers, which make the larger passenger vans inefficient and too costly and VPG's MV–1 too small and costly.

With certain exceptions, FTA's Buy America requirements prevent FTA from obligating an amount that may be appropriated to carry out its program for a project unless ''the steel, iron, and manufactured goods used in the project are produced in the United States.'' 49 U.S.C. 5323(j)(1). A manufactured product is considered produced in the United States if: (1) All of the manufacturing processes for the product must take place in the United States; and (2) All of the components of the product must be of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents. 49 CFR 661.5(d). If, however, FTA determines that ''the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality,'' then FTA may issue a waiver (non-availability waiver). 49 U.S.C. 5323(j)(2)(B); 49 CFR 661.7(c).

On August 5, 2013, the Federal Transit Administration (FTA) published a notice and sought comments on the North Front Range Metropolitan Planning Organization's (NFRMPO) Buy America waiver request for minivans based upon non-availability. 78 FR 47487. FTA received fourteen comments, including comments from the Mayor of the City of Loveland, the Colorado Department of Transportation, Chrysler Group LLC, Taxicab, Limousine & Paratransit Association, Association for Commuter Transportation, vRide, and a number of anonymous comments.[1] Some comments, including the letter from the City of Loveland's Mayor, referenced a similar Federal Highway Administration notice and appeared to be posted in error. Such comments were forwarded to the appropriate Federal agency.

All correctly posted comments expressed support of a waiver. The Colorado Department of Transportation, Division of Transit and Rail, stated that the VanGo Vanpool Program provides a ''vital commuting service,'' is ''an important component in the strategy to address regional air quality issues,'' including the Denver and North Front Range Air Quality Planning regions that are in non-attainment status for Ozone (O2) and maintenance status for Carbon Monoxide (CO), and the use of minivans is critical to keeping the program ''efficient, affordable and effective.'' Chrysler Group LLC also supports a waiver and cited, among other things, the industry's need for a vehicle with greater seating capacity than the MV–1, and the MV–1's production status, which has resulted in a lack of available Buy America compliant vehicles. Another commenter, the Taxicab, Limousine, & Paratransit Association, agreed with the need for a waiver because of the flexibility that a minivan offers, *e.g.,* greater seating capacity than an MV–1, the lack of the MV–1's performance history data, and the need for greater competition. Other commenters requested a broader and longer-lasting waiver that could be applied to other procurements or an expedited waiver process. Finally, a number of anonymous VanGo commuters posted comments in favor of a waiver.

In response to the comments regarding NFRMPO's waiver request, many of the comments refer to issues that FTA addressed in its December 3, 2012 decision, including, among other things, differences between the MV–1 and traditional minivans, competition, and the need for a blanket waiver. FTA directs interested parties to this decision, 77 FR 71673, for additional information. In addition, FTA notes that AM General LLC recently purchased rights to the MV–1 and expects to resume production of the MV–1 in the near term.

However, FTA appreciates all of the comments and recognizes that there are certain limited circumstances when a waiver is warranted. In its December 3, 2012 decision to rescind the blanket Buy America waiver for minivans and minivan chassis on final assembly (77 FR 71673), FTA stated that, although it rescinded the blanket waiver, it would still review waiver requests for minivans and minivan chassis on a case-by-case basis. Subsequently,

[1] In error, FTA cited two docket numbers in its August 5, 2013 notice, FTA–2012–0029 and FTA–2013–0027. Therefore, FTA considered all comments posted to these two dockets that referenced this waiver request.

NFRMPO requested an individual waiver for its minivan procurement and FTA began reviewing the request according to its stated policy.

Therefore, after careful consideration, and based upon the fact that no manufacturer has identified itself as willing and able to supply the seven-passenger vehicles that NFRMPO requires for its VanGo Vanpool Program that comply with FTA's Buy America requirements, FTA hereby waives its Buy America final assembly requirement of 49 CFR 661.11 for NFRMPO's procurement. This non-availability waiver is limited to NFRMPO and valid for a single purchase not to exceed 25 seven-passenger vehicles for its VanGo Vanpool Program to take place no later than December 31, 2014.

Dated: November 21, 2013.

Dorval R. Carter, Jr.,

Chief Counsel.

[FR Doc. 2013–28467 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Environmental Impact Statement for the Lake Tahoe Passenger Ferry Project, Placer and El Dorado Counties and City of South Lake Tahoe, California

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of Intent to Prepare an Environmental Impact Statement (EIS).

SUMMARY: The Federal Transit Administration (FTA) is issuing this Notice of Intent (NOT) to advise other agencies and the public that it will prepare an Environmental Impact Statement (EIS) for the proposed Lake Tahoe Passenger Ferry Project. The project consists of a cross-lake ferry service with a South Shore Ferry Terminal at the Ski Run Marina in South Lake Tahoe, El Dorado County, California, and a North Shore Ferry Terminal at the Grove Street Pier just west of the Tahoe City Marina in Tahoe City, Placer County, California. The project area encompasses the proposed ferry route on Lake Tahoe, the two ferry terminals, and a vessel assembly and maintenance location using existing facilities at Tahoe Keys Marina, City of South Lake Tahoe, El Dorado County, California. The EIS will evaluate alternatives to the proposed action, including, additional terminal locations, if they are adequate for operations.

The EIS will be prepared in accordance with the requirements of the National Environmental Policy Act (NEPA) and its implementing regulations with FTA as the lead agency. The EIS will be prepared as a joint document that includes an Environmental Impact Report (EIR) prepared pursuant to the California Environmental Quality Act (CEQA) with Tahoe Transportation District (TTD) as the CEQA lead agency, and an EIS for the Tahoe Regional Planning Agency (TRPA) prepared pursuant to the Tahoe Regional Planning Compact (Public Law 96–551), Code of Ordinances, and Rules of Procedure.

The purpose of this notice is to alert interested parties regarding the intent to prepare the EIS; to provide information on the nature of the proposed action and possible alternatives; to invite public participation in the EIS process, including providing comments on the scope of the Draft EIS/EIR/EIS; and to announce that public scoping meetings will be conducted.

DATES: Written comments on the scope of the EIS/EIR/EIS, including the project's purpose and need, the alternatives to be considered, the impacts to be evaluated, and the methodologies to be used in the evaluations should be sent to TTD on or before January 3, 2014 at the address below. See **ADDRESSES** below. Public scoping meetings to accept comments on the scope of the EIS/EIR/EIS will be held on the following dates:

- Wednesday, December 4, 2013; beginning at 9:30 a.m. at the TRPA Advisory Planning Commission Meeting at TRPA's offices at 128 Market Street, Stateline, NV 89449.
- Friday, December 13, 2013; beginning at 9:30 a.m. at the TTD Board Meeting at the Granlibaken Conference Center at 725 Granlibaken Road, Tahoe City, CA 96145.

The TRPA APC and TTD Board meetings will begin at 9:30 a.m.; however, scoping for the proposed project is not time certain. Please refer to the agendas posted at *www.tahoetransportation.org* and *www.trpa.org* no more than one week prior to the meetings for updated information.

The locations are accessible to persons with disabilities. Any individual who requires special assistance, such as a language interpreter, to participate in the scoping meetings should contact Alfred Knotts with TTD at least three days prior to the meetings at (775) 589–5503 or *aknotts@tahoetransportation.org*.

Scoping materials will be available at the meetings and are available on the TTD Web site (*http://tahoetransportation.org/current-capital-projects/lake-tahoe-passenger-ferry-alternatives-analysis*). Paper copies of the scoping materials may also be obtained from Alfred Knotts with TTD at (775) 589–5503 or *aknotts@tahoetransportation.org*. Representatives of Native American tribal governments and of all federal, state, regional and local agencies that may have an interest in any aspect of the project will be invited to be participating or cooperating agencies, as appropriate.

ADDRESSES: Comments will be accepted at the public scoping meetings or they may be sent to Mr. Alfred Knotts, Project Manager, Tahoe Transportation District, P.O. Box 499, Zephyr Cove, NV 89449, or via email at *aknotts@tahoetransportation.org*.

FOR FURTHER INFORMATION CONTACT: Ted Matley, Community Planner, Region IX Office, Federal Transit Administration, 201 Mission Street, Suite 1650, San Francisco, CA 94015, phone (415) 744–2590, or via email at *ted.matley@dot.gov*.

SUPPLEMENTARY INFORMATION:

Scoping

Scoping is the process of determining the scope, focus, and content of an EIS. FTA, TTD, and TRPA invite all interested individuals and organizations, public agencies, and Native American tribes to comment on the scope of the Draft EIS/EIR/EIS. Comments should focus on: alternatives that may be less costly or have less environmental or community impact, while achieving similar transportation objectives and the identification of any significant social, economic, or environmental issues relating to the alternatives that should be addressed in the Draft EIS/EIR/EIS.

NEPA ''scoping'' has specific and fairly limited objectives: to identify the significant environmental issues associated with alternatives to be examined in detail, while also limiting consideration of issues that are not truly significant. It is in the NEPA scoping process that potentially significant environmental impacts, which give rise to the need to prepare an EIS, should be identified. Transit projects may also generate environmental benefits that should also be discussed.

In the interest of producing a readable and user-friendly public document, and pursuant to Title 40 of the Code of Federal Regulations (CFR) § 1502.07 and § 1502.10, the EIS/EIR/EIS shall be clear and concise and limited to 300 pages to the extent feasible recognizing CEQA and TRPA requirements. The EIS/EIR/

EIS technical appendices shall be included in a separate volume.

Purpose and Need for the Project

A public transit project connecting the north and south shores of Lake Tahoe is needed for environmental and mobility reasons. The Lake Tahoe Region has seven points of entry, all served by state or federal highways. Access around the Lake is provided by state or federal highways with much of the route limited to winding, two-lane roadways with changing and often steep grades. During summer and winter months, heavy traffic congestion and rugged mountain terrain can make traveling around the Lake slow and difficult, particularly driving between the north and south shores on the narrow, winding highways. During the winter season traveling these routes can be hazardous as a result of snow and ice on the roadways. Routes can also be restricted in winter to vehicles with only four-wheel drive or closed all together due to avalanche control.

There is no current fixed-schedule, cross-region, public transit service between the north and south shores, so all travel must occur by automobile or other personal motor vehicles. Currently, seasonal water taxi service is available from Tahoe City south to Homewood and north to Carnelian Bay. A south shore water taxi operates between Camp Richardson Resort and Lakeside Marina; however, it does not stop at Ski Run Marina. The absence of a north-south, public transit connection across the region results in added traffic congestion, substantial vehicle miles travelled and attendant criteria air pollutant and greenhouse gas (GHG) emissions, and limited transportation options for transit-dependent populations and visitors to the Region. Substantial motor vehicle air pollutant emissions in the Region also contribute to diminished water quality and clarity in Lake Tahoe.

The purpose of the Lake Tahoe Passenger Ferry Project is to support regional goals and planning mandates by: providing a multi-modal transportation alternative and promoting smart growth; enhancing transportation and regional mobility with a safe, reliable, year-round transit service between the north and south shores; reducing vehicle miles traveled and GHG emissions; improving and maintaining air and water quality; and promoting livability and connectivity within the Tahoe Region. Development of the proposed project would help reduce regional automobile travel, alleviate roadway congestion, and provide a safe, convenient, and affordable alternative for traveling between the north and south shores of Lake Tahoe.

Project Location and Environmental Setting

The proposed action would include development of a South Shore Ferry Terminal at the Ski Run Marina in the City of South Lake Tahoe and a North Shore Ferry Terminal at the Grove Street Pier at the end of Grove Street in Tahoe City. A network of shared-use paths, sidewalks, and bicycle lanes exist near both proposed terminal locations. A brief description of the existing facilities and surrounding land uses is provided below.

Ski Run Marina is a privately-owned marina located at the northern end of Ski Run Boulevard in the City of South Lake Tahoe. The marina includes two connected fixed piers. The piers extend approximately 120 feet and 65 feet from the shore of Lake Tahoe. The Tahoe Queen, a paddle-wheel touring vessel, docks on the westernmost of the two piers. Street access to the terminal site is provided by Ski Run Boulevard and US 50. Existing non-motorized access to Ski Run Marina includes a shared-use path that runs parallel to US 50 on the north side of the highway and on both sides of Ski Run Boulevard. Transit access is provided year-round by the South Shore bus service along US 50, which provides service from the south shore ''Y'' in the City of South Lake Tahoe to Stateline, Nevada with connections to the Emerald Bay trolley (providing seasonal service from the ''Y'' to Tahoe City) and the Lake Valley Express (Stateline to the Carson Valley communities of Carson City, Minden, and Gardnerville in Nevada).

Surrounding land uses include Ski Run Marina Village (a collection of shops and restaurants), Tahoe Beach & Ski and Lake Tahoe Vacation Resort (timeshare accommodations), Tahoe Meadows (an approximately 100 acre private residential community listed on the National Register of Historic Places), Ski Run Boulevard commercial district, Heavenly Mountain Resort at the end of Ski Run Boulevard, and numerous business establishments along US 50.

The Grove Street Pier is a privately-owned pier located just west of the Tahoe City Marina and approximately 0.5 mile east of the intersection of SR 89 and SR 28, known as the ''Y''. The existing Grove Street Pier is a fixed pier that is approximately 400 feet long and 8 feet wide. Surrounding land uses include Commons Beach (a 4-acre park and beach area), the Lakeside Bicycle Trail, the Tahoe City Marina, Safeway, the Marina Mall, the Boatworks Mall, and business establishments along SR 28 within the commercial corridor of Tahoe City. Tahoe Area Regional Transit (TART) operates a local, year-round bus service along SR 28, which provides service between Tahoe City and Truckee and to Lake Tahoe communities from Tahoma to Incline Village. The recently completed Tahoe City Transit Center is west of the pier. Tahoe City has the largest population of the California communities on the north shore of Lake Tahoe and provides access to nearby ski resorts, including Squaw Valley USA, Alpine Meadows Resort, Homewood Mountain Resort, Northstar, Sugar Bowl, and other smaller resorts.

Proposed Alternatives

The TTD conducted an Alternatives Analysis (AA) to evaluate the costs, benefits, and impacts of a range of transportation alternatives to address north-south mobility within the Lake Tahoe Basin. A copy of the AA is available on TTD's Web site at *http://tahoetransportation.org/current-capital-projects/lake-tahoe-passenger-ferry-alternatives-analysis*. Ten alternatives were evaluated in the AA. The alternatives included four with ferry service only, two with bus service only, and four hybrid alternatives with a combination of bus and ferry service. The AA was approved by the TTD Board on December 9, 2012. The proposed action reflects the locally preferred alternative (LPA) adopted by the TTD Board on April 13, 2012. The alternatives being evaluated include:

No Project Alternative: Under the No Project Alternative, no ferry terminals would be developed and year-round transit service between the north and south shores would not occur.

Proposed Action: Ferry service would be provided year-round, with a travel time of approximately 25 minutes between terminals and hourly headways (i.e., the length of time between departures). Projected daily ridership is estimated to be between 1,600 to 1,800 passengers, using two ferry vessels. Limited parking for ferry passengers would be provided at or near the terminals. Passengers would also be encouraged to use existing public transit and/or pedestrian and bicycle facilities to access the terminals.

The proposed ferry vessels would be catamarans (a vessel with two parallel hulls) with a passenger capacity of up to 150 persons. The vessel currently under consideration would provide space for bicycles. The passenger ferry, Rich Passage I, used for service between Seattle and Bremerton in Washington, is representative of the type of vessel proposed for the Lake Tahoe Passenger

Ferry Project. The vessels would be assembled at a site within the Tahoe Keys Marina in the City of South Lake Tahoe.

Vessel maintenance would also occur at the Tahoe Keys Marina using existing dry-dock and other facilities. Some required maintenance inspections could take place in the water. The Tahoe Keys Marina already provides maintenance services to vessels of a similar size (such as, The Safari Rose, an 80-foot vessel, and the Woodwind II).

Refueling of the ferry vessels would occur by truck or would require development of fueling facilities or improvement of existing fueling infrastructure at the identified ferry terminals.

Modifications to the existing piers would involve increasing the length of the piers, adding ramped access that meets Americans with Disability Act (ADA) standards, and constructing a floating pier platform that would be long enough to accommodate the ferry and at least 16 feet in width. The area surrounding the proposed pier expansions and floating platforms would require dredging for construction and maintenance dredging to provide sufficient depth during low-lake-level periods. The security requirements at each ferry terminal would likely include fencing, gates, security cameras, lighting, and alarms

Alternatives: Action alternatives that may be considered could include alternative pier designs (such as, a fixed versus floating pier), landside facility configurations, vessel sizes, operational characteristics (such as, service frequency), terminal locations, and/or assembly and maintenance sites. Other reasonable alternatives identified through the public and agency scoping process will be evaluated for potential inclusion in the Draft EIS/EIR/EIS.

Probable Effects

The purpose of this EIS/EIR/EIS is to study, in a public setting, the effects of the proposed action and its alternatives on the physical, human, and natural environment. The FTA, TTD, and TRPA will evaluate all significant environmental, social, and economic impacts of the construction and operation of the proposed project. The probable impacts will be determined as a part of the project scoping. Measures to avoid, minimize, and mitigate adverse impacts will also be identified and evaluated.

FTA Procedures

The regulations implementing NEPA call for public involvement in the EIS process. FTA is required by 23 U.S.C. § 139 to do the following: (1) extend an invitation to other federal and non-federal agencies and Native American tribes that may have an interest in the proposed project to become ''participating agencies;'' (2) provide an opportunity for involvement by participating agencies and the public to help define the purpose and need for a proposed project, as well as the range of alternatives for consideration in the EIS; and (3) establish a plan for coordinating public and agency participation in, and comment on, the environmental review process. An invitation to become a participating or cooperating agency, with scoping materials appended, will be extended to other federal and non-federal agencies and Native American tribes that may have an interest in the proposed project. It is possible that FTA will not be able to identify all federal and non-federal agencies and Native American tribes that may have such an interest. Any federal or non-federal agency or Native American tribe interested in the proposed project that does not receive an invitation to become a participating agency should notify at the earliest opportunity the Project Manager identified above under **ADDRESSES**.

A comprehensive public involvement program and a Coordination Plan for public and interagency involvement will be developed for the project and posted by TTD on the project Web site (*http://tahoetransportation.org/current-capital-projects/lake-tahoe-passenger-ferry-alternatives-analysis*). The public involvement program includes a full range of activities including a public scoping process to define the issues of concern, a project Web page on the TTD Web site, and outreach to local officials, community and civic groups, and the public. Specific activities or events for involvement will be detailed in the public involvement program.

FTA will comply with all applicable Federal environmental laws, regulations, and executive orders during the environmental review process. These requirements include, but are not limited to, the project-level air quality conformity regulation of the U.S. Environmental Protection Agency (EPA) (40 CFR part 93); the § 404(b)(1) guidelines of EPA (40 CFR part 230); the regulation implementing EPA's Anti-degradation Policy (40 CFR 131.12) for Outstanding National Resource Waters, such as Lake Tahoe; the regulations implementing Section 106 of the National Historic Preservation Act (36 CFR part 800), Section 7 of the Endangered Species Act (50 CFR part 402), and Section 4(1) of the Department of Transportation Act (23 CFR part 774); and, Executive Orders 12898 on environmental justice, 11988 on floodplain management, 11990 on wetlands, 13175 on Indian trust assets and Native American consultation, 13112 on invasive species, and 12962 on recreational fisheries.

Dated: November 19, 2013.

Leslie T. Rogers,

Regional Administrator Regional IX, Federal Transit Administration.

[FR Doc. 2013–28352 Filed 11–26–13; 8:45 am]

BILLING CODE M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2013–0080; Notice 2]

Combi USA, Inc., Denial of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of Petition Denial.

SUMMARY: Combi USA, Inc., (Combi),[1] has determined that certain model child restraint systems manufactured between 2007 and 2012 do not fully comply with paragraph 5.4.1.2(a) of Federal Motor Vehicle Safety Standard (FMVSS) No. 213, *Child Restraint Systems.* (49 CFR 571.213). Combi has filed an appropriate report dated June 9, 2013, pursuant to 49 CFR Part 573, *Defect and Noncompliance Responsibility and Reports.*

Pursuant to 49 U.S.C. 30118(d) and 30120(h) and the rule implementing those provisions at 49 CFR part 556, Combi has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety. The National Highway Traffic Safety Administration (NHTSA) published a notice of receipt of the petition, with a 30-day public comment period, on August 9, 2013, in the **Federal Register** (78 FR 48767). No comments were received in response to Combi's petition.

To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) Web site at: *http://www.regulations.gov/.* Then follow the online search instructions to locate docket number ''NHTSA–2013–0080.''

FOR FURTHER INFORMATION CONTACT: For further information on this decision

[1] Combi is a U.S. company that manufactures child restraint systems.

contact Mr. Tony Lazzaro, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366–5304, facsimile (202) 366–7002.

Relevant Requirements of FMVSS No. 213: FMVSS No. 213 paragraph S5.4.1.2(a) requires, in pertinent part, that ''the webbing of belts provided with a child restraint system and used to attach the system to the vehicle or to restrain the child within the system shall— (a) Have a minimum breaking strength for new webbing of . . . not less than 11,000 N in the case of the webbing used to secure a child to a child restraint system when tested in accordance with S5.1 of FMVSS No. 209.''

The term ''new webbing'', is ''webbing that has not been exposed to abrasion, light, or micro-organisms.'' (49 CFR § 571.213, S5.4.1.2(a)).

Child Restraints Involved: Affected are 23,357 Combi Coccoro 2009–2012 model child restraint systems (model #8820), 5,391 Combi Zeus 360 2009–2012 model child restraint systems (model #8836), and 4,391 Combi Zeus Turn 2007–2009 model child restraint systems (model #8815).

Noncompliance: Combi acknowledges that the affected child restraint systems do not meet the minimum breaking strength requirements of FMVSS No. 213 paragraph 5.4.1.2(a). Combi submitted a preliminary Noncompliance Information Report on June 9, 2013. Combi submitted a supplemental Noncompliance Information Report on July 1, 2013.

Summary of Combi's Analysis and Arguments

Combi described the noncompliance as follows:

> Combi USA, Inc. has identified a noncompliance with certain Model #8220 Coccoro Convertible child restraints when the webbing assembly within the restraint is subjected to the minimum breaking strength requirements as specified in FMVSS No. 213 section 5.4.1.2 (a).

Combi filed the same statement describing the noncompliance for the Zeus Turn and Zeus 360 models of child restraint systems. In support of its petition, Combi states that as part of NHTSA's 2012 safety compliance testing of the subject Coccoro child restraint system harness webbing, the breaking strength yielded results of 8,990 N, 9,170 N, and 9,300 N. As noted earlier, paragraph 5.4.1.2(a) of FMVSS No. 213 requires a minimum breaking strength of 11,000 N for webbing used to restrain a child within a child restraint system. Combi also noted that all of the subject Coccoro child restraint systems were produced with the identical harness system as tested by NHTSA in 2012.

Combi further noted that all of the subject Zeus 360 and Zeus Turn child restraint systems were produced with the same embedded stop button within the harness system as the Coccoro child restraints which were tested by NHTSA in 2012.

Combi stated in its petition that the production of the Zeus Turn child restraint system ended on March 25, 2009, and that the production of the Zeus 360 child restraint system ended on May 24, 2012. Combi also explained that it has implemented an engineering modification which removes the embedded stop button to all of the Coccoro child restraints produced since January 29, 2013.

In support of its petition, Combi stated that it has not received notice of any partial or complete breakage or tearing of the harness system in the Coccoro and Zeus child restraints. In further support of its petition, Combi provided data based on its own dynamic testing of the Coccoro and Zeus 360 child restraint systems. According to Combi, its testing attempted to determine the crash force loading on the harness system of the Coccoro and Zeus 360 child restraints when subjected to the FMVSS No. 213 dynamic crash pulse (30 mph crash pulse) and the NCAP pulse (35 mph crash pulse). Combi's own test results showed load cell values ranging from approximately 1,150 N to 1,900 N. Combi stated that these testing results confirm that the harness assemblies of the subject Coccoro, Zeus 360, and Zeus Turn child restraints will not fail in a real world crash under any circumstances, as the forces acting on the harness system in dynamic testing are less than 22 percent of the breaking strength test results determined by NHTSA. Combi therefore asserts that the harness assemblies of the subject Coccoro and Zeus child restraints present no safety risk.

Finally, Combi asserts that given the relatively small number of subject Coccoro, Zeus 360, and Zeus Turn child restraints, the effectiveness of any notification campaign regarding this technical noncompliance will be limited. Combi further states that any noncompliance notice campaign may result in customers deciding to discontinue using their Coccoro and Zeus child restraints for a period of time, adding a risk of injury where none exists as a result of the noncompliance of the harness webbing of the subject Coccoro and Zeus child restraints with the minimum breaking strength requirements of FMVSS No. 213 S5.4.1.2(a).

In summary, Combi contends that the noncompliance is inconsequential to motor vehicle safety, and that its petition to exempt it from providing notification of noncompliance as required by 49 U.S.C. 30118 and remedying the noncompliance as required by 49 U.S.C. 30120, should be granted.

Comments: NHTSA published a notice of the petition in the **Federal Register** to allow an opportunity for members of the public to present information, views, and arguments on the subject petition. As noted earlier, no comments were received. The Agency notes that an absence of opposing argument and data does not require the Agency to grant the petition.[2]

NHTSA'S Consideration of Combi's Inconsequentiality Petition

General Principles: Federal Motor Vehicle Safety Standards are adopted only after the Agency has determined, following notice and comment, that the standards are objective and practicable and ''meet the need for motor vehicle safety.'' *See* 49 U.S.C. 30111(a). Thus, there is a general presumption that the failure of a motor vehicle or item of motor vehicle equipment to comply with a FMVSS increases the risk to motor vehicle safety beyond the level deemed appropriate by NHTSA through the rulemaking process. To protect the public from such risks, manufacturers whose products fail to comply with a FMVSS are normally required to conduct a safety recall under which they must notify owners, purchasers, and dealers of the noncompliance and provide a remedy without charge. 49 U.S.C. 30118–30120.

However, Congress has recognized that, under some limited circumstances, a noncompliance could be ''inconsequential'' to motor vehicle safety. ''Inconsequential'' is not defined either in the statute or in NHTSA's regulations. Rather, the Agency determines whether a particular noncompliance is inconsequential to motor vehicle safety based on the specific facts before it. The relevant issue in determining inconsequentiality is whether the noncompliance in question is likely to significantly increase the safety risk to individuals involved in accidents or to individual occupants who experience the type of injurious event against which the standard was designed to protect. *See*

[2] *See Dorel Juvenile Group; Denial of Appeal of Decision on Inconsequential Noncompliance,* 75 FR 507, 510 (Jan. 5, 2010).

General Motors Corp.; Ruling on Petition for Determination of Inconsequential Noncompliance, 69 FR 19897 (Apr. 14, 2004).

In order to demonstrate inconsequentiality, the petitioner must demonstrate that the noncompliance ''does not create a significant safety risk.'' *See Dorel Juvenile Group;* 75 FR at 510, quoting *Cosco, Inc., denial of Application for Decision of Inconsequential Noncompliance,* 64 FR 29408, 29409 (June 1, 1999). There have been instances in the past where NHTSA has determined that a manufacturer has met its burden of demonstrating that a noncompliance is inconsequential to safety. These include a noncompliance concerning labeling where the discrepancy with the safety standard was determined not to lead to any misunderstanding, especially where sources of the correct information were available (e.g. in the vehicle owner's manual). *See General Motors Corp.,* 69 FR at 19899.

The burden of establishing the inconsequentiality of a failure to comply with a performance requirement in a safety standard is more substantial and difficult to meet, and the Agency has not found many noncompliances related to a safety standard to be inconsequential. *See Id.*

Combi's Argument and NHTSA's Response: In support of its petition, Combi makes several different arguments. First, Combi argues that the company has not received notice of any partial or complete breakage or tearing of the harness system in any Coccoro and Zeus child restraints. The Agency, however, does not consider the absence of complaints to show that the noncompliances are inconsequential to safety. The absence of a complaint does not mean there have not been any problems or failures, and it does not mean that there will not be failures in the future. *See Dorel Juvenile Group, Denial of Petition for Decision of Inconsequential Noncompliance,* 78 FR 53189, 53190 (August 28, 2013).

Second, Combi argues that, based on measured forces acting on the harness system when subjected to FMVSS No. 213 and NCAP crash pulse dynamic testing, the subject child restraints present no motor vehicle safety risk since the measured forces acting on the harness system are less than 22 percent of the breaking strength results determined by NHTSA. The Agency is not persuaded by this argument. NHTSA does not simply have one performance test, a dynamic test. NHTSA has multiple performance tests because a single test does not address the range of safety concerns with child restraints. The webbing breaking strength test and the child restraint system dynamic test do not test for the same conditions and serve distinct purposes. The webbing breaking strength test conditions are necessarily more severe than those for dynamic testing to help ensure that the webbing will afford effective protection for severe crashes, even after the webbing degrades due to abrasion in use and exposure to sunlight. In addressing past similar arguments raised by child restraint system manufacturers who submitted webbing load force data generated in dynamic testing to demonstrate apparent safety margins in comparison to webbing breaking strength test results, the Agency stated that ''[a] 30 mile per hour test is not indicative of the upper limit of safety. The test conditions in FMVSS No. 213 reflect the concern that child restraints will withstand even the most severe crashes. These are well above 30 mph.'' *Dorel Juvenile Group [Cosco] (DJG); Denial of Applications for Determination of Inconsequential Noncompliance,* 73 FR 41397, 41399 (July 19, 2008). While Combi also conducted dynamic testing using the higher NCAP crash pulse, this provides an increase of only 5 mph over the FMVSS No. 213 dynamic crash pulse. In adopting the webbing strength standard, NHTSA has never said and NHTSA does not believe that it is enough that webbing withstands a 35 mph crash. There are real-world severe crashes which take place above this level. In those crashes, the force on the webbing is higher than in a 30 or 35 mph based crash. And, it must be recognized that webbing in child restraints that have been used may be degraded. In such crashes, a child occupant restrained in a child seat with webbing, when new, that merely met a strength test related to a 35 mph crash would be at an increased risk of injury compared with a child restrained in a child seat with webbing that meets the webbing strength test in FMVSS No. 213 S5.4.1.2(a).

Next, Combi asserts that given the relative small number of subject child restraint systems affected, the effectiveness of any notification campaign will be limited. This type of argument is immaterial to the inconsequentiality analysis because ''the number or percentage of vehicles or equipment affected by the noncompliance is not relevant to the issue of consequentiality''. *See General Motors Corp.,* 69 FR 19899; Cosco, Inc., Denial of Application for Decision of Inconsequential Noncompliance, 64 FR 29408, 029409 (June 1, 1999). In addition, the Agency would not necessarily consider an affected population of over 33,000 to be considered a small number when evaluating safety risk.

Finally, Combi argues that any noncompliance notice campaign may result in customers deciding to discontinue using their subject restraint(s) for a period of time thereby adding risk of injury. This argument was not supported with any evidence and the Agency is not persuaded by this argument. The Agency's Recall Management Office will review Combi's noncompliance notification campaign to assure that it is effective and the notification makes it clear to the affected customer(s) that it is better to continue to use the subject child restraint(s) while awaiting the remedy provided by the manufacturer, and that it is unsafe, and in almost all cases unlawful, to transport a child passenger in a motor vehicle without the use of a proper restraint.

Decision: After carefully considering the arguments presented in this matter, NHTSA has decided that the petitioner has not met its burden of persuasion that the noncompliance described is inconsequential to motor vehicle safety. Accordingly, Combi's petition is hereby denied, and the petitioner must notify owners, purchasers and dealers pursuant to 49 U.S.C. 30118 and provide a remedy in accordance with 49 U.S.C. 30120.

Authority: (49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8)

Dated: November 21, 2013.

Nancy Lummen Lewis,

Associate Administrator for Enforcement.

[FR Doc. 2013–28455 Filed 11–26–13; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2012–0005; Notice 2]

Ford Motor Company, Denial of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Denial of Petition.

SUMMARY: Ford Motor Company (Ford) has determined that certain model year 2011 Ford E–150, E–250, E–350 and E–450 motor vehicles manufactured

between May 12, 2011 and May 26, 2011, do not fully comply with paragraph S5.1.1 of Federal Motor Vehicle Safety Standard (FMVSS) No. 205, *Glazing Materials.* Ford has filed an appropriate report pursuant to 49 CFR Part 573, *Defect and Noncompliance Responsibility and Reports,* dated August 22, 2011.

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Ford has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

NHTSA published a notice of receipt of the petition, with a 30-day public comment period, on February 2, 2012, in the **Federal Register** 77 FR 5301. In response to the petition, NHTSA did not receive any comments.

ADDRESSES: To view the petition and all supporting documents, log onto the Federal Docket Management System (FDMS) Web site at: *http://www.regulations.gov/.* Then follow the online search instructions to locate docket number ''NHTSA–2012–0005.''

FOR FURTHER INFORMATION CONTACT: For further information on this decision contact Mr. Luis Figueroa, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366–5298, facsimile (202) 366–7002.

SUPPLEMENTARY INFORMATION:

Vehicles Involved: Affected are approximately 4,532 model year 2011 Ford E–150, E–250, E–350 and E–450 trucks manufactured between May 12, 2011, and May 25, 2011, at Ford's Ohio assembly plant.

Summary of Ford's Analysis and Arguments: Ford described the noncompliance as the formation of air bubbles in the windshields when subjected to high temperatures specified in paragraph S5.1 of FMVSS No. 205.

Paragraph S5.1 of FMVSS No. 205 requires in pertinent part:

> S5.1 Glazing materials for use in motor vehicles must conform to ANSI/SAE Z26.1–1996 (incorporated by reference, see § 571.5) unless this standard provides otherwise . . .
>
> S5.1.1 Multipurpose passenger vehicles. Except as otherwise specifically provided by this standard, glazing for use in multipurpose passenger vehicles shall conform to the requirements for glazing for use in trucks as specified in ANSI/SAE Z26.1–1996 (incorporated by reference, see § 571.5).

Ford expressed its belief that only approximately 100 of the 4,532 subject vehicles may actually develop air bubbles in their windshields.

Ford argues that paragraph S5.1.1 of FMVSS No. 205 specifies meeting the requirements of ANSI Z26.1–1996 Section 5.4 Boil, Test 4. The affected paragraph 5.4.3 ''Interpretation of Results'' states ''The glass itself may crack in this test, but no bubbles or other defects shall develop more than 13 mm (½ in) from the outer edge of the specimen or from any cracks that may develop.'' Although the affected windshields may develop air bubbles, Ford believes this condition does not present a risk to motor vehicle safety for the reasons described below.

The initiation of the air bubbles will most likely occur when the vehicle is parked in the sun with ambient temperatures greater than 80° F, and they occur very early in the life of the vehicle. This was the case for the initial vehicles that exhibited the condition while still at the assembly plant, that was experiencing high seasonal temperatures at the time. Of the 41 field reports of the condition that had occurred as of August 16, 2011, only one occurred subsequent to delivery to a customer. All other field reports were found during pre-delivery vehicle preparation.

The appearance of the air bubbles is a slow process, and there are no reports of air bubbles affecting the entire windshield. If bubbles do occur in the driver vision zone, the vision zone is initially only partially affected. This condition would be noticed by the customer prior to a significant spread of the air bubbles, and the customer would seek repair under Ford's normal 3/36 warranty.

Ford is not aware of accidents or injuries attributed to this condition.

In summation, Ford believes that the described noncompliance of its vehicles to meet the requirements of FMVSS No. 205 is inconsequential to motor vehicle safety, and that its petition, to exempt from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120 should be granted.

Background: FMVSS No. 205 specifies labeling and performance requirements for automotive glazing. FMVSS No. 205 incorporates by reference ANSI Z26.1 (1996). The purpose of Test No. 4 Boil Test (Section 5.4 of ANSI Z26.1 (1996)) is to determine if the glazing material will withstand exposure to tropical temperatures over an extended period of time.

NHTSA's Analysis: Ford believes this condition does not present a risk to motor vehicle safety because the initiation of the air bubbles will most likely occur when the vehicle is parked in the sun with ambient temperatures greater than 80° F. However, data from the National Oceanic and Atmospheric Administration (NOAA) shows that the condition that Ford describes ''sun with ambient temperatures greater than 80° F'' is a very likely event. Data from the NOAA for the USA shows that in early spring (around the month of March 2011) the southern states are already experiencing mean maximum temperatures in excess of 80° F. The same data shows that in July most of the nation is experiencing mean maximum temperatures over 80° F with some states experiencing mean maximum temperatures of over 100° F.

More importantly, the agency believes that the true measure of inconsequentiality is whether there is a safety effect of the noncompliance on the operational safety of the vehicle. In this case if the noncompliance (a bubble or bubbles in the windshield) were to manifest, this condition causes delamination of the glazing material which could weaken the structural integrity around the windshield edge and pose a safety risk to the occupants. Bubbles also could affect the vision of the driver and thus would have a detrimental effect on the operational safety of the vehicle. The agency also notes that the low number of vehicles involved in this case does not lessen the safety issue that the non-compliance creates. The degraded visibility created by the bubbles in the windshield still creates a safety risk even if it only occurs in a few vehicles.

The fact that customers might notice the non-compliance and seek repairs from Ford on their own does not mean that the safety risk posed by the bubbles in the windshield has been completely mitigated.

NHTSA Decision: In consideration of the foregoing, NHTSA has decided that Ford has not met its burden of persuasion that the FMVSS No. 205 noncompliances identified in Ford's Noncompliance Information Report. Accordingly, Ford's petition is hereby denied, and the Ford must notify owners, purchasers and dealers pursuant to 49 U.S.C. 30118 and provide a remedy in accordance with 49 U.S.C. 30120.

Authority: (49 U.S.C. 30118, 30120: delegations of authority at CFR 1.95 and 501.8).

Dated: November 21, 2013.

Nancy Lummen Lewis,

Associate Administrator for Enforcement.

[FR Doc. 2013–28458 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2010–0063; Notice 2]

Foreign Tire Sales, Inc., Denial of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Denial of Petition.

SUMMARY: Foreign Tire Sales, Inc. (FTS), as importer for ProMeter brand medium truck radial replacement tires manufactured by Shandlong Linglong Rubber Company Limited, has determined that certain replacement tires manufactured during the period between the 15th week of 2008 and 22nd week of 2009 do not fully comply with paragraph S6.5(d) of 49 CFR 571.119, Federal Motor Vehicle Safety Standard (FMVSS) No. 119, *New Pneumatic Tires for Motor Vehicles With a GVWR of More than 4,536 Kilograms (10,000 pounds) and Motorcycles.* FTS has filed an appropriate report dated June 11, 2009, pursuant to 49 CFR Part 573, *Defect and Noncompliance Responsibility and Reports.*

ADDRESSES: For further information on this decision, contact Mr. Abraham Diaz, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366–5310.

SUPPLEMENTARY INFORMATION:

FTS's Petition: Pursuant to 49 U.S.C. 30118(d) and 30120(h) and the regulation implementing those provisions at 49 CFR part 556, FTS has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

Notice of receipt of FTS's petition was published with a 30-day public comment period, on June 8, 2010, in the **Federal Register** (75 FR 32536). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System Web site at: *http://www.regulations.gov/.* Then follow the online search instructions to locate docket number ''NHTSA–2010–0063.''

Tires Involved: Affected are approximately 2,659 size 285/75R–24.5 14 ply (steer and drive) and 295/75R–22.5 14 ply (steer and drive) ProMeter brand medium truck radial tires manufactured during the period between the 15th week of 2008 and 22nd week of 2009 with DOT Numbers: 285/75R–24.5—OU4CFTS1508–0U4CFT2209 and 295/75R–22.5—OU34FTS1508–0U34FTS2209.

Summary of FTS'S Analysis: FTS stated that it believed that 100% of the 2,659 tires involved contained the identified non-compliance. FTS says it sold these tires to eleven customers who are distributors. Three of the eleven distributors have not sold any of these tires to their customers.

In a supplemental letter dated April 14, 2010, FTS submitted corrections of typographical errors in its petition and stated that subsequent to submitting its petition it had decided to remedy all of the subject tires that it held in its possession as well as those that had not been sold by its customers (the eleven tire distributors). FTS also revised its estimate of the number of affected tires to 2,000, which encompasses tires that had been sold and not retrieved for remedy. Therefore, it is only those 2,000 tires for which FTS is requesting exemption from the notification and remedy requirements because it claims that the remaining 659 tires have been remedied.

FTS describes the noncompliance as its failure to provide accurate load and inflation information as required by FMVSS No. 119. The maximum load rating and corresponding inflation pressure that are erroneously marked on the FTS tires and the correct information for the non-conforming tires are as follows:

295/75R22.5/14 is marked:

Max. Load Single 2800 kg (6175 lbs) at 720 kPa (105 psi) cold.

Max. Load Dual 2650 kg (5840 lbs) at 720 kPa (105 psi) cold.

295/75R22.5/14 should be marked:

Max. Load Single 2800 kg (6175 lbs) at 760 kPa (110 psi) cold.

Max. Load Dual 2575 kg (5675 lbs) at 760 kPa (110 psi) cold.

285/75R24.5/14 is marked:

Max. Load Single 3000 kg (6610 lbs) at 720 kPa (105 psi) cold.

Max. Load Dual 2725 kg (6005 lbs) at 720 kPa (105 psi) cold.

285/75R24.5/14 should be marked:

Max. Load Single 2800 kg (6175 lbs) at 760 kPa (110 psi) cold.

Max. Load Dual 2575 kg (5675 lbs) at 760 kPa (110 psi) cold.

FTS states that the non-compliance of its tires was brought to its attention on June 9, 2009, ''when new molds were ordered and the old molds were compared to the new molds.''

FTS also states that it has advised the manufacturer to hold any additional non-conforming tires and to change the inaccurate information on the tires before exporting them to the United States.

FTS argues that the inaccurate markings on the tires are inconsequential because the difference between the proper load ranges and inflation pressures are minimal. FTS bases its conclusion on its testing of the subject tires using the inaccurate information noted on its tires, and FTS asserts that the tires ''greatly exceed all FMVSS testing result requirements.'' Specifically, FTS points out that it subjected the tested tires to a modified FMVSS No. 119 endurance test which it states ''is far more demanding than the requirements of FMVSS 119.''

FTS submitted with its application for exemption from notification and remedy requirements a copy of eight endurance test reports, originally written in Chinese, and the English translation of those reports. FTS states that ''These tests performed using the load inflation information which appears on the subject tires clearly indicates that even at the wrong inflation pressure, these tires greatly exceed FMVSS 119 and are safe.'' FTS additionally states that ''the mislabeling of the tires poses absolutely no safety issue since even if a user of the tires inflates the tire to the load inflation pressure contained on the side wall of the subject tire, we know that the tire greatly exceeds all requirements (i.e. the tires ran almost three times longer than required by FMVSS 119 at loads increased by 10% every ten hours (nine times over 130 hours)).''

In summation, FTS requests that NHTSA deem this issue as ''incidental mislabeling'' as it has no bearing on the safety of the tires, therefore requests that FTS's petition, to exempt FTS from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedy the recall noncompliance as required by 49 U.S.C. 30120, should be granted.

Parts in Pertinent

Requirements Background

Paragraph S6.5(d) of FMVSS No. 119 requires in pertinent part:

S6.5 Tire markings. Except as specified in this paragraph, each tire shall be marked on each sidewall with the information specified in paragraphs (a) through (j) of this section. The markings shall be placed between the maximum section width (exclusive of sidewall decorations or curb ribs) and the bead on at least one sidewall, unless the maximum section width of the tire is located in an area which is not more than one-fourth of the distance from the bead to the shoulder of the tire. If the maximum section width falls within that area, the markings shall

appear between the bead and a point one-half the distance from the bead to the shoulder of the tire, on at least one sidewall. The markings shall be in letters and numerals not less than 2 mm (0.078 inch) high and raised above or sunk below the tire surface not less than 0.4 mm (0.015 inch), except that the marking depth shall be not less than 0.25mm (0.010 inch) in the case of motorcycle tires. The tire identification and the DOT symbol labeling shall comply with part 574 of this chapter. Markings may appear on only one sidewall and the entire sidewall area may be used in the case of motorcycle tires and recreational, boat, baggage, and special trailer tires

* * * * *

(d) The maximum load rating and corresponding inflation pressure of the tire, shown as follows:

(Mark on tires rated for single and dual load): max load single _____kg (_____lb) at _____kPa (_____psi) cold. Max load dual _____kg (_____lb) at _____kPa (_____psi) cold.

(Mark on tires rated only for single load): Max load _____kg (_____lb) at _____kPa (_____psi) cold.

NHTSA'S Analysis of FTS'S Reasoning: Foreign Tire Sales (FTS) acknowledges that the subject tires are marked with a maximum load rating higher than the intended correct value and a corresponding inflation pressure lower than the intended correct value, but contends that the tires are safe for use based on additional tests conducted at the incorrectly marked inflation pressure and at loads greater than the incorrectly marked maximum load rating. The maximum load rating and corresponding inflation pressure that are erroneously marked on the subject FTS tires, size 295/75R22.5/14 and 285/75R24.5/14 and of the correct information for the non-comforming tires as follows: For the subject 295/75R22.5/14 tires, they are marked Max. Load Single 2800 kg (6175 lbs) at 720 kPa (105 psi) cold and Max. Load Dual 2650 kg (5840 LBS) at 720 kPa (105 psi) Cold. The correct labeling for these tires are: Max. Load Single 2800 kg (6175 lbs) at 760 kPa (110 psi) Cold and Max. Load Dual 2575 kg (5675 lbs) at 760 kPa (110 psi) cold. For the subject 285/75R24.5/14 tires, they are marked Max. Load Single 3000 kg (6610 lbs) at 720 kPa (105 psi) cold and Max. Load Dual 2725 kg (6005 lbs) at 720 kpa (105 psi) cold. The correct labeling for these tires are: Max. Load Single 2800 kg (6175 lbs) at 760 kpa (110 psi) cold and Max. Load Dual 2575 kg (5675 lbs) at 760 kpa (110 psi) cold.

The additional testing conducted by FTS on the subject tires to support its basis that the tires are safe for use consisted of eight (8) modified FMVSS No. 119 tests, in which the tires were tested at the incorrectly marked inflation pressure and at loads increased by 10% every ten hours of testing up to almost three times longer than that required by FMVSS No. 119. FTS argues that the inaccurate markings on the subject tires are inconsequential because the difference between the proper load ranges and inflation pressures are minimal. FTS further argues that based on its modified FMVSS No. 119 testing, even if a user of the subject tires inflates the tire to the load inflation pressure as marked on the sidewall of the subject tires, the tires greatly exceed FMVSS No. 119 and are safe.

The Agency does not agree with FTS that the noncompliance of the subject tires is inconsequential to motor vehicle safety. The Agency does not consider the difference between the marked load ranges and inflation pressures of the subject tires as compared to the proper marking of load ranges and inflation pressures to be minimal. For example, due to the improper tire marking, the maximum load rating (single) for the subject 285/75R24.5/14 tires is over-rated by 435 lbs and the maximum load rating (dual) for the subject 295/75R22.5/14 tires is over-rated by 165 lbs. Overloading can result in handling or steering problems, brake failure, and tire failure. An under-inflated tire is also a safety concern since the greater the under-inflation, the more the sidewalls of a tire can flex, which increases the internal heat generated and makes the tire more susceptible to failure.

In addition, the Agency does not consider eight (8) additional FMVSS No. 119 endurance tests, even as conducted by FTS with increasing loads and test durations, an adequate basis to support that the subject tires are safe for use as improperly marked. The maximum load ratings and inflation pressures as erroneously marked on the subject tires are outside the intended safe operating limits of the tires as designed for manufacture and proper use. The subject tires as improperly marked indicate a maximum load rating value above that designed for the tire, along with an inflation pressure lower than that designed for the tire. A tire loaded above its designed maximum load rating at a corresponding inflation pressure below the value for which the tire was designed creates a compounding safety problem which clearly impacts the defined purpose of FMVSS No. 119, which includes placing ''the correct information on tires to permit the proper selection and use, and safe operation of the tire''.

NHTSA Decision: In consideration of the foregoing, NHTSA has decided that the petitioner has not met its burden of persuasion that the noncompliance described is inconsequential to motor vehicle safety. Accordingly, FTS's petition is hereby denied, and the petitioner must notify owners, purchasers and dealers pursuant to 49 U.S.C. 30118 and provide a remedy in accordance with 49 U.S.C. 30120.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at CFR 1.95 and 501.8.

Dated: November 21, 2013.

Nancy Lummen Lewis,

Associate Administrator for Enforcement.

[FR Doc. 2013–28461 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2013–0084]

Pipeline Safety: Information Collection Activities, Revisions to Incident and Annual Reports for Gas Pipeline Operators

AGENCY: Pipeline and Hazardous Materials Safety Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: On June 27, 2013, in accordance with the Paperwork Reduction Act of 1995, PHMSA published a notice in the **Federal Register** of its intent to revise six forms under OMB Control Number 2137–0522. These forms include: PHMSA F 7100.1 Incident Report—Gas Distribution System; PHMSA F 7100.1–2 Mechanical Fitting Failure Report Form for Calendar Year 20xx for Distribution Operators; PHMSA F 7100.2 Incident Report—Natural and Other Gas Transmission and Gathering Pipeline Systems; PHMSA F 7100.2–1 Annual Report for Calendar Year 20xx Natural and Other Gas Transmission and Gathering Pipeline Systems; PHMSA F 7100.3 Incident Report—Liquefied Natural Gas Facilities; and PHMSA F 7100.3–1 Annual Report for Calendar Year 20xx Liquefied Natural Gas Facilities.

In response to that notice, PHMSA received comments from three organizations on the proposed revisions. PHMSA is publishing this notice to respond to the comments, to provide the public with an additional 30 days to comment on the proposed revisions to the forms and instructions, and to announce that this revised Information Collection request will be submitted to the Office of Management and Budget (OMB) for approval.

DATES: Comments on this notice must be received by December 27, 2013 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Angela Dow by telephone at 202–366–1246, by fax at 202–366–4566, by email at *angela.dow@dot.gov*.

ADDRESSES: You may submit comments identified by the docket number PHMSA–2013–0084 by any of the following methods:

- *Fax:* 1–202–395–5806.
- *Mail:* Office of Information and Regulatory Affairs (OIRA), Records Management Center, Room 10102 NEOB, 725 17th Street NW., Washington, DC 20503, ATTN: Desk Officer for the U.S. Department of Transportation\PHMSA.
- *Email:* OIRA, OMB, at the following email address: *oira_submissions@omb.eop.gov*.

Requests for a copy of the Information Collection should be directed to Angela Dow by telephone at 202–366–1246, by fax at 202–366–4566, by email at *Angela.Dow1@dot.gov*, or by mail at U.S. Department of Transportation, PHMSA, 1200 New Jersey Avenue SE., PHP–30, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION: Section 1320.8 (d), Title 5, Code of Federal Regulations, requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies a revised information collection request that PHMSA will be submitting to OMB for approval.

I. Summary of Topic Comments/Responses

During the 60-day comment period, PHMSA received comments from the following stakeholders:

- Norton McMurray Manufacturing Company (NORMAC)
- Interstate Natural Gas Association of America (INGAA)
- Pipeline Safety Trust (PST)

The comments from these stakeholders are available at *http://www.regulations.gov,* under docket number ''PHMSA–2013–0084.'' The docket also contains the forms and instructions as amended in response to the comments. The responses to these comments are detailed below.

II. NORMAC's Comments/PHMSA's Responses

NORMAC submitted comments on both the PHMSA F 7100.1 Incident Report—Gas Distribution System (Incident Report) and PHMSA F 7100.1–2 Mechanical Fitting Failure (MFF) Report Form for Calendar Year 20xx for Distribution Operators (MFF Report).

1. NORMAC proposes that PHMSA consistently apply to both the Incident Report and the MFF Report the exemption in the MFF Report instructions against categorizing leaks in gasketed joints found on main or service pipe as ''Equipment Failure.''

Response: PHMSA has proposed changes to the MFF Report and Incident Report instructions to improve clarity. Significant differences exist in the scope of data collected on each form; therefore, PHMSA is not accepting NORMAC's proposal. The Incident Report collects data for all gas distribution pipeline facility failures, regardless of the location of the failure within the facility. The MFF Report only collects data on mechanical fitting failures. The Incident Report does not exempt incidents on mains and services from being categorized as ''Equipment Failures.'' The instructions direct these leaks to either ''Equipment Failure'' or ''Pipe, Weld, or Joint Failures.'' The proposed causes on the Incident Report allow PHMSA to identify failures caused by incorrect installation separately from manufacturing flaws. On the MFF Report, every failure reported is a joint failure and PHMSA provides a different set of cause categories for these failures. The proposed causes on the MFF Report allow PHMSA to identify failures caused by incorrect installation separately from manufacturing flaws.

2. NORMAC asserts that because PHMSA's reports ask the wrong questions, the data collected and stored in PHMSA's database is flawed. NORMAC suggests that PHMSA should delete, redact or similarly account for this flawed data. Further, PHMSA should issue corrections to prior reports and publications that have included remarks based on such flawed data.

Response: PHMSA believes that data being collected is critical to its safety mission and there is no need to delete, redact, or correct its database. PHMSA does not believe it needs to revisit its prior reports and publications on this topic.

3. NORMAC proposes that PHMSA create a bright line separation between equipment failure and improper joining procedures, joint installation, or joint design in the MFF Report and all related PHMSA forms and programs, specifying the precise regulation that applies.

Response: PHMSA has proposed changes to the MFF Report, Incident Report, and the Gas Distribution Annual Report (see docket PHMSA–2013–0004) to improve clarity in the instructions and consistency in the data collected. PHMSA issued an Advisory Bulletin (ADB–2012–07) titled: ''Pipeline Safety: Mechanical Fitting Failure Reports'' communicating, among other things, that hazardous mechanical fitting failures resulting from an installation defect be reported under ''Incorrect Operation''. Through these information collections, PHMSA seeks to implement the separation proposed by NORMAC.

4. NORMAC proposes that PHMSA use the same definition of ''Cause'' in both the Incident Report and the MFF Report.

Response: As mentioned earlier, the scope of data collection under the Incident Report and the MFF Report are very different. The Incident Report collects data for all gas distribution pipeline facility failures regardless of the location of the failure within the facility. The MFF Report only collects data on mechanical fitting failures. These differing scopes preclude applying the same definitions and exemptions to both the Incident Report and MFF Report.

5. NORMAC proposed that PHMSA eliminate the titles and intent of 49 CFR 191.12 and 192.1009 for Mechanical Fitting Failure Reporting.

Response: NORMAC's proposal would require rulemaking, which is beyond the scope of this information collection renewal.

6. NORMAC asserts that the forms do not tie the likely causes of failure to whether such actions, inactions or decisions are compliant with Subpart F, the manufacturer's instructions, or ASME B31.8, as applicable. NORMAC proposes that PHMSA reform the MFF Report to relate each apparent cause of leaks to specific actions or inactions in compliance with PHMSA's applicable regulations.

Response: The MFF Report form and instructions provide numerous apparent leak cause categories and there is no bias toward selecting ''Equipment Failure.''

7. NORMAC proposes that PHMSA remove the note in Part G1 of the Incident Report instructions because the note assumes that the failure of a piece of equipment is always due to a flaw in the equipment and never due to a failure to properly install the equipment.

Response: PHMSA has revised the note in Part G1 of the instructions of the Incident Report to clarify that non-corrosion bonnet, packing, or other gasket failures could be reported under ''Incorrect Operations'' or under ''Equipment Failure.''

8. NORMAC proposes that PHMSA clarify language in both the Incident Report and MFF report instructions for Incorrect Operations.

Response: PHMSA has modified the instructions for Incorrect Operations and Equipment Failure in both the Incident Report and MFF Report in response to NORMAC's proposal.

III. INGAA's Comments/PHMSA's Responses

INGAA submitted comments on PHMSA F 7100.2 Incident Report—Natural and Other Gas Transmission and Gathering Pipeline Systems.

1. INGAA contends that PHMSA did not explain the reason for amending the instructions for item 19, time sequence, and that these changes should not be adopted without discussion with the pipeline safety community.

Response: In a report titled, ''PIPELINE SAFETY Better Data and Guidance Needed to Improve Pipeline Operator Incident Response'' (GAO–13–168) the Government Accountability Office recommends that PHMSA improve the reliability of incident response data. PHMSA concurs with the GAO recommendation and has proposed this change to collect more meaningful data from which to calculate operator response time. PHMSA will calculate response time as ''arrival on-site'' minus ''failure awareness.''

2. INGAA believes there is significant potential value in collecting C3(a) through C3(h) data for welds other than girth welds.

Response: The current data structure of the form allows the collection of one set of C3(a) through C3(h) data for each report. These data elements are required for pipe girth weld failures with the assumption that each data element is the same on each side of the girth weld. The other weld configurations would almost certainly have different C3(a) through C3(h) values on each side of the weld. PHMSA lacks the resources to change the data structure to accommodate multiple C3(a) through C3(h) data per report and there is no compelling reason to do so.

3. INGAA urges PHMSA to ensure that the database is able to accept onshore reports without a valid value for County/Parish.

Response: PHMSA has modified the instructions accordingly and will ensure the database is appropriately configured.

IV. Annual Report Gas Transmission and Gathering Pipeline Systems Comments/PHMSA Responses

PHMSA received comments regarding the proposed changes to the Annual Report for Gas Transmission and Gas Gathering Systems—PHMSA F.7100.2–1 from INGAA and the PST. The following is a summary of the comments PHMSA received regarding the proposed changes to PHMSA F. 7100.2–1. A complete record of the comments received is available at *http://www.regulations.gov,* at docket number ''PHMSA–2013–0084.''

1. Remove Part C–Volume Transported by Transmission Lines

Comment: The PST commented that it was unable to access this data on the Federal Energy Regulatory Commission (FERC) Web site and does not support removing Part C from the PHMSA report.

Response: PHMSA proposed removing Part C under the assumption that volume transported data would be available from the FERC. PHMSA concurs that the data is not readily available from FERC. However, simply keeping the current instructions for Part C is not an attractive alternative. Under the current instructions, Part C data is not required for ''Transmission Lines of Gas Distribution Systems.'' If PHMSA collects volume transported from any gas transmission operator, the data should be collected from all gas transmission operators. To make fair comparisons of operator performance, PHMSA needs to know not just miles of pipe, but also the volume delivered by the pipelines included in each annual report. PHMSA has modified the instructions so that all gas transmission operators are required to submit volume transported data. We expect that operators with both gas transmission and gas distribution assets have the volume transported data readily available, so the reporting burden increase is minimal.

2. Instructions for Parts Q and R

Comment: INGAA has no comments regarding the proposed changes to Parts Q and R of the annual report form, but urges PHMSA to change the instructions for Parts Q and Part R to:

(1) Recognize the distinction between MAOP determination and MAOP verification. According to INGAA, MAOP determination, based on the reporting operator's internal procedures and the best information available, determines the Part Q ''Total'' column where specific mileage will be placed. MAOP verification, which occurs after MAOP determination, determines how much of the reported ''Total'' mileage should be reported in the corresponding ''Incomplete Records'' column.

(2) recognize that an ''Incomplete Records'' entry refers exclusively to the status of the records for the corresponding determination method but does not indicate anything regarding the quality or existence of the operator's records for any of the other MAOP determination methods.

(3) eliminate the phrase ''traceable, verifiable, and complete'' to describe the MAOP records because it appears to impose a standard for records though instructions for completing an annual report.

(4) expand the instructions for Part Q to specify how and where entries should be made when two of the methods specified in subsection 192.619(a) result in the same MAOP.

(5) specify that consistency is required between the ''Total'' columns in Part Q and mileage entered in other parts of the Annual Report. No consistency is expected between the ''Incomplete Records'' columns and other parts of the Annual Report.

(6) provide that if an elevation analysis shows some of a tested segment did not achieve a specified test pressure, (e.g., a 1.25 x MAOP) because of elevation differences, the operator should report the miles that did not achieve the specified test pressure in the pressure test range actually achieved.

Response: PHMSA has revised the instructions to implement the changes listed above except for suggested revision (3). PHMSA is using the data submitted in Parts Q and R as one of many inputs into potential regulation changes. These instruction clarifications should provide more accurate data to inform the rulemaking process. PHMSA has chosen not to change the exisiting instructions for records. PHMSA's use of the phrase ''traceable, verifiable, and complete'' provides guidance for operators to meet the requirements of 49 U.S.C. 60139.

3. Effective Date

Comment: INGAA suggested improvements in the ''General Instructions'' section of the instructions to clarify the effective date for the form.

Response: PHMSA has implemented the suggestion.

4. Filing Supplemental Reports to Amend Part Q

Comment: INGAA expressed concern that the ''General Instructions'' require operators to supplement an annual report if any length of pipe, regardless of how short, changes record status from incomplete to complete.

Response: PHMSA has modified the ''General Instructions'' to clarify that supplemental reports to change the record status are optional.

5. Consistency Among Parts

Comment: INGAA asked for the details behind the consistency

requirements among various parts of the form.

Response: Some of the details already exist in the Parts H through R introductory instructions. PHMSA has expanded these details in accordance with INGAA's request.

6. Categories for Leaks and Failures

After the publication of the 60-day notice, PHMSA found an error in the instructions for leak and failure categories in Part M of the instructions. Under the heading titled ''Third Party Damage/Mechanical Damage,'' operators are instructed to report first, second, and third party excavation damage. Only third party excavation damage should be reported under this heading. First and second party excavation damage leaks and failures represent an error by either the operator (first party) or a contractor working for the operator (second party) and should be reported in the ''Incorrect Operations'' category. PHMSA has revised the instructions accordingly.

V. Proposed Information Collection Revisions and Request for Comments

The following information is provided for each revised information collection: (1) Title of the information collection; (2) OMB control number; (3) Type of request; (4) Abstract of the information collection activity; (5) Description of affected public; (6) Estimate of total annual reporting and recordkeeping burden; and (7) Frequency of collection. PHMSA will request a three-year term of approval for each information collection activity. PHMSA is only focusing on the revisions detailed in this notice and will request revisions to the following information collection activities.

Title: Incident and Annual Reports for Gas Pipeline Operators.

OMB Control Number: 2137–0522.

Current Expiration Date: 02/28/2014.

Type of Request: Revision.

Abstract: PHMSA is looking to revise several reporting forms for gas pipeline operators to improve the granularity of the data collected in several areas.

Affected Public: Gas pipeline operators.

Annual Reporting and Recordkeeping Burden:

Total Annual Responses: 12,164.

Total Annual Burden Hours: 92,321.

Frequency of Collection: On occasion.

Comments are invited on:

(a) The need for the proposed collection of information for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Issued in Washington, DC on November 22, 2013.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

[FR Doc. 2013–28450 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket ID PHMSA–2013–0248]

Pipeline Safety: Random Drug Testing Rate; Contractor Management Information System Reporting; and Obtaining Drug and Alcohol Management Information System Sign-In Information

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of Calendar Year 2014 Minimum Annual Percentage Rate for Random Drug Testing; Reminder for Operators to Report Contractor Management Information System (MIS) Data; and New Method for Operators to Obtain User Name and Password for Electronic Reporting.

SUMMARY: PHMSA has determined that the minimum random drug testing rate for covered employees will remain at 25 percent during calendar year 2014. Operators are reminded that drug and alcohol testing information must be submitted for contractors performing or ready to perform covered functions. For calendar year 2013 reporting, PHMSA will not mail the ''user name'' and ''password'' for the Drug and Alcohol Management Information System (DAMIS) to operators, but will make the user name and password available in the PHMSA Portal (*https://portal.phmsa.dot.gov/pipeline*).

DATES: Effective January 1, 2014, through December 31, 2014.

FOR FURTHER INFORMATION CONTACT: Blaine Keener, National Field Coordinator, by telephone at 202–366–0970 or by email at *blaine.keener@dot.gov.*

SUPPLEMENTARY INFORMATION:

Notice of Calendar Year 2014 Minimum Annual Percentage Rate for Random Drug Testing

Operators of gas, hazardous liquid, and carbon dioxide pipelines and operators of liquefied natural gas facilities must randomly select and test a percentage of covered employees for prohibited drug use. Pursuant to 49 CFR 199.105(c)(2), (3), and (4), the PHMSA Administrator's decision on whether to change the minimum annual random drug testing rate is based on the reported random drug test positive rate for the pipeline industry. The data considered by the Administrator comes from operators' annual submissions of MIS reports required by § 199.119(a). If the reported random drug test positive rate is less than one percent, the Administrator may continue the minimum random drug testing rate at 25 percent. In calendar year 2012, the random drug test positive rate was less than one percent. Therefore, the *PHMSA minimum annual random drug testing selection rate will remain at 25 percent for calendar year 2014.*

Reminder for Operators To Report Contractor MIS Data

On January 19, 2010, PHMSA published an Advisory Bulletin (75 FR 2926) implementing the annual collection of contractor MIS drug and alcohol testing data. All applicable § 199.119 (drug testing) and § 199.229 (alcohol testing) MIS reporting operators are responsible for the submission to PHMSA of all contractor MIS reports to PHMSA, as well as their own, by March 15, 2014.

Contractors with employees in safety-sensitive positions who performed covered functions as defined in § 199.3 of Part 199, must submit these reports only through the auspices of each operator for whom these covered employees performed those covered functions (i.e., maintenance, operations or emergency response).

New Method for Operators To Obtain User Name and Password for Electronic Reporting

In previous years, PHMSA attempted to mail the DAMIS user name and password to operator staff with responsibility for submitting DAMIS reports. Based on the number of phone calls to PHMSA each year requesting this information, the mailing process has not been effective. Pipeline operators have been submitting reports required by Parts 191 and 195 through the PHMSA Portal (*https://portal.phmsa.dot.gov/pipeline*) for the

past few years. Each company with an Office of Pipeline Safety issued Operator Identification Number should employ staff with access to the PHMSA Portal.

The user name and password required for an operator to access DAMIS and enter calendar year 2013 data will be available to all staff with access to the PHMSA Portal in late December 2013. When the DAMIS user name and password is available in the Portal, all registered users will receive an email to that effect. Operator staff with responsibility for submitting DAMIS reports should coordinate with registered Portal users to obtain the DAMIS user name and password. Registered Portal users for an operator typically include the U.S. Department of Transportation Compliance Officer and staff or consultants with responsibility for submitting annual and incident reports on PHMSA F 7000- and 7100-series forms.

For operators that have failed to register staff in the PHMSA Portal for Part 191/195 reporting purposes, operator staff responsible for submitting DAMIS reports can register in the Portal by following the instructions at: *http://opsweb.phmsa.dot.gov/portal_message/PHMSA_Portal_Registration.pdf*.

Pursuant to §§ 199.119(a) and 199.229(a), operators with 50 or more covered employees, including both operator and contractor staff, are required to submit DAMIS reports annually. Operators with less than 50 total covered employees are required to report only upon written request from PHMSA. If an operator submitted a calendar year 2011 DAMIS report with fewer than 50 total covered employees, the PHMSA Portal message may state that no calendar year 2013 DAMIS report is required. Some of these operators may have grown to more than 50 covered employees during calendar year 2013. The Portal message will include instructions for how these operators can obtain a calendar year 2013 DAMIS user name and password.

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60117, and 60118; 49 CFR 1.53.

Issued in Washington, DC on November 21, 2013.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

[FR Doc. 2013–28384 Filed 11–26–13; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 1117X]

St. Lawrence & Atlantic Railroad Company—Discontinuance of Service Exemption—in Cumberland County, Me.

On November 8, 2013, St. Lawrence & Atlantic Railroad Company (SLR) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the prior approval requirements of 49 U.S.C. 10903 to discontinue service over approximately 24.23 miles of rail line, owned by the State of Maine, between milepost 1.74 near Deering, Cumberland County, Me., and milepost 25.97 at the town line between New Gloucester, Cumberland County and Auburn, Androscoggin County, Me. (the Line).[1] The Line traverses U.S. Postal Service Zip Codes 04101, 04102, 04103, 04104, 04105, 04096, and 04069. According to the petition, the Line is stub-ended and therefore not capable of handling overhead traffic.

There is one shipper on the Line, B&M Beans, and SLR states that B&M Beans ships all of its outbound products and some of its inbound ingredients by truck. SLR estimates that B&M Beans will ship 12 cars of inbound ingredients in the forecast year.[2]

SLR states that, based on information in its possession, the Line does not contain any federally granted rights-of-way. Any documentation in SLR's possession will be made available promptly to those requesting it.

The interests of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by February 26, 2014.

Because this is a discontinuance proceeding and not an abandonment, interim trail use/rail banking, and public use conditions are not appropriate. Similarly, no environmental or historic documentation is required under 49 CFR 1105.6(c)(2) and 1105.8(b).

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) to subsidize continued rail service will be due no later than March 7, 2014, or 10 days after service of a decision granting the petition for exemption, whichever occurs sooner. Each offer must be accompanied by a $1,600 filing fee. *See* 49 CFR 1002.2(f)(25).

All filings in response to this notice must refer to Docket No. AB 1117X and must be sent to: (1) Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001, and (2) Eric M. Hocky, Clark Hill Thorp Reed, One Commerce Square, 2005 Market Street, Suite 1000, Philadelphia, PA 19103. Replies to the petition are due on or before December 17, 2013.

Persons seeking further information concerning discontinuance procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment and discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Board decisions and notices are available on our Web site at ''*WWW.STB.DOT.GOV*.''

Decided: November 21, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2013–28477 Filed 11–26–13; 8:45 am]

BILLING CODE 4915–01–P

[1] SLR owns an exclusive, perpetual freight easement over the Line. *See Maine—Petition for Declaratory Order,* FD 35440 (STB served Dec. 29, 2010); *Maine—Acquisition Exemption—Certain Assets of St. Lawrence & Atl. R.R.,* FD 35018 (STB served Sept. 13, 2007).

[2] For the purposes of its petition, SLR uses June 1, 2013, through May 31, 2014, as the forecast year.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35777]

New Orleans & Gulf Coast Railway Company, Inc.—Lease Exemption Containing Interchange Commitment—Union Pacific Railroad Company

New Orleans & Gulf Coast Railway Company, Inc. (NOGC), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to continue to lease from Union Pacific Railroad Company (UP) and operate approximately 11.52 miles of rail line. The line consists of 7.02 miles of UP's main line located between milepost 0.98 at Goldsboro, La., and milepost 8.00 near Westwego, La., and the 4.5-mile

Hooper Spur extending from Harvey Yard, at Harvey, La., south to the end of the spur at Bayou Street.[1]

NOGC and UP have recently entered into a First Supplement to their 2003 Lease Agreement that adds the following new provisions: (1) The lease term is extended from September 24, 2013, to September 23, 2023 (Section 1); (2) NOGC is permitted to construct a new yard on the leased premises (Section 2); and (3) NOGC is permitted to assess a surcharge on all NOGC traffic in order to undertake capital investments (Section 3).

NOGC has certified that the Lease Agreement contains a provision that may limit future interchange at Westwego with a third-party connecting carrier by adjustment in the purchase price or rental (interchange commitment). Consequently, the Board's new rules established in *Information Required in Notices and Petitions Containing Interchange Commitments,* EP 714 (STB served Sept. 5, 2013), require applicant to submit the additional information set forth at 49 CFR 1150.43(h)(1). Applicant has provided that information.[2]

NOGC has certified that its projected annual revenues as a result of this transaction will not result in NOGC's becoming a Class II or Class I rail carrier, but that its projected annual revenues will exceed $5 million. Accordingly, NOGC is required, at least 60 days before this exemption is to become effective, to send notice of the transaction to the national offices of the labor unions with employees on the affected lines, post a copy of the notice at the workplace of the employees on the affected lines, and certify to the Board that it has done so. 49 CFR 1150.42(e).

NOGC, concurrently with its notice of exemption, filed a petition for waiver of the 60-day advance labor notice requirement under § 1150.42(e), asserting that: (1) No UP employees will be affected because no UP employees have performed operations or maintenance on the line since 2003; and (2) no NOGC employees will be affected because NOGC will continue to provide the same service and maintenance on the line as it has been providing since the inception of the lease. NOGC's waiver request will be addressed in a separate decision.

NOGC states that it intends to consummate the transaction on or shortly after the effective date of this transaction. The Board will establish in the decision on the waiver request the earliest date this transaction may be consummated.

If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than December 5, 2013.

An original and 10 copies of all pleadings, referring to Docket No. FD 35777, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Karl Morell, Ball Janik LLP, Suite 225, 655 Fifteenth St. NW., Washington, DC 20005.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: November 21, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2013–28472 Filed 11–26–13; 8:45 am]

BILLING CODE 4915–01–P

[1] NOGC was granted authority to lease and operate the rail line in *New Orleans & Gulf Coast Railway—Lease Exemption—Union Pacific Railroad,* FD 34411 (STB served Oct. 20, 2003).

[2] Regarding § 1150.43(h)(1)(vi), NOGC states that, although there is no direct connection to a third-party railroad, BNSF Railway Company and the New Orleans Public Belt are located in very close proximity to the leased lines.

DEPARTMENT OF THE TREASURY

Office of the Secretary

List of Countries Requiring Cooperation With an International Boycott

In accordance with section 999(a)(3) of the Internal Revenue Code of 1986, the Department of the Treasury is publishing a current list of countries which require or may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

On the basis of the best information currently available to the Department of the Treasury, the following countries require or may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1986).

Iraq
Kuwait
Lebanon
Libya
Qatar
Saudi Arabia
Syria
United Arab Emirates
Yemen

Dated: November 20, 2013.

Danielle Rolfes,

International Tax Counsel, (Tax Policy).

[FR Doc. 2013–28490 Filed 11–26–13; 8:45 am]

BILLING CODE 4810–25–M

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection: Resolution for Transactions Involving Treasury Securities

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A). Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Resolution for Transactions Involving Treasury Securities.

DATES: Written comments should be received on or before January 27, 2014 to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Fiscal Service, Bruce A. Sharp, 200 Third Street A4–A, Parkersburg, WV 26106–1328, or *bruce.sharp@bpd.treas.gov.* The opportunity to make comments online is also available at *www.pracomment.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies should be directed to Bruce A. Sharp, Bureau of the Fiscal Service, 200 Third Street A4–A, Parkersburg, WV 26106–1328, (304) 480–8150.

SUPPLEMENTARY INFORMATION:

Title: Resolution for Transactions Involving Treasury Securities.

OMB Number: 1535–0117.

Form Number: PD F 1010.

Abstract: The information is collected to establish an official's authority (by name and title) when conducting transactions involving Treasury Securities on behalf of an organization.

Current Actions: Revision.

Type of Review: Extension.

Affected Public: Business or other for profit.

Estimated Number of Respondents: 2,580.

Estimated Time per Respondent: 10 minutes.

Estimated Total Annual Burden Hours: 430.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: November 22, 2013.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2013–28449 Filed 11–26–13; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 13818—the Limited Payability Claim Against the United States for Proceeds of an Internal Revenue Refund Check

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning the Limited Payability Claim Against the United States For Proceeds of An Internal Revenue Refund Check.

DATES: Written comments should be received on or before January 27, 2014 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Sara Covington, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *Sara.L.Covington@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Limited Payability Claim Against the United States For Proceeds of An Internal Revenue Refund Check.

OMB Number: 1545–2024.

Form Number: Form-13818.

Abstract: This form is used by taxpayers for completing a claim against the United States for the proceeds of an Internal Revenue refund check.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, Businesses and other for-profit organizations.

Estimated Number of Respondents: 4,000.

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 4,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 18, 2013.

Allan Hopkins,

IRS Tax Analyst.

[FR Doc. 2013–28390 Filed 11–26–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Publication of the Tier 2 Tax Rates

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: Publication of the tier 2 tax rates for calendar year 2014 as required by section 3241(d) of the Internal Revenue Code (26 U.S.C. section 3241). Tier 2 taxes on railroad employees, employers, and employee representatives are one source of funding for benefits under the Railroad Retirement Act.

DATES: The tier 2 tax rates for calendar year 2014 apply to compensation paid in calendar year 2014.

FOR FURTHER INFORMATION CONTACT: Kathleen Edmondson, CC:TEGE:EOEG:ET1, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, Telephone Number (202) 317–6798 (not a toll-free number).

TIER 2 TAX RATES: The tier 2 tax rate for 2014 under section 3201(b) on employees is 4.4 percent of compensation. The tier 2 tax rate for 2014 under section 3221(b) on employers is 12.6 percent of compensation. The tier 2 tax rate for 2014 under section 3211(b) on employee representatives is 12.6 percent of compensation.

Dated: November 21, 2013.

Victoria A. Judson,

Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities).

[FR Doc. 2013–28532 Filed 11–26–13; 8:45 am]

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FEDERAL REGISTER

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Part II

Department of Veterans Affairs

38 CFR Parts 3 and 5

VA Compensation and Pension Regulation Rewrite Project; Proposed Rule

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3 and 5

RIN 2900–AO13

VA Compensation and Pension Regulation Rewrite Project

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and rewrite 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, beneficiaries, veterans' representatives, and VA personnel in locating and understanding these regulations.

DATES: Comments must be received by VA on or before March 27, 2014.

ADDRESSES: Written comments may be submitted through *http://www.regulations.gov*; by mail or hand-delivery to: Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to RIN 2900–AO13. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment (this is not a toll-free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: William F. Russo, Deputy Director, Office of Regulations Policy & Management (02REG), Office of the General Counsel, Department of Veterans Affairs, 810 Vermont Ave. NW., Washington, DC 20420, (202) 461–4902 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Introduction

The VA Office of the General Counsel provides centralized management and coordination of VA's rulemaking process through its Office of Regulation Policy and Management (ORPM). One of ORPM's major functions is to oversee VA's Regulation Rewrite Project (the Project) to improve the organization and clarity of VA's adjudication regulations, which are in current 38 CFR part 3. These regulations govern the adjudication of claims for VA's monetary benefits (compensation, pension, dependency and indemnity compensation, and burial benefits), which are administered by the Veterans Benefits Administration (VBA).

The Project responds to a recommendation made by the VA Claims Processing Task Force in its October 2001 ''Report to the Secretary of Veterans Affairs'' and to criticisms by the U.S. Court of Appeals for Veterans Claims. The Task Force recommended that VA reorganize its regulations in a logical, coherent manner. The Court referred to the current regulations as a ''confusing tapestry'' and criticized VA for maintaining substantive rules in its Adjudication Procedures Manual (manual). Accordingly, the Project reviewed the manual to identify provisions that might be substantive and incorporated those provisions in a complete rewrite of part 3. VA published the rewritten material in 20 Notices of Proposed Rulemaking (NPRMs) and gave interested persons 60 days to submit comments after each publication. These NPRMs addressed specific topics, programs, or groups of regulatory material organized under the following Rulemaking Identifier Numbers (RIN):

- RIN 2900–AL67, Service Requirements for Veterans (January 30, 2004)
- RIN 2900–AL70, Presumptions of Service Connection for Certain Disabilities, and Related Matters (July 27, 2004)
- RIN 2900–AL71, Accrued Benefits, Death Compensation, and Special Rules Applicable Upon Death of a Beneficiary (October 1, 2004)
- RIN 2900–AL72, Burial Benefits (April 8, 2008)
- RIN 2900–AL74, Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries (January 14, 2011)
- RIN 2900–AL76, Benefits for Certain Filipino Veterans and Survivors (June 30, 2006)
- RIN 2900–AL82, Rights and Responsibilities of Claimants and Beneficiaries (May 10, 2005)
- RIN 2900–AL83, Elections of Improved Pension; Old-Law and Section 306 Pension (December 27, 2004)
- RIN 2900–AL84, Special and Ancillary Benefits for Veterans, Dependents, and Survivors (March 9, 2007)
- RIN 2900–AL87, General Provisions (March 31, 2006)
- RIN 2900–AL88, Special Ratings (October 17, 2008)
- RIN 2900–AL89, Dependency and Indemnity Compensation Benefits (October 21, 2005)
- RIN 2900–AL94, Dependents and Survivors (September 20, 2006)
- RIN 2900–AL95, Payments to Beneficiaries Who Are Eligible for More than One Benefit (October 2, 2007)
- RIN 2900–AM01, General Evidence Requirements, Effective Dates, Revision of Decisions, and Protection of Existing Ratings (May 22, 2007)
- RIN 2900–AM04, Improved Pension (September 26, 2007)
- RIN 2900–AM05, Matters Affecting the Receipt of Benefits (May 31, 2006)
- RIN 2900–AM06, Payments and Adjustments to Payments (October 31, 2008)
- RIN 2900–AM07, Service-Connected Disability Compensation (September 1, 2010)
- RIN 2900–AM16, VA Benefit Claims (April 14, 2008)

VA received numerous comments to the 20 NPRMs. These came from private individuals and several Veterans Service Organizations. VA thanks the commenters for the time they invested and the contribution they have made to the quality of the proposed regulations in this document.

VA also wishes to thank its employees, past and present, for their hard work and dedication in drafting these regulations. We are especially grateful for the contributions of the late Richard Hirst and Robert M. White, who dedicated their lives to our nation's disabled veterans.

In several of the prior NPRMs, we proposed to amend certain provisions or portions of provisions in 38 CFR part 3. Upon further consideration, if VA implemented the Project as a new 38 CFR part 5, it would not amend any part 3 provisions in conjunction with publishing part 5. Instead, it would remove part 3 in its entirety when it is no longer applicable to the adjudication of benefit claims and would provide public notice before doing so.

As stated in the prior NPRMs, we would incorporate numerous statutory amendments, VA General Counsel Opinions, court decisions, and VA manual provisions in the rewritten regulations. To the extent that any manual provision would be inconsistent with a rewritten regulation, the regulation would be binding on VA and the public. Any implementation of the rewritten regulations, whether implemented as proposed in this NPRM or in some other manner, would require a corresponding rewrite of VA's adjudication procedures manual.

VA does not intend to publish a final rule in this rulemaking proceeding in the near future. In the first quarter of fiscal year 2012, VBA formulated a Transformation Plan to improve the delivery of benefits to veterans and their dependents and survivors. In the first phase of this plan, VBA's transformational people, processes, and technology initiatives are designed to achieve VA's priority goals of processing all disability claims within 125 days and increasing rating quality to 98 percent by the end of 2015. Upon achieving those goals, the plan calls for VBA to allocate resources to maintain high-quality service for compensation claims while redirecting resources to the second phase of the transformation, which will address the needs of VBA's other benefit programs (appeals, veterans and survivors pension, dependency and indemnity compensation, burial benefits, vocational rehabilitation, education, and fiduciary). To ensure that VBA successfully implements this plan and accomplishes the Department's priority goals of eliminating the disability claims backlog and improving veterans' and survivors' access to benefits and services, VA may not publish a final-rule notice in this rulemaking until VBA's Transformation implementation is complete.

In the interim, VA will continue to amend its adjudication regulations in 38 CFR part 3 to implement changes in law and the policies and procedures that it needs to properly administer its benefit programs. In amending part 3, VA may refer to the work done by the Project and may incorporate that work in whole or in part depending upon the nature of the amendments. In this way, regardless of any future decision about implementation of the Project's rewritten regulations, VA will update its regulations at the same time that VBA is improving the delivery of benefits to veterans and survivors under the Transformation Plan.

Request for Public Comments

In this NPRM, we have merged the Rulemaking Identifier Numbers (RINs) of the 20 prior NPRMs into the RIN for this NPRM, AO13. The preamble to this NPRM addresses the public comments that VA received in response to those NPRMs and explains the changes we have made to the initially proposed rules.

Although VA does not intend to complete this rulemaking in the near future, we request public comments on the consolidation of the prior proposed rules, which would be implemented in a new 38 CFR part 5, and on the changes made to those proposed rules. Prior to publishing a final rule in this rulemaking, VA will consider any comments that it receives in response to this NPRM and will evaluate the feasibility of a one-time implementation of new part 5 as proposed. If VA determines that such an implementation is feasible, we may need to publish additional rulemakings to adapt to implementation plans and keep these proposed rules up to date.

Substantive v. Non-substantive Changes

In the NPRMs we stated:

> [a]lthough 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
> . . . .
> . . . .
> Readers who . . . observe substantive changes between [existing regulatory provisions and proposed provisions] should consult the text that appears later in this document for an explanation of significant changes in each regulation.

In the NPRMs we sometimes referred to specific proposed changes from part 3 as ''substantive'' or ''not substantive.'' Sometimes we said ''we intend no substantive change.'' Our intent was to clarify for readers whether we were making a policy change (''substantive'') or merely restating existing VA policy more clearly (''non-substantive''), in those instances where we thought a reader might need that guidance. Most often, however, we applied neither label to our changes; instead we simply told the reader how we were proposing to change a regulation provision and why.

However, the case of *Roberts* v. *Shinseki,* 23 Vet. App. 416 (2010), *aff'd on other grounds,* 647 F.3d 1334 (Fed. Cir. 2011), the U.S. Court of Appeals for Veterans Claims (CAVC) showed how such labels can be misleading. In *Roberts,* the CAVC affirmed VA's severance of fraudulent service connection. The Secretary argued severance for fraud is subject to the due process required in 38 CFR 3.103(b) (concerning adverse decisions) and exempt from the requirements of § 3.105(d) (concerning severance of service connection). The CAVC also held that the reference to compliance with § 3.105(d) in the regulation on protection of service-connected status § 3.957 does not apply in cases of fraud. In holding that § 3.105(d) does not apply to severance of service connection based fraud, the CAVC explicitly rejected appellant's §§ 3.105(a) and 3.957 arguments that severance for fraud requires proof that the grant was based on clear and unmistakable error (CUE).

The *Roberts* dissent quoted at length from NPRM AM 01, 72 FR 28770, May 22, 2007, to rebut the Secretary's assertion that his argument correctly stated VA interpretation of §§ 3.105(d) and 3.957 in light of regulatory history and in the absence of historical information that VA ever implemented the regulations differently. The dissent first noted that in rewriting §§ 3.957 and 3.105(d), ''VA intends to 'clarify' and recodify 38 CFR 3.957 and the provisions of 38 CFR 3.105(d) that govern when service connection may be severed at 38 CFR 5.175, entitled 'Protection or severance of service connection.' '' *Id.* at 436. The dissent also noted that our proposed regulations did not except severance of service connection based on fraud from the due process or burden of proof elements of §§ 3.957 or 3.105(d). Finally, the dissent noted that the NPRM stated that it explained any substantive changes between part 3 and part 5, 72 FR 28771–27772, May 22, 2007, and that there was nothing in the NPRM ''indicating that the rewriting and restructuring of the regulations [pertaining to severance of service connection for fraud] are intended as substantive changes.'' Id. at 437–39. From these observations, the dissent reasoned, the NPRM revealed VA's interpretation of §§ 3.957 and 3.105(d) as requiring application of both the process and burden of proof provisions of § 3.105(d) before severing service connection.

This dissent illustrates the need to revise the way we use labels describing differences between part 5 regulations and the part 3 regulations from which they derive. In addition to the confusion highlighted by the *Roberts* case, we believe that readers may incorrectly read our substantive or non-substantive labels as referring to the distinction that the Administrative Procedures Act (specifically 5 U.S.C. 553) makes between substantive rules and interpretive or procedural rules. See *Cmty. Nutrition Inst.* v. *Young,* 818 F.2d 943 (D.C. Cir. 1987); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519 (1978); *Am. Hosp. Ass'n* v. *Bowen,* 834 F.2d 1037, 1045 (D.C. Cir. 1987).

To avoid potential confusion, we now advise readers to draw no inferences from the use of, or non-use of, the labels substantive or non-substantive in the NPRMs. Instead, readers should simply rely on our actual description of the change and our reasons for making the change. The only instances where we use ''substantive'' in this preamble are where we used the term to refute a

comment asserting that we are diminishing rights or benefits and when used to distinguish a ''substantive'' provision from a ''procedural'' one.

II. Overview of New Part 5 Organization

We plan to organize the new 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 grouped together. This organization will allow claimants, beneficiaries, and their representatives, as well as VA adjudicators, 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, general definitions, and general policy provisions for this part. We published this subpart as a Notice of Proposed Rulemaking (NPRM) on Mar. 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. We published this subpart as an NPRM on Jan. 30, 2004. *See* 69 FR 4820

''Subpart C: Adjudicative Process, General'' would inform readers about claim filing and benefit application procedures, VA's duties, claimants' and beneficiaries' rights and responsibilities, general evidence requirements, and general effective dates of new awards, and about revision of decisions and protection of VA ratings. We published this subpart as three separate NPRMs due to its size. We published the first, concerning the duties of VA and the rights and responsibilities of claimants and beneficiaries, on May 10, 2005. *See* 70 FR 24680. We published the second, concerning general evidence requirements, effective dates, revision of decisions, and protection of existing ratings, on May 22, 2007. *See* 72 FR 28770. We published the third, concerning rules on filing benefits claims, on April 14, 2008. *See* 73 FR 20136.

''Subpart D: Dependents and Survivors'' would inform readers how VA determines whether a person is a dependent or a survivor for purposes of determining eligibility for benefits. It would also provide the evidence requirements for these determinations. We published this subpart as an NPRM on September 20, 2006. *See* 71 FR 55052.

''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. We published this subpart as three separate NPRMs due to its size. We published the first, concerning presumptions related to service connection, on July 27, 2004. *See* 69 FR 44614. We published the second, concerning special ratings, on October 17, 2008. *See* 73 FR 62004. We published the third, concerning service-connection and other disability compensation, on September 1, 2010. *See* 75 FR 53744.

''Subpart F: Nonservice-Connected Disability Pensions and Death Pensions'' would include information regarding the three types of nonservice-connected pension: Old-Law Pension, Section 306 Pension, and Improved Pension. This subpart would also include those provisions that state how to establish entitlement to Improved Pension and the effective dates governing each pension. We published this subpart as two separate NPRMs due to its size. We published the portion concerning Old-Law Pension, Section 306 Pension, and elections of Improved Pension on December 27, 2004. *See* 69 FR 77578. We published the portion concerning eligibility and entitlement requirements, as well as effective dates of Improved Pension, on September 26, 2007. *See* 72 FR 54776.

''Subpart G: Dependency and Indemnity Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary'' would contain regulations governing claims for dependency and indemnity compensation (DIC); accrued benefits; and various special rules that apply to the disposition of benefits, or proceeds of benefits, when a beneficiary dies. This subpart would also include related definitions, effective-date rules, and rate-of-payment rules. We published this subpart as two separate NPRMs due to its size. We published the NPRM concerning accrued benefits, special rules applicable upon the death of a beneficiary, and several effective-date rules, on October 1, 2004. *See* 69 FR 59072. We published the NPRM concerning DIC benefits and general provisions relating to proof of death and service-connected cause of death 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 a child with various birth defects. We published this subpart as an NPRM on March 9, 2007. *See* 72 FR 10860.

''Subpart I: Benefits for Certain Filipino Veterans and Survivors'' would pertain to the various benefits available to Filipino veterans and their survivors. We published this subpart as an NPRM on June 30, 2006. *See* 71 FR 37790.

''Subpart J: Burial Benefits'' would pertain to burial allowances. We published this subpart as an NPRM on April 8, 2008. *See* 73 FR 19021.

''Subpart K: Matters Affecting the Receipt of Benefits'' would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits. We published this subpart as an NPRM on May 31, 2006. *See* 71 FR 31056.

''Subpart L: Payments and Adjustments to Payments'' would include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules. We published this subpart as two separate NPRMs due to its size. We published the first, concerning payments to beneficiaries who are eligible for more than one benefit, on October 2, 2007. *See* 72 FR 56136. We published the second, concerning payments and adjustment to payments, on October 31, 2008. *See* 73 FR 65212.

The final subpart, ''Subpart M: Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries'' would include regulations governing apportionments, benefits for incarcerated beneficiaries, and guardianship. We published the NPRM, concerning apportionments to dependents and payments to fiduciaries and incarcerated beneficiaries, on January 14, 2011. *See* 76 FR 2766.

III. Tables Comparing Proposed Part 5 Rules With Current Part 3 Rules

The purpose of the Regulation Rewrite Project is to reorganize all of VA's compensation and pension rules in a logical, claimant-focused, and user-friendly format. We have redistributed the part 3 regulations into a new organizational structure, part 5. We have created two tables, the distribution table and the derivation table, to facilitate the understanding of the redistribution of the regulations. These tables are meant to aid users who are familiar with either

the part 3 or the part 5 regulations and are searching for their counterparts in part 5 or part 3. We have updated the tables in this NPRM to reflect the proposed changes from the 20 initial NPRMs already published.

The distribution table lists the part 3 regulations by title and matches them with the corresponding part 5 regulations. There may not be an equivalent part 5 regulation for some part 3 regulations. This is indicated by the phrase ''NO PART 5 REG—unnecessary'' in the part 5 column. There are several reasons not to include certain part 3 regulations in part 5. It may be obsolete or repetitive of another provision that fully covers the intent of the regulation.

The derivation table is organized by subpart. Each subpart contains regulations relevant to the title of the subpart. The derivation table lists the proposed part 5 regulations in numerical order, with the corresponding part 3 paragraph numbers and the part 5 section title. Some of the part 5 regulations have no part 3 counterpart. This is indicated by the term ''new'' in the part 3 column. A regulation is determined to be ''new'' because it may be based on a change in law, a court decision, a General Counsel Opinion, or a manual provision.

As stated previously, there are also instances where we have not carried over a part 3 regulation into part 5. Where appropriate, we have included a comment explaining why part 5 does not include a certain part 3 provision. We propose to add part 5 citations to all the cross-references on the table to ensure that readers will be able to locate the relevant regulation.

IV. General Comments on Regulation Rewrite Project

One commenter, in response to AL70, ''Presumptions of service connection for certain disabilities, and related matters'', suggested that VA's decision to rewrite and reorganize the provisions of part 3 and promulgate them as part 5 is not in the best interest of veterans. The commenter stated that as part 3 has withstood the scrutiny of the courts and has been changed accordingly, there is no reason to now rewrite it. Additionally, the commenter feared that the introduction of part 5 will lead to an increase in the number of appeals to the courts as the regulations undergo the rigors of judicial review, which will result in delays to claimants.

Another commenter asserted that proposed AL83, ''Elections of Improved Pension; Old-Law and Section 306 Pension'', would add to the administrative costs of VA programs and therefore should not be adopted. This commenter urged VA to provide the services already promised rather than seek ''to change the manner in which they are not put forward.''

The project to rewrite and reorganize the regulations responds to a recommendation made in the October 2001 ''Report to the Secretary of Veterans Affairs'' by the VA Claims Processing Task Force. The Task Force recommended that the Compensation and Pension (C&P) regulations be rewritten and reorganized in order to improve VA's claims adjudication process. These regulations are among the most difficult VA regulations for readers to understand and apply. The Project began its efforts by reviewing, reorganizing, and redrafting the regulations in 38 CFR part 3 governing the C&P programs of the Veterans Benefits Administration.

We disagree with the assertion of the commenters that rewriting and reorganizing the regulations in part 3 is not in the best interests of veterans. Although it is possible that the validity of the new part 5 regulations may be challenged in the short-term, in the long-term, rewriting and reorganizing these regulations will be beneficial to veterans. This is because part 5 will be better organized, which will allow readers and VA personnel to find information more easily. In addition, the part 5 regulations will be easier for the average reader to understand, will resolve many ambiguities and inconsistencies, and they will not include many outdated references and regulations that are found in part 3. Therefore, we propose to make no changes based on these comments.

One commenter asserted that, without legal authority, VA interprets, amends, and reverses laws enacted by Congress. The commenter stated that VA regulations obstruct compensation and ''impose a separate, discriminatory, quasi-judicial process upon veterans.''

We respectfully disagree with the comment and propose to make no changes based on it. Congress has given VA authority to regulate in order to carry out statutory programs supporting veterans and their families, as stated in 38 U.S.C. 501, ''Rules and regulations''. Paragraph (a) of section 501 includes the following:

- The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including—
  - regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws;
  - the forms of application by claimants under such laws;
  - the methods of making investigations and medical examinations; and
  - the manner and form of adjudications and awards.

The same commenter asserted that the Feres Doctrine (which restricts active duty servicemembers from filing suit against the U.S. Government) and the restrictions on veterans hiring attorneys to represent them in VA claims (*see* 38 U.S.C. 5904) are unconstitutional. The commenter also asserted that VA decisions have upheld the grant of ''sovereign immunity'' to the chemical companies that manufactured Agent Orange and other defoliants. Lastly, the same commenter urged that VA adopt a regulation requiring that any VA employee who wrongfully denies benefits to a veteran to be permanently removed from federal employment and lose all their retirement benefits. We propose to make no changes based on any of these comments because they are outside the scope of this rulemaking.

V. Technical Corrections and Changes to Terminology for Part 5

We propose to make certain additional technical corrections and changes in terminology in this proposed rule.

Technical Corrections

In addition to considering any necessary changes to proposed part 5 regulations based on comments received from the public, we propose to make certain technical corrections. These corrections include updated citations to certain regulations to which the NPRM referred. We are now replacing these ''place holder'' citations with the current part 5 citations.

Additionally, we propose to renumber certain regulations of part 5 in order to accommodate all needed regulations.

As stated previously in this preamble, we propose to eventually replace 38 CFR part 3 with a new part 5. We note that numerous 38 CFR sections reference part 3 sections. To update these citations throughout 38 CFR, we propose to add ''or [insert part 5 section]'' after each to include a reference to the part 5 equivalent to the referenced part 3 provision.

We have compiled the following table that lists the sections in 38 CFR outside part 3 that reference part 3 sections. In addition to the part 3 section, the list includes the corresponding part 5 citation. The list is organized by part. As discussed in various portions of this preamble, there are instances where a

part 3 regulation will not be carried over into part 5. In those instances, we propose to simply leave the part 3 citation unchanged.

TABLE OF REFERENCES TO 38 CFR PART 3 SECTIONS

This table lists the sections in 38 CFR outside part 3 that reference part 3 sections. In addition to the part 3 section, the list includes the corresponding part 5 citation. The list is organized by part.

Part	Part name	38 CFR section	Part 3 section referenced	Equivalent part 5 citation
1	General Provisions	1.17(c)	3.311	5.269
		1.911(f)(2)	3.103(e)	5.80
		1.969(b)(1)	3.104(a)	5.160(a)
		1.969(b)(2)	3.105(a); 3.105(b)	5.162(c); 5.162(f); 5.163
		1.969(b)(3)	3.103	5.4(a); 5.4(b); 5.80; 5.81; 5.82; 5.83; 5.84
		1.969(c)	3.105(b)	5.163
		1.969(c)	3.400(h)	5.150(a); 5.166; 5.55(e)
4	Schedule for Rating Disabilities	4.3	3.102	5.249(a); 5.4(b); 5.3(b)(2); 5.3(b)(3); 5.3(b)(5);
		4.17(b)	3.321(b)(2)	5.380(c)(5)
		4.28(Note(1))	3.105(e)	5.177(f)
		4.29(a)(2)	3.105(e)	5.177(f)
		4.29(g)	3.321(b)(1)	5.280
		4.30 (introduction)	3.105(e)	5.177(f)
		4.30(a)(3)	3.105(e)	5.177(f)
		4.71a (table II) (row 2 column 2).	3.350(c)(1)(i)	5.326(a)
		4.71a (table II) (row 2 column 3).	3.350(b)	5.324
		4.71a (table II) (row 2 column 4).	3.350(f)(1)(x)	5.327(a)
		4.71a (table II) (row 2 column 5).	3.350(f)(1)(vi)	5.325(c)
		4.71a (table II) (row 2 column 6).	3.350(f)(1)(xi)	5.328(b)
		4.71a (table II) (row 2 column 7).	3.350(f)(1)(viii)	5.326(f)
		4.71a (table II) (row 3 column 3).	3.350(b)	5.324
		4.71a (table II) (row 3 column 4).	3.350(f)(1)(iii)	5.325(b)
		4.71a (table II) (row 3 column 5).	3.350(f)(1)(i)	5.325(a)
		4.71a (table II) (row 3 column 6).	3.350(f)(1)(iv)	5.326(d)
		4.71a (table II) (row 3 column 7).	3.350(f)(1)(ii)	5.326(c)
		4.71a (table II) (row 4 column 4).	3.350(d)(1)	5.328(a)
		4.71a (table II) (row 4 column 5).	3.350(c)(1)(iii)	5.326(e)
		4.71a (table II) (row 4 column 6).	3.350(f)(1)(ix)	5.327(d)
		4.71a (table II) (row 4 column 7).	3.350(f)(1)(xi)	5.328(b)
		4.71a (table II) (row 5 column 5).	3.350(c)(1)(ii)	5.326(b)
		4.71a (table II) (row 5 column 6).	3.350(f)(1)(vii)	5.327(c)
		4.71a (table II) (row 5 column 7).	3.350(f)(1)(v)	5.327(b)
		4.71a (table II) (row 6 column 6).	3.350(e)(1)(i)	5.330(a)
		4.71a (table II) (row 6 column 7).	3.350(d)(3)	5.328(d)
		4.71a (table II) (row 7 column 7).	3.350(d)(2)	5.328(c)
		4.71a Note to table II	3.350(b); 3.350(e)(2); 3.350(f)(3); 3.350(f)(4); 3.350(f)(5).	5.324; 5.330(d); 5.331(d); 5.331(e); 5.331(f)

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This table lists the sections in 38 CFR outside part 3 that reference part 3 sections. In addition to the part 3 section, the list includes the corresponding part 5 citation. The list is organized by part.

Part	Part name	38 CFR section	Part 3 section referenced	Equivalent part 5 citation
		4.73 Note	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.73 Note after (the pelvic girdle and thigh).	3.350(a)(3)	5.323(d)(1); 5.323(d)(2)
		4.73 Note after 5327 (miscellaneous).	3.105(e)	5.177(f)
		4.73 Note after 5329 (miscellaneous).	3.105(e)	5.177(f)
		4.75(c)	3.383(a)	5.383(b)
		4.75(f)	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.79 Note after 6014	3.105(e)	5.177(f)
		4.79 footnote 1 after (diseases of the eye).	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.79 footnote 1 after (ratings for impairment of visual fields).	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.85(f)	3.383	5.283
		4.85(g)	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.87 Note after (6208)	3.105(e)	5.177(f)
		4.88b Note after (6301)	3.105(e)	5.177(f)
		4.88b Note after (6302)	3.105(e)	5.177(f)
		4.96(c)	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.97 Note after (6731)	3.105(e)	5.177(f)
		4.97 Note after (6819)	3.105(e)	5.177(f)
		4.97 footnote 1	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.104 Note after (7011)	3.105(e)	5.177(f)
		4.104 Note after (7016)	3.105(e)	5.177(f)
		4.104 Note after (7019)	3.105(e)	5.177(f)
		4.104 Note after (7110)	3.105(e)	5.177(f)
		4.104 Note 3 after (7111)	3.105(e)	5.177(f)

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		4.104 Note after (7123)	3.105(e)	5.177(f)
		4.114 Note after (7343)	3.105(e)	5.177(f)
		4.114 Note after (7351)	3.105(e)	5.177(f)
		4.115b Note	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.115b Note after (7528)	3.105(e)	5.177(f)
		4.115b Note after (7531)	3.105(e)	5.177(f)
		4.115b footnote 1	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.116 Note2	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.116 Note after (7627)	3.105(e)	5.177(f)
		4.116 footnote 1	3.350	5.323; 5.322; 5.324; 5.325; 5.326; 5.327; 5.328; 5.329; 5.330; 5.331(c); 5.331(d); 5.331(f); 5.332; 5.333; 5.346(b)(1)(i); 5.346(b)(2);
		4.117 Note after (7702)	3.105(e)	5.177(f)
		4.117 Note after (7703)	3.105(e)	5.177(f)
		4.117 Note after (7709)	3.105(e)	5.177(f)
		4.117 Note after (7714)	3.321(b)(1)	5.280
		4.117 Note after (7715)	3.105(e)	5.177(f)
		4.117 Note after (7716)	3.105(e)	5.177(f)
		4.118 Note after (7818)	3.105(e)	5.177(f)
		4.118 Note after (7833)	3.105(e)	5.177(f)
		4.119 Note after (7914)	3.105(e)	5.177(f)
		4.119 Note after (7919)	3.105(e)	5.177(f)
		4.12a Note(5) after (8045).	3.114	5.152
		4.127	3.310(a)	5.246
		4.128	3.105(e)	5.177(f)
14	Legal Services, General Counsel, and Miscellaneous Claims.	14.636(c)	3.156	5.3(b)(6); 5.55; 5.153; 5.165
		14.636(h)(1)(iii)	3.750	5.745
17	Medical	17.36(b)(7)	3.271; 3.272; 3.273; 3.276.	5.370; 5.410(a); 5.410(c); 5.410(d); 5.410(e); 5.410(f); 5.412; 5.413; 5.414(a); 5.414(c); 5.421; 5.423(a); 5.423(b); 5.423(e); 5.706(b); 5.707(c)
		17.39(a)	3.42(c)	5.613
		17.39(b)	3.42(c)	5.613
		17.47(d)(4)	3.271; 3.272	5.370; 5.410(a); 5.410(c); 5.410(d); 5.410(e); 5.410(f); 5.411(a); 5.411(c); 5.412; 5.413; 5.706(b); 5.707(c)
		17.47(d)(5)	3.275	5.410(d); 5.411(b), 5.411(c), 5.412(a); 5.414; 5.706(b);

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		17.96(a)(1)	3.1(u);3.1(w)	5.1 (Improved Pension); 5.1 (Section 306 Pension); 5.460
		17.900	3.814(c)(2); 3.815(c)(2)	5.589; 5.590
		17.900	3.815(c)(3)	5.590
		17.900	3.814(c)(1); 3.815(c); 3.815(c)(1).	5.589; 5.590
		17.901(a)	3.814; 3.815	5.589; 5.590; 5.591
		17.901(b)	3.815; 3.815(a)(2)	5.590
		17.903(a)(2)(i)	3.814	5.589; 5.591
		17.903(a)(2)(ii)	3.815	5.590; 5.591
18	Nondiscrimination in Federally Assisted Programs of the Department of Veterans Affairs-Effectuation of Title VI of the Civil Rights Act of 1964.	Appendix B to Subpart E of part 18 (Veterans' Benefits) (Adjudication).	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)
		Appendix B to Subpart E of part 18 (Survivors' and Dependents' Educational Assistance) (Adjudication).	3.57; 3.807(d)	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)
		Appendix B to Subpart E of part 18 (Survivors' and Dependents' Educational Assistance) (Adjudication) (Survivors' and Dependent's Educational Assistance Under 38 U.S.C. Chapter 35).	3.807(d).	
		Appendix B to Subpart E of part 18 (Veterans' Educational Assistance).	3.50; 3.57; 3.59	5.1 (Custody of a child); 5.201(a); 5.203(b); 5.220; 5.223; 5.225; 5.226; 5.238; 5.417; 5.435; 5.695(a)
20	Board of Veterans' Appeals: Rules of Practice	20.101(a)(28)	3.812(d)	5.588
		20.1502(c)(3)	3.156	5.3(b)(6); 5.55; 5.153; 5.165
		20.1502(c)(4)	3.105	5.162
		20.1503(d)	3.159(b)(1)	5.90
		20.1504(b)	3.159(c)	5.90
		20.1505	3.2600	5.161
		20.1507(a)	3.103(c); 3.2600(c)	5.82; 5.161
		20.1507(a)(2)	3.2600	5.161
		Appendix A to part 20 (20.1).	3.103	5.4(a); 5.4(b); 5.80; 5.81; 5.82; 5.83; 5.84
		Appendix A to part 20 (20.1105).	3.156; 3.160	5.3(b)(6); 5.55; 5.153; 5.165; 5.57(b)–(d)
		Appendix A to part 20 (20.1106).	3.22	5.520(b); 5.521; 5.522
		Appendix A to part 20 (20.1304).	3.103; 3.156; 3.160	5.3(b)(6); 5.4(a); 5.4(b); 5.55; 5.80; 5.81; 5.82; 5.83; 5.84; 5.153; 5.165; 5.57(b)–(d)
21	Vocational Rehabilitation and Education	21.33 Cross-Reference	3.103	5.4(a); 5.4(b); 5.80; 5.81; 5.82; 5.83; 5.84
		21.42(b)(1)	3.12	5.30; 5.31(c); 5.31(e); 5.32; 5.33; 5.34(c); 5.35(b)–(d); 5.36; 5.39
		21.48(a)	3.105(d); 3.105(e)	5.83(a) 5.175(b)(1); 5.175(b)(2); 5.177(d); 5.177(f)
		21.260(d)	3.50; 3.51; 3.57; 3.59	5.1 (Custody of a child); 5.201(a); 5.203(b); 5.220; 5.223; 5.225; 5.226; 5.238; 5.417; 5.435; 5.695(a)
		21.330(a)	3.451; 3.458	5.771; 5.775
		21.330(b)	3.400(e)	5.782
		21.414(a)	3.105(a)	5.162(c); 5.162(f)

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This table lists the sections in 38 CFR outside part 3 that reference part 3 sections. In addition to the part 3 section, the list includes the corresponding part 5 citation. The list is organized by part.

Part	Part name	38 CFR section	Part 3 section referenced	Equivalent part 5 citation
		21.414(b)	3.105(b)	5.163
		21.414(c)	3.105(c)	5.177(e)
		21.414(d)	3.105(d)	5.177(d)
		21.414(e)	3.105(e)	5.177(f)
		21.422(d)(3)	3.103(c); 3.103(d)	5.81; 5.82
		21.3021(a)(2)(ii)	3.6(a); 3.807	5.21(a); 5.586(b); 5.586(c)
		21.3021(b)	3.40(b); 3.40(c); 3.40(d); 3.807(d).	5.610
		21.3021 Cross-Reference	3.6	5.21(a); 5.22(a); 5.23; 5.24; 5.25; 5.29
		21.3021 Cross-Reference (persons included).	3.7	5.21(a); 5.23(a)–(b); 5.24(a); 5.25(a)–(b); 5.28; 5.31(c)
		21.3021 Cross-Reference (Philippine and insular forces).	3.40	5.610
		21.3023 Cross-Reference (concurrent payments).	3.707	5.764(b); 5.764(c); 5.764(d)
		21.3023 Cross-Reference (certification).	3.807	5.586(b); 5.586(c)
		21.3024 Cross-Reference	3.708	5.750; 5.751
		21.3041(e)	3.57(c)	5.223(b)
		21.3131(d)	3.40(b); 3.40(c); 3.40(d)	5.610
		21.3133(c)	3.1000	5.1 (Accrued benefits); 5.1 (Evidence in the file on the date of death); 5.551; 5.784; 5.552(a); 5.552(b); 5.553; 5.554
		21.3306(b)(3)(ii)	3.102	5.3(b)(2); 5.3(b)(3); 5.3(b)(5); 5.4(b); 5.249(a)
		21.3333(c)	3.40(b); 3.40(c); 3.40(d)	5.610
		21.4003(a)	3.105(a)	5.162(c); 5.162(f)
		21.4003(b)	3.105(b)	5.163
		21.4003(c)	3.105(c)	5.177(e)
		21.4003(d)	3.105(d)	5.177(d)
		21.4007	3.900; 3.901(except paragraph (c)); 3.902 (except paragraph (c)); 3.903;3.904; 3.905.	5.675(a); 5.676(b) and (c); 5.677(b) and (c); 5.678(b)(3); 5.675(b); 5.1 (Fraud (1)); 5.676(a); 5.676(b)(2); 5.676(b)(1); 5.676(b)(3)(i); 5.680(c)(1); 5.680(c)(2); 5.677; 5.678; 5.676(d); 5.677(b)(3)(ii); 5.677(c)(2); 5.678(b)(3)(iv); 5.678(c)(2); 5.679; 5.680(a); 5.680(c)(3)
		21.4135(t)	3.114(b)	5.152
		21.4200(x)	3.1(i)	5.1 (State)
		21.5021(b)(5)	3.15	5.21(b); 5.39(e)
		21.5021(l)	3.1(j)	5.191
		21.5021(m)	3.1(j); 3.52	5.191; 5.200(a); 5.200(b)
		21.5021(n)(2)	3.57; 3.58	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a); 5.224(a)
		21.5021(o)	3.59	5.238
		21.5040(b)(2)(ii)	3.13(c)	5.37(d)
		21.5040(b)(3)	3.12; 3.13	5.30; 5.31(c); 5.31(e); 5.32; 5.33; 5.34(c); 5.35(b)–(d); 5.36; 5.39; 5.37(b); 5.37(c); 5.37(d)
		21.5040(c)(3)	3.15	5.21(b); 5.39(e)
		21.5040(d)(1)(ii)	3.4(b)	5.24(a); 5.24(b)
		21.5040(d)(3)	3.15	5.21(b); 5.39(e)
		21.5065(b)(5)(iv)	3.4(b)	5.24(a); 5.24(b)

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		21.5065(b)(6)	3.15	5.21(b); 5.39(e)
		21.5067(c)	3.1000	5.1 (Accrued benefits); 5.1 (Evidence in the file on the date of death); 5.551; 5.784; 5.552(a); 5.552(b); 5.553; 5.554
		21.5740(b)(2)(iii)	3.4(b)	5.24(a); 5.24(b)
		21.5740(b)(3)	3.15	5.21(b); 5.39(e)
		21.5742(a)(1)	3.15	5.21(b); 5.39(e)
21	VR&E	21.6050(a)	3.342	5.380; 5.347
		21.6050(b)	3.342	5.380; 5.347
		21.6420(d)	3.343	5.286; 5.347
		21.6501(a)	3.340; 3.341	5.284; 5.285
		21.6503(b)	3.340; 3.341	5.284; 5.285
		21.6507(a)	3.343(c)(2)	5.286
		21.6521(b)	3.343(c)(2)	5.286
		21.7020(b)(1)(iii)	3.6(b)	5.22(a); 5.22(b); 5.23(a)(1); 5.23(b)(1); 5.24(a); 5.24(b)(1); 5.25(a); 5.29(a)
		21.7020(b)(1)(iv)	3.6(b)	5.22(a); 5.22(b); 5.23(a)(1); 5.23(b)(1); 5.24(a); 5.24(b)(1); 5.25(a); 5.29(a)
		21.7020(b)(9)(ii)	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)
		21.7020(b)(9)(iii)	3.59	5.238(a); 5.238(c); 5.238(e)(1) and 5.238(e)(2)(i)
		21.7042	3.15	5.21(b); 5.39(e)
		21.7044	3.15	5.21(b); 5.39(e)
		21.7080(c)(3)	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)
		21.7080(c)(4)	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)
		21.7031(e) Cross-Reference.	3.667	5.551(a); 5.695(b); 5.695(c); 5.695(d); 5.695(f)–(i)
		21.7135(y)	3.114(b)	5.152
		21.7140(g)	3.1000	5.1 (Accrued benefits); 5.1 (Evidence in the file on the date of death); 5.551; 5.784; 5.552(a); 5.552(b); 5.553; 5.554
		21.7280(b)(2)	3.312	5.504
		21.7303(a)	3.105(a)	5.162(c); 5.162(f)
		21.7303(b)	3.105(b)	5.163
		21.7635(u)	3.114(b)	5.152
		21.7803(a)	3.105(a)	5.162(c); 5.162(f)
		21.7803(b)	3.105(b)	5.163
		21.8010(a)	3.815(c)(3)	5.590
		21.8010(a)	3.814(c)(2); 3.815(a)(2); 3.815(c)(2).	5.589; 5.590
		21.8010(a)	3.814(c)(3)	5.589
		21.8010(a)	3.814(c)(1); 3.815(c)(1)	5.589; 5.590
		21.9570(b)(3)	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)
		21.9570(b)(4)	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)

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		21.9625(j)(4)	3.57	5.1 (Custody of a child); 5.417; 5.220; 5.223; 5.225; 5.226; 5.435; 5.695(a)
		21.9635(u)	3.114(b)	5.152
		21.9680(e)	3.1000	5.1 (Accrued benefits); 5.1 (Evidence in the file on the date of death); 5.551; 5.784; 5.552(a); 5.552(b); 5.553; 5.554

Changes in Terminology for Clarity or Consistency

We propose changes in terminology in this rulemaking primarily to achieve consistency throughout part 5. For example, while reviewing the NPRMs, we noted that we had used the word ''termination'' interchangeably with the word ''discontinuance'' (including variations of the two words). To ensure clarity and consistency in our part 5 regulations, we propose to use the term ''discontinuance'' throughout. The word ''discontinuance'' is more accurate because there are occasions when the benefit is not terminated, but discontinued for a period, and then resumed. Similarly, we propose to use ''person'' rather than ''individual'' in all instances where either term would apply.

According to paragraph 12.9 of the Government Printing Office Style Manual (2008), numerals rather than words are used when referring to units of measurement and time. Therefore, we propose to substitute the number for the word (for example, ''1 year'' instead of ''one year'') throughout part 5.

Another source of ambiguity and confusion is the phrase ''on or after'' which is used in connection with a specific date when discussing the effective date of a regulatory provision or the date by which an event must have occurred. For example, a regulatory provision might be effective ''on or after'' October 1, 1982, which to some may seem to permit a choice between ''on'' or ''after''. The simplest way to eliminate this ambiguity is to identify the day before the effective date and precede that date with the word ''after''. In the above example, the regulatory provision would be effective ''after September 30, 1982''. This method of stating effective dates makes our regulations easier to understand and apply.

We noted that in the NPRMs we used ''VA benefits'' and ''benefits'' inconsistently and interchangeably. We propose to define ''*Benefit'' as* ''any VA payment, service, commodity, function, or status, entitlement to which is determined under this part, except as otherwise provided.'' Therefore, we propose to generally not include ''VA'' before ''benefit''. However, we propose to still use ''VA benefit'' when that term is needed to distinguish it from some other benefit such as a Social Security benefit or some benefit for which election is required (e.g. Radiation Exposure Compensation Act).

Removal of Death Compensation Provisions

There are less than 300 beneficiaries currently receiving death compensation. Except for one small group of beneficiaries, death compensation is payable only if the veteran died prior to January 1, 1957. VA has not received a claim for death compensation in over 10 years and we do not expect to receive any more.

Because of the small number of beneficiaries of death compensation, there is no need to include the provisions concerning claims for death compensation in part 5. We therefore propose to remove the death compensation provisions (§§ 5.560–5.562) that were initially proposed in AL71. 69 FR 59072, Oct. 1, 2004. We propose to reserve §§ 5.560–5.562 for later use. We propose to revise § 5.0 (the scope provision for part 5), as initially proposed in AL87, 71 FR 16464, Mar. 31, 2006, to direct that any new claims for death compensation or actions concerning death compensation benefits be adjudicated under part 3. We propose to retain provisions regarding death compensation in subpart L because a death compensation beneficiary may still elect to receive dependency and indemnity compensation instead.

Removal of Spanish-American War Death Pension Provisions

There is currently one beneficiary receiving a Spanish-American War death pension. Therefore, the provisions concerning Spanish-American War death pensions should not be carried forward to part 5. Instead, we propose to remove the Spanish-American War death pension provisions initially proposed in AL83 (§§ 5.460(c) and 5.462). 69 FR 77578, Dec. 27, 2004. We propose to reserve § 5.462 for later use. In addition, we propose to change initially proposed § 5.0 (the scope provision for part 5) as proposed in AL87, 71 FR 16464, Mar. 31, 2006, to direct that any new claims or actions concerning Spanish-American War death pension benefits be adjudicated under part 3.

Change in Titles of Certain VA Officials

Effective April 11, 2011, VA reorganized its Compensation and Pension Service by dividing it into several smaller entities, including the Compensation Service and the Pension and Fiduciary Service. We propose to update these terms throughout part 5.

VI. Subpart A: General Provisions AL87

In a document published in the *Federal Register* on March 31, 2006, we proposed to revise Department of Veterans Affairs (VA) regulations concerning general compensation and pension provisions. *See* 71 FR 16464. We provided a 60-day comment period that ended May 30, 2006. We received submissions from seven commenters: Paralyzed Veterans of America, Disabled American Veterans, Disabled American Veterans Chapter 57, Vietnam Veterans of America, National Organization of Veterans' Advocates, and two members of the general public.

§ 5.0 Scope and Applicability

In the NPRM, we identified proposed § 5.0 as a new regulation in the derivation table. 71 FR 16465–16466, Mar. 31, 2006. However, initially proposed § 5.0 is derived from § 3.2100, which governs the applicability of rules in one subpart of 38 CFR part 3. Section 5.0(a) states a similar applicability provision for all of part 5, with only minor revisions to conform it to the part 5 formatting and numbering. The derivation and distribution tables are corrected accordingly.

To provide a smooth transition from part 3 to part 5 we propose to add a new paragraph (b) to initially proposed § 5.0 establishing the applicability date for part 5. We propose two rules to govern the applicability date of part 5, and two rules to state the different situations in which part 3 would still apply. These rules would make it clear that part 5 will apply prospectively, but not retroactively.

To have part 5 apply immediately to all pending cases would require readjudication of thousands of claims (e.g. those where a decision has been rendered by the agency of original jurisdiction and the appeal period has not expired), which would significantly delay processing new claims being filed with VA. We believe that our proposed applicability structure will be the most efficient way to transition from part 3 to part 5 and is clear both to VA employees and to the members of the public who use VA regulations.

We propose to have part 3 continue to apply to all death compensation and Spanish-American War benefits. As explained in detail later in this preamble, these two benefit programs have very limited numbers of beneficiaries or potential claimants, and these claims can continue to be processed under part 3, so there is no need to include them in part 5.

To ensure that users of part 3 are aware of part 5's applicability, we propose to add a new § 3.0 to 38 CFR part 3. This section will be titled Scope and applicability and will state that part 5, not part 3, will apply to claims filed on or after the effective date of the final rule.

We note that part 5 is not a ''liberalizing VA issue approved by the Secretary or at the Secretary's direction'' under § 5.152 with regard to a claim that was filed while part 3 was still in effect for new claims. That is because part 5 does not apply to a claim that was filed while part 3 was still in effect for new claims. Therefore, part 5 cannot be liberalizing with respect to such a claim.

§ 5.1 General Definitions

Initially proposed § 5.1, included the following definition of the term ''agency of original jurisdiction'': ''*Agency of original jurisdiction* means the VA activity that is responsible for making the initial determination on an issue affecting a claimant's or beneficiary's right to benefits.'' In the preamble to the AL87 NPRM, we noted that this definition differed somewhat from a definition of the same term in 38 CFR 20.3(a), which reads as follows: ''*Agency of original jurisdiction* means the Department of Veterans Affairs activity or administration, that is, the Veterans Benefits Administration, Veterans Health Administration, or National Cemetery Administration, that made the initial determination on a claim.'' We stated that, ''The difference is because of the narrower scope of part 5 and because the definitions in § 20.3 apply in an appellate context while the definitions in proposed § 5.1 do not.''

Notwithstanding our initially proposed reason for creating a different definition, we have determined that it is unnecessary because the § 20.3(a) definition will work well in part 5. Moreover, having two different definitions, even if the two are substantially the same, could cause a reader to mistakenly believe that VA intends to define ''agency of original jurisdiction'' differently depending on whether a case is pending at a VA regional office or at the Board of Veterans' Appeals (the Board). We therefore propose to replace the definition from the AL87 NPRM with the § 20.3(a) definition.

In response to RIN 2900–AM05, ''Matters Affecting Receipt of Benefits'', we received several comments on our proposed definitions of ''willful misconduct'', ''proximately caused'', and ''drugs''. 71 FR 31056, May 31, 2006. Because these terms apply to several different subparts in part 5, we propose to move them to § 5.1 and will therefore discuss these comments in connection with § 5.1 below.

In proposed rulemaking RIN 2900–AM16, VA Benefit Claims, we initially proposed definitions of ''application'' and ''claim'', to be added to § 5.1, ''General definitions''. 73 FR 20138, Apr. 14, 2008. In that rulemaking, we proposed that, ''*Application* means a specific form required by the Secretary that a claimant must file to apply for a benefit'' and ''*Claim* means a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit.''

In responding to this comment, we determined that we had used the terms ''file'' and ''submit'' interchangeably in the NPRMs. We note that other provisions in title 38 use ''submit'' or variants thereof with respect to the presentation of evidence. *See* proposed 38 current 38 CFR 3.103(b)(2), 3.203(c), and 20.1304. We note also that there is a reasonable basis for using ''file'' in relation to documents initiating claims and appeals and ''submit'' in relation to presentation of evidence: it appears that Congress has used the term ''file'' only in relation to documents that have procedural significance in terms of initiating claims or appeals. *See* 38 U.S.C. 5101(a), 7105(b), (c), and (d)(3). In referring to the presentation of evidence, Congress has used a variety of other terms, such as ''submit[ ]'' (38 U.S.C. 108(b)), ''furnish'' (sec. 5101(c)), ''provide[ ]'' (sec. 5103), or ''present[ ]'' (sec. 5108). Further, it is possible that ''file'' may suggest a requirement for a written submission—which is appropriate for claims, notices of disagreement, and substantive appeals—whereas ''submit'' would include oral presentation of evidence at a hearing. For these reasons, we propose throughout part 5 to use ''file'' in relation to documents initiating claims and appeals and ''submit'' in relation to presentation of evidence.

One commenter commented on our initially proposed definition of ''claimant,'' which stated that, ''any person applying for, or filing a claim for, any benefit under the laws administered by VA'', noting that the term ''claim'' has a different meaning than ''application''. The commenter noted that a claim does not end with the disposition of the application and that there may be subsequent administrative actions in a claim which were not initiated by any application and action by the claimant. The commenter did not address the substance of our definitions nor did the commenter suggest any revisions. For the reasons set forth in the preamble to proposed AM16, our definitions of ''application'' and ''claim'' reflect the distinctions described by the commenter. We therefore propose to make no changes based on the comment.

One commenter objected to the scope of our definition of ''claimant'', noting that Congress, in 38 U.S.C. 5100, restricted the definition of ''claimant'' to 38 U.S.C. chapter 51. The commenter asserted that VA should restrict its definition to 38 CFR part 5. The commenter then noted that 38 U.S.C. 7111 also uses the word ''claimant'' in connection with a review of a Board decision on grounds of clear and

unmistakable error. The commenter asserted that, in 38 U.S.C. 7111, the person whose file is under review is not a claimant.

The first phrase of § 5.1 states that, ''The following definitions apply to this part''. Although other parts of 38 CFR may adopt the definitions used in part 5 by expressly stating so, the definitions we provided in § 5.1 are restricted by this phrase to use in part 5 unless adopted in other parts. The situation described by the commenter (concerning the person whose file is being reviewed by the Board) is not related to this rule because it concerns 38 CFR part 20. As stated above, the regulation as initially proposed already restricts the application of the definition of claimant to part 5.

Based on this comment, however, we propose to narrow the definition of ''claimant'' to ''a person applying for, or filing a claim for, any benefit under this part.'' Because § 5.1 applies only to part 5, it is beyond the scope of this section to include as a part 5 claimant a person who is seeking VA benefits under another part of title 38 CFR, such as health care. For the same reason, we propose to make similar changes to our definitions of ''claim'', ''beneficiary'', and ''benefit''.

We propose to add the definition of ''custody of a child,'' which means that a person or institution is legally responsible for the welfare of a child and has the legal right to exercise parental control over the child. Such a person or institution is the ''custodian'' of the child. This definition is consistent with the definition of ''child custody'' in 38 CFR 3.57(d) and with current VA practice and usage in 38 CFR part 3.

In AM05, § 5.661(a)(3), we initially proposed to define the term ''drugs'' as ''prescription or non-prescription medications and other substances (e.g., glue or paint), whether obtained legally or illegally.'' The definition is now proposed in § 5.1. A commenter suggested an amendment to this definition. The commenter asserted that the definition should include the word ''chemical'' because in the commenter's view, ''chemical'' abuse also causes euphoria and ''chemicals'' are widely abused. Our initially proposed definition used the term ''other substances'' to describe the chemicals discussed by the commenter. We intended our definition to include organic substances, such as hallucinogenic mushrooms, and all other substances that may be abused to cause intoxication.

In reviewing this comment, we determined that the ''other substances'' language of our definition may have been overly broad. For instance, it might be misconstrued to include any substance, for example, water. In order to avoid this potential misinterpretation, we propose to modify our basic definition of drugs to read as follows: ''chemical substances that affect the processes of the mind or body and that may cause intoxication or harmful effects if abused.'' The language about affecting the mind or body is taken from ''Dorland's Illustrated Med. Dictionary'' 575 (31st ed. 2007). We propose to add the language about intoxication or harmful effects to ensure that we exclude items which technically are chemical substances that might affect the mind or body (for example, commercially prepared prune juice), but do not cause intoxication or harmful effects. We propose to add a second sentence to incorporate important concepts already stated in the initially proposed definition: that our definition includes prescription and non-prescription drugs and includes drugs that are obtained legally or illegally.

Another AM05 commenter stated that the phrase ''obtained legally or illegally'' was unnecessary and contained a negative implication. The commenter recommended saying, ''however obtained'' instead. We used the phrase ''obtained legally or illegally'' because as we stated in the NPRM, this phrase is sufficiently broad to cover all the means of obtaining drugs or other substances. We used the phrase ''obtained legally or illegally'' to ensure that the regulation makes clear that a properly prescribed drug, obtained legally, may be abused such as to cause intoxication and thus proximately cause injury, disease, or death. We propose to make no changes based on this comment because the recommended change would not make clear that the abuse of legally obtained drugs is also considered drug abuse constituting willful misconduct under § 5.661(c).

We do propose, however, to change ''and drugs that are obtained legally or illegally'' to ''whether obtained legally or illegally.'' This makes it clearer that ''legally or illegally'' applies to how prescription and non-prescription drugs are obtained. The language initially proposed could be misread to mean that there are four distinct categories of drugs, prescription, non-prescription, legally obtained, and illegally obtained. ''Whether obtained legally or illegally'' makes it clear that there are two categories, prescription and non-prescription, either of which could be obtained legally or illegally.

We propose to define ''effective the date of the last payment'' as paragraph (s) in § 5.1. This term is commonly used in part 3 as ''effective date of last payment'', but not defined in part 3. In certain cases of reduction, suspension, or discontinuance of benefit payments, VA adjusts payments effective the date of the last payment of benefits. This means that ''VA's action is effective as of the first day of a month in which it is possible to suspend, reduce, or discontinue a benefit payment without creating an overpayment.'' We are adding the word ''the'' before ''date'' and ''last'' for clarity.

One commenter noted that the definition of ''fraud'' depended on where in the regulations it was used. This commenter expressed the opinion that the meaning of a word in a statute is presumed to be the common law meaning unless Congress has plainly provided otherwise. The commenter then expressed the opinion that none of the definitions of fraud presented in initially proposed § 5.1 incorporate all the common law aspects of fraud, especially the requirement for proof of fraudulent intent and the requirement for proof by clear evidence.

We first note that Congress has specifically defined ''fraud'' in 38 U.S.C. 6103(a) for purposes of forfeiture of benefits. We incorporated that definition in paragraph (1) of our initially proposed definition of fraud and then proposed to make it VA's ''general definition'' of fraud. In reviewing our definition based on this comment, we have determined that there is no need for a general definition of fraud, since the term is only used in the context of forfeiture. We therefore propose to limit the scope to instances of forfeiture.

Regarding the commenter's assertion regarding common law, we note that the five elements of common law fraud are: (1) A material misrepresentation by the defendant of a presently existing fact or past fact; (2) Knowledge or belief by the defendant of its falsity; (3) An intent that the plaintiff rely on the statement; (4) Reasonable reliance by the plaintiff; and 5) Resulting damages to the plaintiff. *See* 100 Am. Jur. Proof of Facts 3d section 8. The intent element of the common law definition of fraud relates to the defendant's desire for the plaintiff's reliance on the statement, while the material misrepresentation only requires that the person committing the fraud have a knowledge or belief that the statement is false.

As stated above, our proposed definition of fraud in § 5.1 now relates only to forfeiture and is consistent with the applicable statute. There is no requirement that our definitions in § 5.1 conform to the common law definition.

Veterans benefits and the body of law VA applies are often very different from the common law. Moreover, the intent requirement described in the third common law element above is contained in § 5.1 in the language requiring an ''intentional'' misrepresentation or failure to disclose pertinent facts ''for purpose of obtaining'' the specified objective.

Although some State jurisdictions require ''clear'' or ''clear and convincing'' evidence of fraud in various contexts, the Supreme Court has stated that ''Congress has chosen the preponderance standard when it has created substantive causes of action for fraud.'' *Grogan* v. *Garner,* 498 U.S. 279, 288 (1991). Congress should not be presumed to have intended a higher standard of proof where it has not specified such a standard. *See id.* at 286; *Thomas* v. *Nicholson,* 423 F.3d 1279, 1284 (Fed. Cir. 2005). The definitions in these rules implement statutes that do not specify a higher standard of proof, and our general rules for evaluating evidence will suffice in determinations concerning fraud. Since we already include an intent element where it is appropriate and our standards of proof are appropriate for our decisions, we propose to make no changes based on this comment.

We propose to remove the definitions for ''in the waters adjacent to Mexico'' and ''on the borders of Mexico''. Both of these phrases applied to determining entitlement to benefits for the Mexican Border War. There are no surviving veterans of this war, so the definitions are no longer necessary.

We initially proposed to define ''notice,'' now proposed § 5.1, as ''written notice sent to a claimant or beneficiary at his or her latest address of record, and to his or her designated representative and fiduciary, if any.'' In reviewing this definition to respond to a comment, we determined that limiting this definition only to written communications could create unintended problems. In *Paralyzed Veterans of America* v. *Sec'y of Veterans Affairs,* 345 F.3d 1334, 1349 (Fed. Cir. 2003), the court held that the requirement in 38 U.S.C. 5103A(b)(2) that VA ''notify'' a claimant of VA's inability to obtain certain evidence may be satisfied by either written or oral notice. The court noted that ''[i]t is certainly not unreasonable, in our view, for VA to retain the flexibility to provide oral rather than written notice, as it is clear that under certain circumstances oral notice might be the preferred or more practicable option.'' In addition, there may be other situations besides those involving section 5103A(b)(2) where written notice is not practicable and that it would not be desirable to limit the definition of ''notice'' to only written communications. When a specific statute or regulation requires written notice, we propose to signify that in part 5 by using the term ''written'' in that specific context (e.g., § 5.83(b) based on § 3.103(a) and (b)).

In addition, we have determined that the use of the defined term as part of the definition is not useful to the reader. The term ''notice'' is more accurately defined as a ''communication,'' as opposed to a ''notice.'' We, therefore, propose to define ''notice'' as either:

- A written communication VA sends a claimant or beneficiary at his or her latest address of record, and to his or her designated representative and fiduciary, if any; or
- An oral communication VA conveys to a claimant or beneficiary.

Additionally, we propose to add the definition of ''payee''. This term is used throughout part 5. We propose to define this term in § 5.1 as a person to whom monetary benefits are payable.

One AM05 commenter disagreed with our initially proposed definition of ''proximately caused''. This commenter also disagreed with including a definition of ''proximate cause'' in the regulation, stating that the concept has a long history and that for VA to select one definition narrows the concept, which may not work in the favor of veterans. The commenter also objected to restricting the definition to the second definition found in ''Black's Law Dictionary'' 213 (7th Ed. 1999).

It is necessary to define ''proximately caused'' because it has many definitions, as the commenter noted. Moreover, we do not believe the concept is well-known by the public. Claimants, beneficiaries, veterans' representatives, and VA employees are the primary users of regulations. It is important that we choose one definition, to ensure a common understanding of our regulations and to ensure that all users apply them the same way.

We selected the second definition of ''proximately caused'' from ''Black's Law Dictionary'' 234 (7th ed. 1999) (the same definition is used in the 8th Edition (2004) and the 9th Edition (2009)), because that definition most closely reflects the way VA and the U.S. Court of Appeals for Veterans Claims (CAVC) apply the concept. *See,* for example, *Forshey* v. *West,* 12 Vet. App. 71, 73–74 (1998) (''‘Proximate cause' is defined as 'that which, in a natural continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred.' ''Black's Law Dictionary'' 1225 (6th ed.1990).''). We chose not to adopt the first definition because it deals with liability and the VA system is not a tort-claims system. Congress has specified different court procedures for tort actions. We therefore propose to make no changes based on this comment.

We propose to add a definition of ''psychosis'' as § 5.1 because other part 5 regulations use the term. The definition is based on 38 CFR 3.384, which defines it as any of the following disorders listed in Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, of the American Psychiatric Association (DSM–IV–TR):

- Brief Psychotic Disorder;
- Delusional Disorder;
- Psychotic Disorder Due to General Medical Condition;
- Psychotic Disorder Not Otherwise Specified;
- Schizoaffective Disorder;
- Schizophrenia;
- Schizophreniform Disorder;
- Shared Psychotic Disorder; and
- Substance-Induced Psychotic Disorder.

We propose to add definitions of the terms ''service-connected'', § 5.1, and ''nonservice-connected'' as § 5.1. Both of these definitions are identical to those in 38 U.S.C. 101(16) and (17), except that we use the term ''active military service'' in lieu of the longer term ''active military, naval, or air service''. *See* 69 FR 4820, Jan. 30, 2004.

We initially proposed a definition of ''service medical records'' in § 5.1. We now propose to change the defined term to ''service treatment records'', now § 5.1. The Benefits Executive Council, co-chaired by senior VA and Department of Defense (DoD) officials, formally changed the term for a packet of medical records transferred from DoD to VA upon a servicemember's release from active duty. Specifically, they found that VA, the reserve components, and all of the military services, used approximately 20 different phrases for what VA referred to as ''service medical records''. They concluded that this inconsistent use of terminology was a contributing factor in the fragmented processing of medical records. This proposed change would implement the Benefits Executive Council's directive.

We omitted the Canal Zone from the initially proposed definition of ''State'' in § 5.1, because § 3.1(i) does not include the Canal Zone in its definition of ''State''. However, 38 U.S.C. 101(20) defines ''State'' to include ''For purpose of section 2303 and chapters 34 and 35 of this title, such term also includes the Canal Zone.'' To correct this omission,

we propose to revise the definition of ''State'' in proposed § 5.1 to include the Canal Zone ''for purposes of 38 U.S.C. 101(20), and 38 U.S.C. chapters 34 and 35''.

We propose to add a definition of ''VA'', as § 5.1, that is consistent with current 38 CFR 1.9(b)(1) and 38 U.S.C. 101.

Regarding our initially proposed definition of ''willful misconduct'', an AM05 commenter suggested revising the last sentence of initially proposed § 5.661(a)(1) from, ''A mere technical violation of police regulations or other ordinances will not by itself constitute willful misconduct'', to, ''A mere technical violation of police regulations or any local ordinances, including those under police, city or county authority, will not by itself constitute willful misconduct.'' Another commenter expressed the opinion that the use of the word ''other'' before the word ''ordinances'' may be misunderstood to refer to a state's general police power to make and enforce laws. We propose to clarify the rule based on these comments for the reasons discussed below.

The definition of ''ordinance'' includes city or county authority. The word ''ordinance'' is defined as, ''An authoritative law or decree; esp., a municipal regulation.'' ''Black's Law Dictionary'' 1208 (9th ed. 2009). ''Municipal'' is defined as, ''1. Of or relating to a city, town or local government unit. 2. Of or relating to the internal government of a state or nation.'' *Id.* at 1113.

In most municipalities, the police department establishes regulations relating to parking, street usage, and other similar civil issues. The use of the phrase ''police regulations'' is intended to express the idea that a violation of these types of regulations will not be used as the grounds for a finding of willful misconduct. Violations of these regulations are ''civil infractions''. An ''infraction'' is ''[a] violation, usually of a rule or local ordinance and usually not punishable by incarceration.'' ''Black's Law Dictionary'' 850 (9th ed. 2009). A civil infraction is ''An act or omission that, though not a crime, is prohibited by law and is punishable.'' *Id.* Since that term is not readily understood by most of the general public, parenthetical explanations following the use of the term will clarify the meaning for most people. We propose to revise the last sentence of what was initially proposed § 5.661(a) to read, ''Civil infractions (such as mere technical violation of police regulations or other ordinances) will not, by themselves, constitute willful misconduct.'' We are proposing to make this change to ensure that civil infractions, while prohibited by law, do not by themselves deprive an otherwise entitled veteran to benefits. We now propose to incorporate this provision into § 5.1.

The second sentence of initially proposed § 5.661(a)(2) read: ''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.'' We have determined that this statement is unnecessary because § 5.1 already defines ''proximately caused'', so we propose to remove the example.

One commenter expressed the opinion that a VA determination of ''willful misconduct'' is a quasi-criminal determination. This commenter stated that the preponderance of the evidence standard is not appropriate in adjudicating a quasi-criminal determination. The commenter asserted that the preponderance of the evidence standard of proof for willful misconduct determinations was too low because a determination of willful misconduct essentially bars a veteran or claimant from receiving benefits based on the veteran's service. The commenter asserted that this deprived the veteran or claimants claiming entitlement based on a veteran's service of procedural due process under the Fifth Amendment to the U.S. Constitution. The commenter expressed the opinion that VA should instead establish the clear and convincing evidence standard as the standard of proof in making willful misconduct determinations. The commenter noted that the U.S. Supreme Court has stated that a principal function of establishing a standard of proof is ''to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.'' *Addington* v. *Texas,* 441 U.S. 418, 423 (1979).

The commenter acknowledged that VA had adopted the standard of proof articulated by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in *Thomas,* 423 F.3d 1279. The commenter also noted that VA has the authority to adopt a different standard notwithstanding the standard adopted by the Federal Circuit, as explained by the Supreme Court in *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 969–70 (2005) (finding that an agency could, through publication of a regulation, adopt an interpretation of a statute that was different than the interpretation of the same statute made by a court if the statute was ambiguous and the court's interpretation was not the only permissible interpretation of the statute).

The commenter noted that the Federal Circuit found in *Thomas* that the statute did not contain a standard of proof and that VA had not, by regulation, imposed a standard of proof. *See* 423 F.3d at 1283–84. The Federal Circuit then found that the Board's and the U.S. Court of Appeals for Veterans Claims' decisions to apply the preponderance of the evidence standard were supported by their stated reasons and bases. *Id.* at 1284–85. The commenter noted that the *Nat'l Cable & Telecomms. Ass'n* Court found that even if a court has established a standard of proof as a gap-filling measure, an agency may still establish a different standard of proof to fill gaps in a statute by regulation if the agency decides that the court's determination of a standard of proof is not in accordance with the agency's policies or does not align with the agency's perception of Congressional intent.

VA does not equate administrative willful misconduct determinations with quasi-criminal proceedings and decisions. VA administrative procedures for determining entitlement to benefits are non-adversarial and pro-claimant, in contrast to criminal proceedings. Attempts to categorize the administrative entitlement decisions made by VA as quasi-criminal proceedings characterize both the claimants and the VA administrative process incorrectly. While the commenter does not fully explain what was meant by ''quasi-criminal'' proceedings, we note that unlike criminal proceedings, VA has no authority under these regulations to fine, imprison, or otherwise impose punishment on a claimant. VA administratively decides entitlement to benefits in accordance with the duly enacted statutes of Congress. We do not follow the procedures used in either criminal or civil courts.

A decision that a disability was the result of willful misconduct only prohibits service connection for the disability or death incurred as a result of the willful misconduct. Contrary to the commenter's assertion, a veteran or a claimant claiming entitlement based on a veteran's service does not lose entitlement to all benefits. A decision that willful misconduct caused a disability results in essentially the same consequences as a decision that an injury or disease was not incurred in service. Service connection for that disability or death is not granted. In making a determination that the

disability was due to willful misconduct, the veteran or a claimant claiming entitlement based on a veteran's service is notified of the information or evidence needed to substantiate the claim, of the decision on the claim, and of their appellate rights.

Additionally, there is no violation of the Fifth Amendment through application of the preponderance of the evidence standard to willful misconduct decisions. Since the commenter merely asserted a violation of the Fifth Amendment without explaining how the use of any one particular standard of proof could violate the due process provision of the Fifth Amendment, we are unable to respond more fully to this comment and propose to make no changes based on this comment.

VA does not need to decide if the commenter's reasoning concerning adoption of a standard of proof differing from that found by the court in *Thomas* is correct. After reviewing the various standards of proof, we have determined that the preponderance of the evidence standard is the appropriate standard of proof to prove willful misconduct, except as otherwise provided by statute. We provided our reasons for selecting this standard of proof in the NPRM that proposed this segment of part 5. *See* 71 FR 16470, Mar. 31, 2006. The preponderance of the evidence standard provides that if the evidence demonstrates that it is more likely than not that a fact is true, the fact will be considered proven. This is an appropriate standard to apply to the administrative decisions we propose to make in connection with veterans' benefits.

We propose to move the definitions of ''accrued benefits'', ''claim for benefits pending on the date of death'', and ''evidence in the file on the date of death'' from § 5.550 to § 5.1. A comment to RIN 2900–AL71 ''Accrued Benefits and Special Rules Applicable Upon Death of a Beneficiary'', raised questions concerning the initially proposed definition of ''accrued benefits''. Based on that comment, we made technical revisions to clarify the definition, and also made the following revisions.

The last sentence of initially proposed § 5.550(d) (definition of ''[c]laim for benefits pending on the date of death'') read, ''[a]ny new and material evidence must have been in VA's possession on or before the date of the beneficiary's death.'' One commenter, responding to RIN 2900–AL71 ''Accrued Benefits and Special Rules Applicable Upon Death of a Beneficiary'', suggested that VA should clarify this sentence by inserting the phrase ''used to reopen the claim'' between the words ''evidence'' and ''must''. The commenter was concerned that the proposed language would deter a deceased beneficiary's survivor from filing existing additional evidence in support of a claim for accrued benefits. However, because a claim for accrued benefits must be granted based on evidence in the file on the date of death, such additional evidence would not be considered in deciding the claim. Nevertheless, to avoid any potential confusion we propose to add ''submitted to reopen the claim'' between ''evidence'' and ''must''. We propose to use ''submitted'' rather than ''used'' because the later implies that VA will always find that the evidence was new and material.

We made additional revisions to the definition of ''claim for benefits pending on the date of death'' for both readability and consistency purposes. One such revision is that we replaced the initially proposed term ''finally disallowed claim'' with ''finally denied claim'' and reorganized the sentence structure with respect to new and material evidence.

§ 5.2 Terms and Usage in Part 5 Regulations

38 CFR part 3 uses both singular and plural nouns to refer to a single, regulated person. For example, § 3.750(b)(2) refers to ''*a veteran* with 20 or more years of creditable service'', while § 3.809(a) refers to ''*veterans* with wartime service'' (emphasis added). This inconsistent usage could confuse readers so we propose to use only singular nouns to refer to a particular regulated person. We propose to state in previously reserved § 5.2 that a singular noun that refers to a person is meant to encompass both the singular and plural of that noun. For example, the term ''a surviving child'' would apply not only to a single surviving child, but also to multiple surviving children. Where a provision is meant to apply only to a group of people (for example, the division of benefits between a surviving spouse and children), we will indicate this by using a plural noun to refer to the regulated group of people. Similarly, we will use a plural noun when referring to a specific, identified group of people. *See,* for example, § 5.27, ''Individuals and groups designated by the Secretary of Defense as having performed active military service.''

§ 5.3 Standards of Proof, and Comments on Definitions of Evidentiary Terms

One commenter suggested that VA should include additional definitions in § 5.1. The commenter suggested that ''evidence'' should be defined as ''all the means by which any alleged matter of fact, the truth of which is submitted to an adjudicator, is established or disproved.'' The commenter went on to state that, ''Evidence includes the testimony of witnesses, introduction of records, documents, exhibits, objects, or any other probative matter offered for purpose of inducing a belief in the contention by the fact-finder'' and that, ''evidence is the medium of proof''. The commenter opined that defining ''evidence'' would assist an unrepresented claimant in understanding the term and would inform claimants that some materials he or she submitted would not be evidence (such as arguments, assertions, and speculations).

This commenter asserted that after we define ''evidence'', we should define ''relevant evidence'' and ''probative evidence'', as follows:

> *Relevant evidence* means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the matter more probable or less probable than it would be without the evidence.
>
> *Probative evidence* is evidence that tends to prove a particular proposition or to persuade a trier of fact as to the truth of an allegation.

The commenter asserted that this would enable the claimants to understand what evidence should be submitted in order for the claimants to succeed with their claims for benefits.

We propose to make no changes based on these comments. We do not believe that there is a significant need to define the referenced terms, and there is some risk that such definitions would be misinterpreted as limiting the types of items a claimant may file or that VA will consider. Except as to claims based on clear and unmistakable error, VA is required to consider all material filed. *See* 38 U.S.C. 5107(b) (''The Secretary shall consider all information and lay and medical evidence of record in a case''). Defining ''evidence'' as suggested might discourage claimants from filing arguments or other information and statements.

The dictionary definition of ''evidence'' is ''something that furnishes proof.'' ''Merriam-Webster's Collegiate Dictionary'' 433 (11th ed. 2006). VA does not use the word in a manner different from this ordinary or natural definition: ''When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.'' *Smith* v. *United States,* 508 U.S. 223, 228 (1993). This concept applies equally to regulations. Thus, it is not necessary to define words used in a regulation when the words are used in

accord with their ordinary or natural meaning. The commenter's suggested definitions of ''credibility'', ''determination'', ''material'', ''matter'', ''proof'', and ''testimony'' are likewise not needed.

The suggested definitions of ''relevant evidence'' and ''probative evidence'' are also not necessary. As explained below, the definition of ''competent evidence'' will be helpful to claimants because VA may in individual cases inform the claimant of the need for competent medical expert evidence on some issues. However, definitions that appear to delineate other categories of evidence, such as ''relevant evidence'' and ''probative evidence'' may be confusing to claimants and appear to suggest restrictions on the types of evidence claimants may file or that VA will consider. It is generally to the claimants' advantage to file all information and evidence they have that have potential bearing upon the issues in their claim. Introducing definitions of ''relevant evidence'' and ''probative evidence'' might create confusion and discourage claimants from filing all information and evidence that they might otherwise file.

The same commenter urged VA to adopt a certain definition of the term ''probative value of evidence'', namely ''the tendency, if any, of the evidence to make any fact of consequence in the determination of the matter more or less probable than it would be without the evidence.'' However, the commenter did not specifically state why VA should adopt a definition of that term, but focused instead on the suggestion that VA define the distinct but related term ''probative evidence''. For the same reasons that we propose not to define ''probative evidence'', we propose not to define ''probative value of evidence''.

This commenter also suggested we adopt a definition of the word ''issue'' as ''a single, certain point of fact or law that is important to the resolution of a claim for veterans' benefits.'' The commenter noted that this word is used in 38 U.S.C. 5107(b). The commenter opined that because Congress used this word in the statute, we must define the word. The commenter similarly opined that § 5.3(b), ''Proving a fact or issue'', is confusing because we did not define the word ''issue'' in § 5.1. The commenter suggested that we used the words ''issue'' and ''fact'' as unrelated concepts. The commenter then reasoned that, since the statute did not use the word ''fact'', VA may not have authority to include that word in the regulations, noting the canon of ''expressio unius est exclusio alterius'' (''to express or include one thing implies the exclusion of the other, or of the alternative'', ''Black's Law Dictionary'' 661 (9th ed. 2009)).

The commenter is correct that the word ''issue'' is used in 38 U.S.C. 5107(b), but the word is also used in other places in title 38, often with a different meaning. *See,* for example, 38 U.S.C. 5112(b)(6) and 5110(g). The word ''issue'' is used within part 5 with at least three different meanings. *See,* for example, §§ 5.82(d), 5.103(e), 5.133(b), and 5.152. VA's policy is to broadly interpret 38 U.S.C. 5107(b), such that the benefit of the doubt applies both to the ultimate ''issue'' in a case (for example, whether to award benefits) but also to individual issues of material fact (for example, whether a particular event occurred). Therefore, we propose to revise §§ 5.1 and 5.3 to refer, where appropriate, to both questions of fact and the resolution of issues.

The same commenter urged VA to adopt a definition of the term ''presumption''. In § 5.260(a) of our proposed rule, ''Presumptions of Service Connection for Certain Disabilities, and Related Matters'', we clearly described the meaning of the term in the veterans benefits context: ''A presumption of service connection establishes a material fact (or facts) necessary to establish service connection, even when there is no evidence that directly establishes that material fact (or facts)''. 69 FR 44624, July 27, 2004. We therefore propose to make no changes based on this comment.

The same commenter urged VA to adopt a definition of ''rebuttal of a presumption''. Section 5.3(c), which states, ''A presumption is rebutted if the preponderance of evidence is contrary to the presumed fact'', in effect defines the term already so we decline to make any changes based on this comment.

The same commenter urged VA to adopt a definition of ''weight of [the] evidence'', a term which was used in initially proposed § 5.3(b)(1) and (3). We agree that such a definition would be helpful to readers and we therefore propose to add the following definition in § 5.3(b)(1), ''*Weight of the evidence,* means the persuasiveness of some evidence in comparison with other evidence.'' ''Black's Law Dictionary'' 1731 (9th ed. 2009). With this addition, initially proposed paragraphs (b)(1) through (5) are redesignated as paragraphs (b)(2) through (6), respectively.

One commenter noted that 38 U.S.C. 5107(b) contains the language ''approximate balance of positive and negative evidence'' and that the regulation that VA proposed to adopt to implement section 5107(b) did not attempt to give any meaning to the statutory terms ''positive and negative evidence''. The commenter asserted that these two statutory terms have known ''legal'' meaning and that VA must define ''positive evidence'' and ''negative evidence'' in order to give full force and effect to section 5107(b).

We did not define the terms ''positive evidence'' and ''negative evidence'' in initially proposed § 5.1 because we did not use those terms in initially proposed § 5.3(b)(2), which implements section 5107(b). Instead, we described ''evidence in support of'' and ''evidence against'' a matter. This interpretation of the statute is consistent with the clear and unambiguous meaning of the statute. *See,* for example, *Ferguson* v. *Principi,* 273 F.3d 1072, 1076 (Fed. Cir. 2001) (holding that section 5107(b) is ''unambiguous'' and upholding a decision not to apply the benefit-of-the-doubt-rule to a case where ''there was more credible evidence weighing against the claim than supporting the claim''). We propose to make no changes based on this comment.

In § 5.3(a), we propose to revise the first sentence of the initially proposed paragraph by adding ''material to deciding a claim''. In response to various comments concerning this proposed regulation, we noted that while we had adequately stated the general standards for proving facts and resolving issues, we had not included the reason for proving a fact.

Also in initially proposed § 5.3(a), ''Applicability'', we stated, ''This section states the general standards of proof for proving facts and for rebutting presumptions. These standards of proof apply unless specifically provided otherwise by statute or a section of this part.'' In reviewing the initially proposed paragraph, we have decided to clarify that ''a section'' means another section besides § 5.3. We therefore propose to change ''a section'' to ''another section''.

Initially proposed § 5.3(b)(1) (now § 5.3(b)(2)) stated, ''*Equipoise* means that there is an approximate balance between the weight of the evidence in support of and the weight of the evidence against a particular finding of fact, such that it is as likely as not that the fact is true.'' One commenter objected to the use of the word ''equipoise'' in § 5.3(b). The commenter noted that this word does not appear in 38 U.S.C. 5107(b), ''Claimant responsibility; benefit of the doubt''. The commenter expressed the opinion that VA should remove this word and its definition and replace the word and definition with the exact language used in 38 U.S.C. 5107(b). The commenter

noted that ''in attempting to define the meaning of the term 'equipoise', the initially proposed regulation states that equipoise means there is an 'approximate balance between the weight of the evidence in support of and the weight of the evidence against a particular finding of fact, such that it is as likely as not that the fact is true.' '' The commenter felt that by omitting the word ''equipoise'' and its definition, VA would avoid confusion and be consistent with the governing statute.

We propose to make no changes based on this comment. It is not necessary to use the exact language Congress used in drafting a statute in the wording of the regulations we promulgate. The Secretary has been directed by Congress to ''prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department.'' 38 U.S.C. 501(a). We chose to use the word ''equipoise'' because as used and defined in § 5.3, it is a clear and concise term and has the same meaning as traditionally applied to the phrase used in 38 U.S.C. 5107(b), ''approximate balance of positive and negative evidence''. Our use of this word is consistent with the governing statute.

Another commenter asserted that our definition of ''equipoise'' in initially proposed § 5.3(b)(1) (now § 5.3 (b)(2)) accurately restates the third sentence of § 3.102, but fails to accurately restate the second sentence, which emphasizes and makes clear that the balances are always to be resolved in favor of the veteran. The same commenter felt that the sentence in initially proposed § 5.3(b)(2) (now § 5.3(b)(3)) that read, ''However, if the evidence is in equipoise and a fact or issue would tend to disprove a claim, the matter will not be considered proven'', contradicts the benefit of the doubt rule because the rule must ''always be applied in favor of the veteran''. We propose to clarify the statement of the benefit of the doubt rule by revising the first sentence § 5.3(b)(3) to now state, ''When the evidence is in equipoise regarding a particular fact or issue, VA will give the benefit of the doubt to the claimant and the fact or issue will be resolved in the claimant's favor.''

In reviewing initially proposed § 5.3(b)(1) (now § 5.3(b)(2)), we have determined that the phrase ''such that it is as likely as not that the fact is true'' might cause a reader to mistakenly believe that this is an additional requirement for triggering the ''reasonable doubt'' doctrine, over and above the requirement that there be an ''approximate balance between the weight of the evidence in support of and the weight of the evidence against a particular finding of fact''. We therefore propose to remove the language ''such that . . .'' from this paragraph.

One commenter urged VA to use the current language of 38 CFR 3.102 in proposed § 5.3(b)(2). The commenter asserted that the use of the term ''equipoise'' in initially proposed § 5.3(b)(2) is adversarial and that the proposed rule would ''restrict [veterans'] ability to put forth the best evidence and challenge the credibility [of] evidence which the VA accepts or denies.''

As discussed in the preamble to the NPRM, we are not substantively changing the provisions in current § 3.102. Instead, we are rewording and reorganizing them to make them easier for the reader to understand. We disagree that the changes described in the NPRM and in this rulemaking make these provisions adversarial, and we therefore propose to make no changes based on this comment.

Although we decline to make the changes to initially proposed § 5.3(b)(2) (now § 5.3(b)(3)) suggested by the commenter, in reviewing the first two sentences of that paragraph, we have determined that they can be clarified. Specifically, the initially proposed sentences could be misread to imply that evidence can be in equipoise regarding an issue and at the same time tend to prove or disprove a claim. As stated in 38 CFR 3.102, where the evidence is in equipoise, it ''does not satisfactorily prove or disprove the claim''. We therefore propose to remove the potentially confusing language regarding ''support'' of a claim and ''tend[ing] to disprove a claim'', and combined the two sentences into one. The new sentence now reads, ''When the evidence is in equipoise regarding a particular fact or issue, VA will give the benefit of the doubt to the claimant and the fact or issue will be resolved in the claimant's favor.''

One commenter noted that the sentence in initially proposed § 5.3(b)(3) (now (b)(4)) lacked parallelism. We agree and propose to change the wording by adding the words ''the weight of'' before the words ''the evidence against it.''

One commenter objected to the sentence in initially proposed § 5.3(b)(5) (now § 5.3(b)(6)): ''VA will reopen a claim when the new and material evidence merely raises a reasonable possibility of substantiating the claim.'' This commenter asserted that the ''reasonable possibility of substantiating the claim'' portion could be read by an adjudicator as requiring sufficient evidence to grant the claim. This commenter suggests adding language to ensure that the adjudicator does not equate the new and material evidence requirement to the evidence requirements needed to grant the claim.

We disagree that a VA decisionmaker would apply this sentence as requiring that the new and material evidence to reopen a claim also be sufficient to grant the claim. To the contrary, when read in conjunction with initially proposed § 5.3 (b)(2) (now § 5.3 (b)(3)), ''Benefit of the doubt rule'', this sentence makes it very clear that a lower standard of proof is applied for reopening a claim than for granting a claim. We therefore propose to make no changes based on this comment.

One commenter objected to the general format of initially proposed § 5.3(b)(5) (now § 5.3(b)(6)) because the commenter asserted that there was a lack of emphasis on the different standard of proof used to determine whether evidence is new and material. The commenter asserted that the last sentence of the paragraph should be rewritten and moved to the front of the paragraph to add emphasis to the concept that the higher standard of proof does not apply when determining if the evidence is new and material.

We agree and we propose to change the sentence to read, ''The standards of proof otherwise provided in this section do not apply when determining if evidence is new and material, but do apply after the claim has been reopened.'' We propose to place this sentence as the first sentence of that paragraph, now designated as § 5.3(b)(6), to add emphasis to this provision.

One commenter noted that in § 5.3(c), we stated that, ''A presumption is rebutted if the preponderance of evidence is contrary to the presumed fact.'' The commenter stated that in 38 U.S.C. 1111, the evidence to rebut the presumption of sound condition when accepted and enrolled for service is specified as clear and unmistakable evidence, a standard higher than a preponderance of evidence. The commenter recommended inserting the phrase ''Except as otherwise provided'' at the beginning of the section.

We agree that the standard in § 5.3(c) applies to rebutting presumptions unless an applicable statute provides a different standard, such as in the example provided by the commenter. However, we already provided for the application of different standards in § 5.3(a) by stating, ''These standards of proof apply unless specifically provided otherwise by statute or a section of this part.'' Since the regulations already address the point raised by the

commenter, we propose to make no changes based on this comment.

Several commenters noted that under 38 U.S.C. 1113(a), a presumption can be rebutted only when ''there is affirmative evidence to the contrary.'' The commenters stated that the ''affirmative evidence'' requirement should be inserted into § 5.3(c). We disagree with the commenters. There are many statutes that govern the rebuttal of presumptions, *see,* for example, 38 U.S.C. 1111, 1132, and 1154(b), but the ''affirmative evidence'' requirement of section 1113(a) affects only presumptions related to diseases that are covered by proposed § 5.260(c). (We note that section 1113 does not affect the ALS presumption, which is also covered by § 5.260(c)). Hence, the affirmative evidence requirement appears in § 5.260(c), but not in the general rule that applies except as provided otherwise.

We agree with these assertions to the extent that we should retain the phrase ''affirmative evidence'' and propose to revise § 5.260(c)(2) to include the phrase ''affirmative evidence''. We propose to revise § 5.260(c)(2), by replacing ''Any evidence . . .'' with ''Affirmative evidence'' in the beginning of the sentence. We also note that 38 U.S.C. 1116(f) requires ''affirmative evidence'' to rebut the presumption of exposure to herbicides in the Republic of Vietnam and so we now propose to insert that term into § 5.262(d).

We also propose to revise § 5.3(c) by adding a second sentence after the first sentence, that states, ''In rebutting a presumption under § 5.260(c)(2), affirmative evidence means evidence supporting the existence of certain facts.'' We have chosen this definition instead of one of the definitions recommended by the commenters because this is consistent with the definition of ''affirmative'' found in ''Black's Law Dictionary'', 68 (9th ed. 2009).

In a related matter, comments on both RIN 2900–AL87, ''General Provisions'', 71 FR 16464, Mar. 31, 2006, and on RIN 2900–AL70, ''Presumptions of Service Connection for Certain Disabilities, and Related Matters'', 69 FR 44614, July 27, 2004, indicated the need for our rules to address the role of ''negative'' evidence, by which we mean an absence of evidence. An absence of evidence may be considered as evidence in support of, or weighing against, a claim. For example, an absence of evidence of signs or symptoms of a particular disability prior to service would support a veteran's claim that he incurred the disability during service. On the other hand, a lack of symptoms or complaints during service may indicate that the veteran was not disabled during service. An absence of evidence may also be used to rebut a presumption. The U.S. Court of Appeals for the Federal Circuit endorsed this view. *Maxson* v. *Gober,* 230 F.3d 1330 (2000) (holding that VA may properly consider a veteran's entire medical history, including absence of complaints, in determining whether presumption of aggravation is rebutted). This evidence is generally one of the weaker forms of evidence, but it is nevertheless important to recognize the role that it may play in certain cases, particularly where there is little evidence to support a claim. Hence, we propose to add § 5.3 (e), which states, ''VA may consider the weight of an absence of evidence in support of, or against, a particular fact or issue.''

One commenter expressed concern about how a VA decisionmaker would read § 5.3(d), ''Quality of evidence to be considered'', in conjunction with § 5.1 that defines ''competent lay evidence''. The commenter asserted that if he or she determined that the evidence did not fit within the definition of competent lay evidence or that lay evidence is generally not competent, he or she would be more likely to assess the evidence as adverse to the veteran.

The commenter's assumption is incorrect. Competent lay evidence may be neutral or may be favorable to the claimant. Such evidence may also be probative, depending on the claim to be adjudicated. We also do not agree that a VA decisionmaker would determine that lay evidence was generally not competent. We have provided for the determination of what makes lay evidence competent in the definition in proposed § 5.1. A VA decisionmaker's application of these provisions will lead the adjudicator to determine what is competent lay evidence and what is not. We propose to make no changes based on this comment.

In objecting to our initially proposed definitions of ''competent expert evidence'' and ''competent lay evidence'', one commenter wrongly asserted that there are no such definitions in current VA regulations. In fact, as stated in the preamble of RIN 2900–AL87, these definitions are based on similar definitions in 38 CFR 3.159(a)(1) and (2).

The same commenter asserted that defining competent evidence would ''cause the claims of veterans to be pre-judged by adjudicators and foster an adversarial climate in the claims process.'' The commenter urged that, ''Rather, all the evidence of record in each case should be judged on its own merits, and on the merits of the case as a whole.''

The commenter did not explain how our definitions of ''competent expert evidence'' and ''competent lay evidence'' have the adverse effects he predicts, and we disagree that they would have such effects. VA has applied substantially similar definitions since 2001. 38 CFR 3.159(a)(1) and (2); *see* 66 FR 45630, Aug. 29, 2001. These definitions have not caused any such adverse effects, and the changes we are making to the definitions in § 5.1 will not either. We therefore propose to make no changes based on this comment.

One commenter expressed concern that by changing the definitions of ''competent medical evidence'' to ''competent expert evidence'' and ''competent lay evidence'' we were impermissibly amending § 3.159, ''Department of Veterans Affairs assistance in developing claims.'' The commenter expressed the concern that since these terms were originally adopted as part of that regulation, a change in the definitions would amend § 3.159 without providing public notice and the opportunity for public comment as required by 5 U.S.C. 553.

The commenter's concerns relate to the removal of part 3 when we adopt part 5. This rulemaking will not affect such a removal; nor will this rulemaking affect claims currently being adjudicated under part 3. The definitions in § 5.1 only apply to part 5, not to part 3. Hence, there is no basis for a concern that any action in this rulemaking will affect a part 3 rule.

One commenter opined that the definitions of ''competent expert evidence'' and ''competent lay evidence'' should be revised since neither definition focused on the relevance of the evidence. The commenter also asserted that neither definition correctly described ''competent expert evidence'' or ''competent lay evidence''. The commenter believed that treatises, medical or scientific articles, and other writings are not ''competent expert evidence'' because they are not based on the author's personal knowledge of the specific facts of the veteran's particular case.

Although we do not agree with the suggestion that treatises, medical and scientific articles, and other writings of this type may never be ''competent expert evidence'', the commenter raises a valid point. Treatises and similar writings may be ''competent'' in the sense that they state findings and opinions based on specialized training or experience and personal knowledge

of the facts on which such findings and opinions are based. However, it is misleading to equate treatises and similar writings with the types of expert evidence ordinarily provided in VA benefit claims. That is because medical treatises ordinarily recite facts or opinions derived apart from a particular veteran's case and thus are not based on personal knowledge of the facts of the veteran's case. The U.S. Court of Appeals for Veterans Claims has noted that treatise evidence is often too general or speculative to provide significant evidence concerning the cause of a particular veteran's disability. *See Sacks* v. *West,* 11 Vet. App. 314, 316–17 (1998). Citing treatises as an example of competent expert evidence may mislead claimants to the belief that such treatises are the equivalent of medical opinions based on the specific facts of their case. While treatise evidence may in some situations be probative of the fact to be proved, and must always be considered by VA when presented in a case, we do not consider it helpful to cite such writings as representative examples of competent expert evidence. Thus, we propose to revise the definition as urged by the commenter by removing the reference to treatise evidence in the definition of ''competent expert evidence''.

We propose not to revise the definitions to include a statement concerning the relevancy of the evidence. The relevance of the evidence depends on the facts in each case and is to be determined on a case-by-case basis by the VA employee charged with making the decision on the claim.

One commenter urged VA to define ''competent evidence'' in part 5 as, ''evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the matter more probable or less probable than it would be without the evidence.''

This suggested definition is actually more a definition of ''probative evidence'' than ''competent evidence''. In fact, this same commenter urged VA to define ''probative evidence'' as ''evidence that tends to prove a particular proposition or to persuade a trier of fact as to the truth of an allegation.'' Since the suggested definition of competent evidence concerns evidence's probative value rather than its competence, we propose to make no changes based on the comment.

In our initially proposed definition of competent expert evidence, we stated, ''Expert evidence is a statement or opinion based on scientific, medical, technical, or other specialized knowledge.'' We propose to add ''all or in part'' after ''based'' because an expert opinion may also be based on the specific facts of a case. An example of such an opinion would be a doctor's opinion that general medical principles indicate that a particular injury would not likely have been aggravated under the facts of a particular case. *See Emenaker* v. *Peake,* 551 F.3d 1332, 1335–37 (Fed. Cir. 2008).

The initial NPRM to § 5.3 explained why part 5 will not repeat the fifth sentence of § 3.102. 71 FR 16464 (Mar. 31, 2006). Section 5.3 would also not repeat the fourth sentence. It is unnecessary because, like the fifth sentence, it confusingly elaborates the idea of ''approximate balance'' of evidence, which 5.3(b)(2) through (5) do well without the confusing language of the fourth or fifth sentences of § 3.102.

§ 5.4 Claims Adjudication Policies

One commenter asserted that VA gives too much weight to medical exam reports prepared by VA doctors and insufficient weight to medical exam reports prepared by a veteran's own doctors. The commenter cited the example of VA giving more weight to the report of a VA doctor who examined him for less than an hour than to the medical records from his treating doctor covering a period of over 5 years. The commenter asserted that VA's over-reliance on its own medical exams is ''VA policy'' but is not ''sound medical practice''. The commenter further asserted that when a VA medical exam is ''poorly conducted and documented'', VA orders a second exam rather than rely on the treating doctor's records to decide the claim. The commenter urged VA to ''establish a level of proof which meets the balance test of both patient history and proof of medical condition'' and not rely on ''an arbitrary, 'snapshot' exam conducted in a VA hospital meaning more than years of records from the veteran's regular physician(s).''

We decline to make any changes based on this comment in the manner in which VA weighs medical evidence. VA often gives significant weight to an examination conducted, or a medical opinion provided by, a VA health care provider because they follow set procedures designed to elicit information relevant to the particular claim. However, as stated in 38 CFR 3.326(b), ''Provided that it is otherwise adequate for rating purposes, any hospital report, or any examination report, from any government or private institution may be accepted for rating a claim without further examination.'' Under 38 U.S.C. 5103A(d), VA must provide a medical examination or medical opinion in all disability claims when it is ''necessary to make a decision on the claim''. Under this duty, VA regularly conducts specialized medical examinations of veterans' disabilities and often requests medical opinions on specific questions. If VA's adjudicator finds that such an exam or opinion is inadequate, he or she returns the case to the health-care provider and requests for an adequate one to be provided.

However, VA must also ''consider all information and lay and medical evidence of record in a case''. 38 U.S.C. 5107(b). Another statute requires the Board of Veterans' Appeals to review appeals to the Secretary ''based on the entire record in the proceeding and upon consideration of all evidence and material of record.'' 38 U.S.C. 7104(a). This statute indicates that evidence is an element of a person's entire VA record. The statute prescribing that VA considers the ''places, types, and circumstances'' of a veteran's service when deciding a claim for service connection prescribes that VA consider ''all pertinent lay and medical evidence''. 38 U.S.C. 5104(a). Although section 5104(a) could be interpreted to distinguish evidence from other documents in the record, VA regulations demonstrate that our actual practice is to review the entire record in every claim. The regulation implementing the benefit of the doubt rule of 38 U.S.C. 5107(b) provides for ''careful consideration of all procurable and assembled data'' and of ''the entire, complete record''. 38 CFR 3.102. Therefore, in addition to considering VA medical exams and opinions, VA weighs and considers all other medical evidence, including that produced by a veteran's treating physician.

We note that 38 CFR 3.303(a) only prescribes that VA decide claims for service connection ''based on review of the entire evidence of record'' and there is no rule in part 3 that specifically implements 38 U.S.C. 5107(b). We therefore propose to add a new sentence at the beginning of § 5.4(b) stating, ''VA will base its decisions on a review of the entire record.'' We use the term ''entire record'' because it is unclear whether ''entire evidence of record'' means all of the evidence of record, or the entire record. The evidence in a VA claims file is only part of the entire record comprising the claims file. Our language resolves the ambiguity in favor of the more inclusive meaning, which is consistent with current VA practice. Because § 5.4(b) would clearly state that ''VA will base its decisions on a review of the entire record'', we believe it would be redundant and possibly confusing to restate this principle in specific sections in part 5 (as does part

3). We therefore propose to remove such provisions from §§ 5.269(e), (f)(1) and (2), and 5.343. In order to incorporate the court's holding in *Bell* v. *Derwinski,* 2 Vet. App. 611 (1992), we propose to add the phrase ''including material pertaining to the claimant or decedent, in a death benefit claim, that is within VA's possession and could reasonably be expected to be a part of the record'' to the end of that sentence.

§ 5.5 Delegations of Authority

We propose to add § 5.5, ''Delegations of authority'', to this initially proposed segment. This regulation was inadvertently not included in the initially proposed rule. These provisions are the same as § 3.100, ''Delegations of authority'', reorganized to make them easier to read. We also propose to replace the § 3.100(a) language, ''. . . entitlement of claimants to benefits under all laws administered by the Department of Veterans Affairs governing the payment of monetary benefits to veterans and their dependents . . .'' with ''entitlement to benefits under part 5''. We propose to make this change because part 5, like part 3, includes benefits which do not involve monetary payments. These include a grant of service connection for a veteran's disability rated 0 percent and certification of loan guaranty benefits for a surviving spouse. Lastly, we propose to omit the reference to the ''Compensation and Pension Service'' (used in § 3.100(a) and now subdivided into the ''Compensation Service'' and ''Pension and Fiduciary Service'') is a subdivision of the Veterans Benefits Administration, and the reference is therefore unnecessary.

VII. Subpart B: Service Requirements for Veterans AL67

In a document published in the **Federal Register** on January 30, 2004, we proposed to amend VA regulations governing service requirements for veterans, to be published in a new 38 CFR part 5. *See* 69 FR 4820. The title of this proposed rulemaking was, ''Service Requirements for Veterans'' (RIN 2900–AL67). We provided a 60-day comment period that ended on March 30, 2004. We received submissions from four commenters: Disabled American Veterans, Vietnam Veterans of America, and two members of the general public.

§ 5.20 Dates of Periods of War

One commenter expressed satisfaction with the progress of the Regulation Rewrite Project and offered praise for proposed RIN 2900–AL67. The commenter was pleased with the inclusion of the Mexican Border Period in proposed § 5.20, ''Dates of periods of war'', as there are veterans and dependents who may still be alive and eligible for benefits based on military service during this period.

While we appreciate the commenter's concern, because there are no veterans or surviving spouses of the Mexican Border Period on VA's compensation and pension rolls and only one surviving dependent (a child), we propose to delete the provisions related to this period of war and refer regulation users to the applicable statutory provisions concerning this earlier period of war. This deletion would not affect benefit entitlement in any way. Should the occasion arise, VA will adjudicate any new claim using the statutory definition of this earlier period of war. See 38 U.S.C. 101(30).

The table in § 5.20 was published as a proposed rule using the terms ''armed forces'' and ''active military, naval, or air service''. For consistency, we propose to capitalize ''Armed Forces'' and change ''active military, naval, or air service'' to ''active military service''.

§ 5.22 Service VA Recognizes as Active Duty

In our NPRM, we invited comments on ''whether, and to what extent, VA should recognize military duty for special work as active duty for VA purposes.'' 69 FR 4822, Jan. 30, 2004. One of the commenters urged that VA recognize active duty for special work. Subsequent to that publication, however, additional issues have arisen which require closer coordination than we previously anticipated between VA and the Department of Defense. When that coordination has been completed, we will publish a separate NPRM on the characterization of active duty for special work. Hence, we propose not to revise § 5.22 to address the recognition of active duty for special work.

§ 5.24 How VA Classifies Duty Performed by Armed Services Academy Cadets and Midshipmen, Attendees at the Preparatory Schools of the Armed Services Academies, and Senior Reserve Officers' Training Corps Members

Current 38 CFR 3.6(c)(4) refers to ''deaths and disabilities resulting from diseases or injuries incurred or aggravated after September 30, 1982, and . . . deaths and disabilities resulting from diseases or injuries incurred or aggravated before October 1, 1982''. In initially proposed § 5.24(c)(1) (based on § 3.6(c)(4)), we proposed to replace the phrase ''incurred or aggravated'' with the term ''that occurred''. Although it was not our intention, the use of ''occurred'' could be construed as narrowing the scope of the regulation by excluding aggravation. Therefore, we now propose to replace ''that occurred'' with ''incurred or aggravated'' in § 5.24(c)(1).

§ 5.27 Individuals and Groups That Qualify as Having Performed Active Military Service for Purposes of VA Benefits Based on Designation by the Secretary of Defense

The official names of groups of civilians who, pursuant to section 401 of Public Law 95–202, have been designated by the Secretary of Defense as having performed active military service for VA benefit purposes are listed alphabetically in proposed § 5.27(b).

Such groups apply for status as having performed active military service using group names that, as nearly as possible, precisely identify the members of the group and the service they want recognized. In fact, when a favorable determination is made, the Secretary's **Federal Register** notice is almost always phrased in terms of ''service of the group known as'', followed by the group's official name.

In the NPRM, we initially proposed to revise some of the group names for clarity and readability. However, we have determined that this could cause confusion that a group other than the original was determined to have performed active military service. Such confusion can be avoided by strictly adhering to the official names of the groups, and we now propose to revise § 5.27(b) to reflect the original group names exactly as they were provided to VA by the Secretary of Defense.

§ 5.28 Other Groups Designated as Having Performed Active Military Service

In reviewing initially proposed § 5.28, we determined that we mistitled it. This section refers only to groups, not individuals and we have retitled it accordingly.

§ 5.31 Statutory Bars to VA Benefits

In initially proposed § 5.31(c)(4), we defined the acronym ''AWOL'' as ''absence without official leave''. However, in the Uniform Code of Military Justice (10 U.S.C. 886) that particular offense is called ''absence without leave'', and the word ''official'' is not used. Therefore, for purposes of consistency and clarity, we propose to delete the word ''official'' from § 5.31(c)(4).

§ 5.39 Minimum Active Duty Service Requirement for VA Benefits

Initially proposed § 5.39(c)(2) stated, ''If it appears that the length of service requirement may not be met, VA will request a complete statement of service to determine if there are any periods of active military service that are required to be excluded under paragraph (e) of this section.'' After reviewing this paragraph to respond to a public comment, we propose to correct a typographical error (by changing the reference to paragraph ''(e)'' to ''(d)'') and to clarify the paragraph to improve readability.

In § 5.39(d)(4), we initially proposed to exclude any person who has a compensable disability under 38 U.S.C. chapter 11 from the minimum active duty requirement. A disability is compensable if VA rates it as 10 percent or more disabling according to the Schedule for Rating Disabilities in part 4 of this chapter. One commenter asserted that it would be wrong to discontinue the entitlement of a veteran who did not meet the minimum active duty requirements, but was awarded an initial temporary 100 percent rating under 38 CFR 4.29 or 4.30, which was subsequently reduced to a noncompensable (0 percent) rating. Likewise, any veteran lacking the minimum active duty requirements who had a compensable disability, but a subsequent decision reduced the rating to 0 percent, should not lose entitlement. This commenter agreed that disability ratings should fluctuate with the severity of the disability, but that eligibility, once established, should not be revoked in such cases.

Under 38 U.S.C. 5303A(b)(1), a person who initially enters service after September 7, 1980, must be discharged or released after completing 24 months of continuous active duty or the full period for which such person was called to active duty to be eligible for, or be entitled to, any benefit administered by VA based upon the length of active duty service. Section 5303A(b)(3)(C) excludes those persons from the minimum active duty service requirements who have a disability that the Secretary has determined to be compensable under chapter 11 of this title. Section 5.39(d)(4) clarifies the term ''compensable'' to include veterans receiving special monthly compensation under 38 CFR 3.350, as well as those receiving a 10 percent rating for multiple 0 percent disabilities under 38 CFR 3.324.

The commenter's position appears to be that once service connection has been established and a disability rating of 10 percent or more disabling has been assigned, a person is forever excluded from having to satisfy the minimum active duty service requirements. We cannot agree.

Under 38 U.S.C. 5303A, the minimum active duty service requirements must be satisfied in order for a person discharged or released from a period of active duty to be eligible for, or entitled to, any benefit based on that period of active duty, unless a person is a member of one of the excluded groups. Under section 5303A(b)(3)(C), a person ''who has a disability that the Secretary has determined to be compensable under chapter 11 of this title'' meets the minimum active duty service requirement. The statute uses the present tense, ''has'' when referring to that disability, which means the veteran trying to show that he or she qualifies under section 5303A(b)(3)(C) must currently have a compensable disability. We also note that the current regulation on this point, § 3.12a(d)(3), already requires a current compensable disability to qualify for this exclusion. Section 5.39 does not, in any way, change the scope of this exclusion. For these reasons, we propose not to make any changes on minimum active duty service requirements based on this comment.

Upon reviewing § 5.39(d)(4) in relation to this comment, we determined that it was appropriate to clarify the regulation consistent with the above discussion. We therefore propose to replace the phrase ''VA determines to be'' with ''is currently'' in this paragraph. This will ensure that readers understand that the regulation requires that a person have a currently compensable disability to qualify for the paragraph (d)(4) exclusion.

One commenter contended that 38 U.S.C. 5303A pertains only to those persons who are veterans by virtue of having served on active duty. This commenter asserted that a person, who obtained veteran status because an injury or disease was incurred or aggravated during active duty for training, or because an injury was incurred or aggravated during inactive duty training, is exempt from the provisions of section 5303A. The commenter alleged that the initially proposed rule does not clarify that these persons are not required to have a compensable disability to qualify for general benefits under title 38.

Upon a closer review of section 5303A and the definitions in 38 U.S.C. 101, we agree with the commenter. To be a veteran, a person must have ''active military, naval, or air service'', referred to in part 5 as ''active military service''. There are three types of service that qualify as active military service: (1) Service on active duty, (2) Service on active duty for training during which an injury or disease is incurred or aggravated, or (3) Service on inactive duty training during which an injury is incurred or aggravated, or during which the person suffers an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident. *See* 38 U.S.C. 101(24). Since section 5303A, by its terms, applies only to veterans who served on active duty, it does not apply to veterans who performed active military service under the provisions of § 5.21(a)(4) or (5). We therefore propose to revise initially proposed § 5.39(d) to add two other categories of persons excluded from the minimum active duty service requirements: Persons who performed active military service under the provisions of § 5.21(a)(4) or (5).

In reviewing initially proposed § 5.39 in relation to the comment discussed above, we discovered that we inadvertently omitted a phrase contained in current § 3.12a(b): ''based on that period of active service''. To correct that omission, we propose to revise § 5.39(a) accordingly.

In initially proposed § 5.39, we included proposed paragraphs (f)(2)(iv) and (v). Based on our review of the proposed rule, we noted that this was a numbering error. Proposed paragraphs (f)(2)(iv) and (v) should have been numbered (f)(2)(iii) and (iv) respectively because the proposed regulation did not have a paragraph (f)(2)(iii). Instead, it mistakenly skipped from (f)(2)(ii) to (f)(2)(iv). We propose to correct this error.

Comments Outside the Scope of RIN 2900–AL67

One person commented with reference to RIN 2900–AL67. The comments related to the definition of ''Service in the Republic of Vietnam'', and to the so-called Bluewater sailors. These comments are outside the scope of the proposed rule published under RIN 2900–AL67, but relate to another NPRM, RIN 2900–AL70. We discussed these comments together with the other comments received in connection with RIN 2900–AL70.

We also received a comment that was not directed at any particular proposed rule, but we thought it would be most appropriately addressed in this portion of the proposed rule. The commenter was concerned that National Guard full time active duty members were not considered veterans unless they were injured on duty.

The commenter is correct. Persons who serve full time in the National

Guard under section 316, 502, 503, 504, or 505 of title 32 are on active duty for training and are not considered veterans under title 38, VA's controlling statutes, unless they are disabled by an injury or disease that was incurred or aggravated during such duty. If the law is clear and unambiguous, VA is bound by it. Congress has spoken clearly about who may be considered a veteran for VA purposes. *See* 38 U.S.C. 101(2) and (24). Under such circumstances, the commenter's only remedy would be a change of statutory law. No change in regulations can be made based on this comment.

Changes in Terminology for Clarity and/or Consistency

For the convenience of readers and for economy of language, we propose to spell out the full name of each VA program or benefit the first time we use it in any part 5 regulation, and to abbreviate it thereafter. For example, the death benefit payable to a surviving spouse, child, or dependent parent based on death in service or due to a service-connected disability is officially titled ''dependency and indemnity compensation''. That benefit name is quite cumbersome when it is repeated several times within a regulation. The abbreviation or acronym ''DIC'' is much easier to use and improves the readability of a regulation. In order to use the acronym, we must first spell it out for the reader, and while we do not want to spell out the term every time we use it, neither do we want to spell it out once in part 5 or once in each subpart and force the reader to keep referring back to a definition that is remote from where the acronym is being used. To strike a balance we propose to spell out the official program name followed by the acronym in parentheses the first time the program name is encountered in a section and to use the acronym throughout the remainder of that section. This will apply to regulatory text only, and not to section titles. If we use the program title only once in a section, we would spell it out with no parenthetical abbreviation or acronym. We will apply this convention throughout part 5.

Lastly, we propose to standardize the words used in referring to VA's rating schedule, ''the Schedule for Rating Disabilities in part 4 of this chapter''. For this subpart, the new term will replace the initially proposed language in § 5.39(d)(4)(i).

VIII. Subpart C: Adjudicative Process, General

VA Benefit Claims AM16

In a document published in the **Federal Register** on April 14, 2008, we proposed to revise VA regulations governing benefit claims. 73 FR 20136. We provided a 60-day comment period that ended June 13, 2008. We received submissions from two commenters: Center for Plain Language and a member of the general public.

One commenter criticized our use of the passive voice and overly long sentences in the initially proposed rulemaking. Based on this comment, we propose to revise all of the proposed regulations to use the active voice and shorter sentences whenever possible or appropriate.

In addition to the specific changes discussed below, we propose to revise the regulations proposed in NPRM, RIN 2900–AM16 to help improve clarity and consistency with other part 5 regulations.

§ 5.50 Applications VA Furnishes

Initially proposed § 5.50(a) stated, ''Upon request in person or in writing, VA will furnish the appropriate application to a person claiming or applying for, or expressing intent to claim or apply for, benefits under the laws administered by VA.'' Based on our review, we propose to remove ''in person or in writing'' because it is too restrictive. Claimants may also request applications using the telephone or email. We also propose to remove the phrases ''or applying for'' and ''or apply for'' because these phrases are redundant of ''claiming'' and ''claim''. Moreover, they may cause a reader to mistakenly believe that we mean something different by the use of these different phrases.

We have defined ''notice'' in § 5.1. The definition applies to VA's duty to inform a claimant of something a certain way. We propose to revise the first sentence of proposed paragraph § 5.50(b) by replacing the word ''notice'' with ''information'' because use of ''notice,'' as so defined, would be inappropriate.

The term ''dependent'' as used in the initially proposed rule and in § 3.150 from which it derives referred to persons known to VA as the deceased veteran's dependents at the time of his or her death. The term ''survivor'' better meets the requirement to provide an application to persons with ''apparent entitlement'', because it encompasses persons not known to VA as the veteran's dependent who could, nevertheless, be entitled to a death benefit. We therefore propose to revise initially proposed paragraph (b) by replacing the word ''dependent'' with the word ''survivor''.

We also propose to revise paragraph (b) by replacing the word ''forward'' in the first sentence with ''furnish'' and replacing ''for execution by or on behalf of'' with ''to''. As revised, the sentence states that, ''VA will furnish the appropriate application to any survivor''. ''Furnish'' is a more accurate word for supplying the survivor an application and it is consistent with paragraph (a), which also uses the word ''furnish''. The initially proposed rule stated that VA will forward the application ''for execution by or on behalf of'' a dependent. In this regulation, it is surplus to state that the application is ''for execution''. Although VA provides applications so claimants can execute them, the rules about what to do with an application are more appropriate to the regulations about filing claims. In the same sentence, we have changed the general reference to ''such benefits'' to name the benefits that a dependent could possibly receive, for example, death pension or dependency and indemnity compensation.

Additionally, we propose to revise the phrase, ''If it is not indicated'', which appeared at the beginning of the second sentence of the initially proposed rule, to read, ''If the available evidence does not indicate''. This phrase more clearly states what records VA will review to determine if there is a potential accrued benefits claimant. In the same sentence, we have replaced ''forward'' with ''furnish'' for the reasons discussed above. We also propose to revise the last sentence of paragraph (b) to specifically describe the 1-year time limit for filing a claim for accrued benefits because it will be helpful to claimants.

In the NPRM, paragraph (c) implied that VA would not assist in a claim for disability or death due to hospital treatment, medical or surgical treatment, examination, or training. The initially proposed rule stated, in pertinent part, ''VA will not forward an application for benefits under 38 U.S.C. 1151.'' We believe that it is important to instead inform the reader that VA does not have an application for claims under 38 U.S.C. 1151. We therefore propose to revise paragraph (c) to clarify that a claimant may apply in any written form for disability or death benefits due to hospital treatment, medical or surgical treatment, examination, or training under the provisions of 38 U.S.C. 1151. VA does not have an application for such a claim. See § 5.53, Claims for benefits under 38 U.S.C. 1151 for

disability or death due to VA treatment or vocational rehabilitation, for the requirements for filing a claim pursuant to 38 U.S.C. 1151.

Initially proposed § 5.50 repeated the cross reference to § 3.109(b) from the end of § 3.150. This cross reference is erroneous because § 3.109(b) does not apply to any deadlines for filing claims referenced in §§ 3.150 or 5.50. We therefore propose to remove this cross reference from § 5.50.

§ 5.51 Filing a Claim for Disability Benefits

Initially proposed § 5.51(a) stated, ''An individual must file a specific claim in the form prescribed by the Secretary in order for disability benefits to be paid under the laws administered by VA.'' We propose to replace the phrase ''in order for disability benefits to be paid under the laws administered by VA'' with ''for VA to grant a claim for disability benefits''. This change clarifies that the provision applies not only to cases where VA grants monetary benefits, but also to cases where VA grants service connection and rates the disabilities as 0 percent disabling.

Subsequent to the publication of proposed § 5.51, section 502 of Public Law 112–154 (2012) amended 38 U.S.C. 5101 by adding a new paragraph which states that if an individual has not attained the age of 18 years, is mentally incompetent, or is physically unable to sign a form, a form filed under paragraph (1) for the individual may be signed by a court-appointed representative, a person who is responsible for the care of the individual, including a spouse or other relative, or an attorney in fact or agent authorized to act on behalf of the individual under a durable power of attorney. If the individual is in the care of an institution, the manager or principal officer of the institution may sign the form * * * The term 'mentally incompetent' with respect to an individual means that the individual lacks the mental capacity—(A) to provide substantially accurate information needed to complete a form; or (B) to certify that the statements made on a form are true and complete. We propose to update § 5.51(a) to reflect this amendment.

§ 5.52 Filing a Claim for Death Benefits

Initially proposed § 5.52(a) stated, ''An individual must file a specific claim in the form prescribed by the Secretary (or jointly with the Commissioner of Social Security, as prescribed by § 5.131(a)) in order for death benefits to be paid under the laws administered by VA.'' Subsequent to the publication of proposed § 5.52, section 503 of Public Law 112–154 (2012) amended 38 U.S.C. 5105 by removing the requirement that the Secretary of Veterans Affairs and the Commissioner of Social Security jointly prescribe forms for use by survivors of members and former members of the uniformed services in filing application for benefits under chapter 13 of title 38 and title II of the Social Security Act. Section 503 also removed the requirement that each such form request information sufficient to constitute an application for benefits under both laws. Finally, section 503 also removed the requirement that such a claim be filed on a particular form by allowing it to be filed ''on any document indicating an intent to apply for survivor benefits''. We proposed to include these statutory changes in § 5.52(a).

In response to the Center for Plain Language's comment about sentence length in initially proposed § 5.52, we propose to revise the regulation to be more concise. We propose to revise initially proposed paragraph (a) by changing ''in the form prescribed'' to ''for death benefits by completing and filing the application prescribed''. *See* § 5.1, ''Definitions''; compare definition of ''application'', with definition of ''claim'', § 5.1(k). The requirement to use a prescribed application to claim a death benefit is consistent with the authorizing statute, 38 U.S.C. 5101(a), and its current implementing regulation, § 3.152(a). Both statute and regulation incorporate by reference the requirement that the Secretary and the Commissioner of Social Security jointly prescribe an application for use at either agency to apply for certain benefits, and that the application constitutes a claim for both agency's benefits when filed with either agency. *See* 38 U.S.C. 5105; 38 CFR 3.153.

In *Fleshman* v. *West,* 138 F.3d 1429, 1431 (Fed. Cir. 1998), involving a claim for disability compensation, the Federal Circuit addressed whether the phrase ''in the form'' in section 5101(a) means ''on a form''. The court distinguished between the phrases, citing § 3.153 pertaining to claims for death benefits as an example of a regulation that clearly requires the claimant to use a specific application by using the phrase ''on a form prescribed''. Section 5.52(a) will implement the court's reasoning and make explicit VA's practice regarding claims for death benefits. The proposed change of language from ''in the form prescribed'' to ''by completing and filing the application prescribed'' is a clarifying change from § 3.152(a). We also propose to change the language in initially proposed paragraph (a) of § 5.52 from, ''in order for death benefits to be paid under the laws administered by VA'', to, ''for VA to grant death benefits'', to be consistent with § 5.51.

We propose to revise paragraph (b) by removing references to filing a claim for death compensation. This benefit is not available for new applicants, so it is not necessary to include death compensation provisions in part 5. As a result of this change, we propose to eliminate initially proposed (b)(1) and redesignate proposed (b)(2) and (3) as (b)(1) and (2), respectively. We propose to revise paragraph (b) to eliminate needless repetition of language common to initially proposed § 5.52(b)(2) and (3).

In initially proposed § 5.52(c)(4) and (5), we addressed the effective dates of a child's death benefits. These paragraphs referenced the claimant's requirement to timely submit evidence that VA requests and the consequence of failure to timely submit such evidence. The rules on timely submission of evidence are in § 5.136, ''Abandoned claims'', derived from current § 3.158. We propose to remove these provisions from initially proposed § 5.52 because there is no need to repeat them. To make the regulations more concise and easier to use, we propose to combine the remaining portions of initially proposed paragraphs (c)(4) and (5) with paragraph (c)(3) and to cross reference the effective date rules by referencing § 5.696 in paragraph (c)(1) and referencing §§ 5.538 and 5.431 in paragraph (c)(3).

§ 5.53 Claims for Benefits Under 38 U.S.C. 1151 for Disability or Death Due to VA Treatment or Vocational Rehabilitation

We propose to remove the last sentence of initially proposed § 5.53, which stated, ''Such communication may be contained in a formal claim for pension, disability compensation, or DIC, or in any other document.'' The first sentence of the regulation states that VA may accept ''any communication in writing'' as a claim for benefits under 38 U.S.C. 1151. In light of that rule, the sentence we propose to remove is surplus; ''any communication in writing'' inherently includes one ''contained in a formal claim''.

§ 5.54 Informal Claims

We propose to make several changes to initially proposed § 5.54. These changes will revise and reorganize the rule to be clearer and consistent with current VA practice.

Paragraph (a) defines an informal claim and states that the informal claim must be written. VA defines a ''claim'' as a ''formal or informal communication

in writing'' (§ 5.1). Section 5.54(a) merely reiterates this requirement for clarity in the rule governing informal claims. *See Rodriguez* v. *West,* 189 F.3d 1351, 1354 (Fed.Cir. 1999) (VA defines ''claim'' as a formal or informal written communication, therefore ''under the Department's regulations an informal claim application must be written''). We also propose to add a cross reference in proposed paragraph (c)(2) to § 5.56, ''Report of examination, treatment, or hospitalization as a claim.'' The reader should find it convenient to have a reference here to an alternative method of claiming certain benefits.

Initially proposed paragraph (a) also stated that ''[a]ny communication or action'' may be an informal claim for benefits. As the phrase is used in current § 3.155 from which it derives, any ''action'' that would be a claim for benefits would be a communication. Therefore, we propose to remove the phrase ''or action'' as superfluous.

Additionally, initially proposed paragraph (a) listed who may file an informal claim and stated certain conditions for persons other than the claimant to file the claim. We propose to move this list to paragraph (b) to distinguish the authority to file an informal claim from the required content of an informal claim. Readers should find it convenient to have in one place a list of persons who can file a claim and any conditions on that authority. Initially proposed paragraph (b), like 38 CFR 3.155(b), listed several types of representatives: agents, attorneys, and service organizations. Initially proposed paragraph (a) contained the term ''authorized representative'', which we have moved into paragraph (b). Because ''authorized representative'' includes agents, attorneys, and service organizations, we propose to remove those terms from § 5.54.

Initially proposed paragraph (a) provided that a ''duly authorized representative'' may file a claimant's informal claim. We propose to remove the word ''duly'' from the phrase ''duly authorized representative''. It is a superfluous legalism. A claimant has or has not authorized a representative. There is no such thing as an unduly authorized representative. Such a representative would simply not be authorized.

Initially proposed paragraph (b), like current § 3.155(b), imposed conditions on VA's acceptance of an informal claim when filed by certain organizations or persons. The regulation stated the rule negatively: ''A communication . . . may not be accepted . . . if a power of attorney . . . was not executed at the time the communication was written.'' We propose to restate the rule affirmatively in paragraph (b) after the term ''authorized representative''. The restated rule will read, ''if authorized before VA received the informal claim''. This proposed change would also clarify the timing of the authorization.

Initially proposed § 5.54(b), also like current § 3.155(b), required that a power of attorney from the listed parties ''was . . . executed at the time the communication was written.'' VA requires that it receive the executed power of attorney before it will act on a written communication from certain representatives as an informal claim. In current practice, VA accepts as an informal claim a written communication from one of the listed representatives if it meets the requirements of an informal claim and VA receives it along with a power of attorney executed as regulation requires. ''At the time the communication was written'' is ambiguous. It could mean the power of attorney was executed simultaneously, more or less contemporaneously, or simply before the communication was written. VA has no mechanism to ascertain whether the power of attorney was executed at any of these times, nor need VA ensure the power of attorney was executed ''at the time the communication was written.'' VA is sufficiently assured of the authenticity of the power of attorney and of the authority of the representative to act for the veteran if VA receives a properly executed power of attorney and the communication the representative wrote for the claimant together.

Initially proposed § 5.54(b) contained a cross reference to 38 CFR 14.631, ''Powers of attorney; disclosure of claimant information.'' Because § 14.630, ''Authorization for a particular claim'', also describes a type of authorized representative, we propose to add a cross reference to that section, too.

We propose to reorganize the elements of initially proposed paragraphs (a) and (c) that addressed the effect of filing an informal claim, combining them in paragraph (c). Paragraph (c)(1) applies to original informal claims. Initially proposed paragraph (a) provided that VA will ''forward'' an application to anyone who files an informal claim, but has not filed a formal claim. We propose to revise this to say that VA will ''furnish an appropriate application to a person who files an informal claim''. This is consistent with § 5.50(a), which requires VA to furnish an ''appropriate application'' for a benefit upon request. VA does not have an application for all benefits. We propose to make paragraph (c)(1) practicable by limiting the requirement that VA ''furnish an appropriate application'' to those benefits for which VA has an application.

The initially proposed rule prescribed that VA would accept the date of receipt of an informal claim as the date of the claim, ''If [the application is] received within 1 year after the date it was sent to the claimant''. We propose to add to paragraph (c)(1) that ''VA will take no action on the informal claim until the claimant files the completed application.'' Though the initially proposed language stating that VA forwards the application ''for execution'' implies that it must be returned executed (that is, completed), it is clearer to say so explicitly.

We propose to revise initially proposed paragraph (c) as paragraph (c)(2). We propose to remove ''an informal request'' and ''will be accepted as a claim''. The revised regulation will prescribe VA's action upon receipt of an ''informal claim'' from a claimant who has previously satisfied § 5.51 or § 5.52, as did the initially proposed regulation. We propose to remove the term ''informal request'' for the same reason we propose to remove ''action'' from paragraph (a). Any ''informal request'' for an increase or to reopen must be a communication indicating ''an intent to apply for one or more benefits'', that is, an informal claim. We propose to remove ''will be accepted as a claim'', because to say that VA will accept an informal request as a claim if the claimant previously satisfied the requirements of § 5.51 or § 5.52 is merely to say that an informal claim is a claim under those circumstances. That is exactly what the regulation means, and VA has never intended an ''informal request'' to be something different from an informal claim. Using another term for an informal claim confusingly suggests that there is some other type of ''informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a VA benefit'' that might not be an informal claim. As the definition of ''claim'' reveals, this cannot be so. *See* § 5.1, defining ''claim''.

Paragraph (c)(2) provides that VA will act on an informal claim without requiring another application from a person who has previously filed an application. The initially proposed rule and current § 3.155(c) allowed an informal claim for increase or to reopen to be accepted without the claimant subsequently filing an application if the claimant had previously filed a claim

that ''met the requirements of § 5.51 [disability benefits] or § 5.52 [death benefits]''. It is implicit, but not obvious, that VA can accept an informal claim for each type of benefit without requiring a subsequent application only if the claimant has previously filed an application for that type of benefit. An application that provides information critical to the benefit claimed satisfies the statutory requirement to file a claim ''in the form prescribed by the Secretary''. *Fleshman,* 138 F.3d at 1431–32 (Applicant must file claim containing specified information, and without the ''critical information'' it will not be ''in the form prescribed by the Secretary'' so as to comply with 38 U.S.C. 5101(a)). It is VA's receipt of the information critical to a claim for disability benefits or for death benefits that enables VA to accept a subsequent informal claim for disability benefits or death benefits without requiring another application.

The previous filing of a claim for disability benefits will not have provided VA the critical information necessary for the claimant to have met the requirement of 38 U.S.C. 5101(a) for a claim for death benefits, and vice versa. As proposed to be revised, § 5.54(c)(2)(i) and (ii) will explicitly state the implicit requirement in initially proposed § 5.54(c) that VA will accept an informal claim for increase or to reopen a claim for disability or death benefits only if the claimant has previously filed a claim for that type of benefit.

§ 5.55 Claims Based on New and Material Evidence

We propose to revise initially proposed § 5.55 in response to a comment and based on our further review of the regulation. The commenter requested that VA make the rule clearer and use the active voice. We propose to revise this regulation to enhance readability and be more consistent with the format of other part 5 regulations.

The proposed revisions describe the process of, and provide instructions for, reopening a claim that the initially proposed regulation did not. The proposed revisions afford the claimant the same rights, however, and prescribe the same burdens and duties for the claimant and for VA in seeking to reopen a claim as did the initially proposed regulation. They articulate current VA practice in implementing 38 U.S.C. 5108, which requires VA to ''reopen the claim and review the former disposition'' if ''new and material evidence is presented or secured''. They also make explicit several aspects of reopening a claim that are implicit in the initially proposed and the current regulation.

We propose to move the definition of a ''reopened claim'' from initially proposed § 5.57(f) to § 5.55(a) and (d) and restate it as a list of conditions necessary to reopen a claim VA has finally denied.

Initially proposed § 5.55(a) stated, ''A claimant may reopen a finally adjudicated claim''. The paragraph characterized new and material evidence in reference to ''evidence of record at the time of the last prior final denial of the claim sought to be reopened''. Both quoted phrases come from current § 3.156(a). As now proposed, § 5.55(a) states, ''A claimant may reopen a claim if VA has made a final decision denying the claim.'' It would be redundant to state that a claimant may reopen a ''finally'' adjudicated claim because we define ''claim'' in § 5.1 and we define ''final decision'' in § 5.1. A claim is not subject to reopening if a prior decision is not final. Therefore, in order to reopen a claim, paragraph (a) of this section requires the existence of a final decision denying that claim. These changes are consistent with the circumstances in which a claimant will seek to reopen a claim.

We propose to move the language in initially proposed § 5.57(f) regarding the Board of Veterans' Appeals (Board) treatment of certain evidence into § 5.55(d) because it relates to new evidence in the context of reopening a claim. We have shortened that language because under § 20.1304(b)(1)(i), any evidence or request for hearing referenced in that rule will be returned to the RO ''upon completion of the Board's action on the pending appeal''. Therefore, the RO will apply § 20.1304(b)(1)(i) only in the context of a final denial, which is already discussed in § 5.55(a), or a grant or remand, in which case, the provisions of § 5.55 are irrelevant. The primary relevance of § 20.1304(b) to § 5.55 is that evidence submitted to the Board prior to its decision, but not considered by the Board, as set forth in § 20.1304(b), may be considered ''new'' for purposes of § 5.55.

We propose not to include the provision contained in § 5.57(f) regarding hearings in § 5.55(d). When a claimant requests a hearing at the Board more than 90 days after certification of an appeal and transfer of the claims file to the Board, the Board will not allow the hearing unless there is a showing of good cause for the delayed request. If the Board finds good cause and allows the hearing, then any testimony presented is considered in deciding the appeal. If the Board does not find good cause, then it will decide the appeal without conducting the hearing. In that case, it will refer the hearing request to the AOJ as required by 38 CFR 20.1304(b)(1)(i). Any testimony presented at a subsequent AOJ hearing on a claim for a benefit the Board denied would necessarily be ''[e]vidence the claimant presented . . . since VA last made a final decision denying the claim the claimant seeks to reopen'' under § 5.55(d)(1). Therefore, there is no need to include the § 5.57(f) language about hearings.

We propose to add paragraphs (b) and (c). Proposed paragraph (b) states, ''To reopen a claim, the claimant must present or VA must secure new and material evidence. If VA receives a claim to reopen, it will determine whether evidence presented or secured to reopen the claim is new and material.'' Proposed paragraph (c) reads, ''If the claimant has presented or VA has secured new and material evidence, VA will reopen and decide the claim on its merits.'' Together, these paragraphs clearly prescribe the sequence of actions in reopening a claim, implementing 38 U.S.C. 5108 and long-standing judicial precedent. *See Manio* v. *Derwinski,* 1 Vet. App. 140 (1991).

We propose to move the definition of ''new and material evidence'' in initially proposed § 5.55(a) to paragraph (d), so it now follows the information a claimant needs to know about the process of reopening a claim. We propose to reorganize the definition of ''new and material evidence'' as a set of criteria that evidence must meet to be ''new'' and a set of criteria it must meet to be ''material''.

As initially proposed, the definition of ''new and material'' evidence could be misconstrued to imply that ''new and material'' evidence has some sort of combined characteristics in addition to those that satisfy the requirement that it is new and that it is material. VA has never intended the term ''new and material evidence'' to be interpreted this way, and the Federal Circuit has rejected such an interpretation. *Anglin* v. *West,* 203 F.3d 1343, 1346 (Fed. Cir. 2000) (rejecting appellant's assertion that ''the concepts of newness and materiality are so intertwined that they cannot meaningfully be separated into 'prongs' of a test'').

In proposing the current definition of ''new and material evidence'', 38 CFR 3.156(a), VA stated, ''We propose to clarify the definition of 'new and material evidence' . . . to state that 'new evidence' means . . . evidence not previously submitted to agency decisionmakers, that is neither

cumulative nor redundant of the evidence of record at the time of the last final denial of the claim.'' 66 FR 17838, Apr. 4, 2001. The courts have consistently associated ''cumulative'' with a failure of evidence to be New *See, le.g., Anglin,* 203 F.3d at 1346–47 (holding that CAVC correctly used first prong of *Colvin* test in finding appellant who filed ''cumulative'' evidence had not filed ''new'' evidence); *Elkins* v. *West,* 12 Vet. App. 209, 212 (1999) (new evidence is evidence not of record at time of last final disallowance of the claim and not merely cumulative of other evidence that was then of record); *Colvin* v. *Derwinski,* 1 Vet. App. 171, 174 (1991) (''New evidence is not that which is merely cumulative of other evidence on the record.'') (overruled in part by *Hodge* v. *West,* 155 F.3d 1356 (Fed. Cir. 1998)).

In *Anglin,* the Federal Circuit affirmed the holding of the CAVC that the appellant's cumulative evidence was not new evidence. 203 F.3d at 1347. The Federal Circuit explained that *Hodge* did not overrule the first prong of the so-called *Colvin* test of ''new and material evidence.'' 203 F.3d at 1346 (''[N]othing in Hodge suggests that the understanding of 'newness' as embodied in the first prong of the *Colvin* test is inadequate or in conflict with the regulatory definition of new and material evidence.''). The *Anglin* court rejected the appellant's argument that ''the concepts of newness and materiality are so intertwined that they cannot meaningfully be separated into 'prongs' of a test.'' *Id.* at 1346. The CAVC explicitly found ''[b]ecause the evidence presented . . . was not new, the CAVC did not examine whether it was material. This application of the first prong of the *Colvin* test was entirely consistent with the regulatory definition of new and material evidence.'' *Id.* at 1347. As restated, proposed § 5.55(d) clearly distinguishes between new evidence and material evidence. It makes clear what new evidence is, what material evidence is, that to reopen a claim the evidence must meet both criteria, and that failure of the claimant to present or of VA to secure either will bar reopening the claim.

Initially proposed § 5.55(a) reiterated the language of current § 3.156(a), ''New evidence means existing evidence'', and ''Material evidence means existing evidence''. For the following reasons, we propose to remove the term ''existing'' in both instances.

In 2001, VA amended the definition of ''new and material evidence'' to implement the Veterans Claims Assistance Act of 2000, Public Law 106–475, sec. 3, 114 Stat. 2096, 2096–98 (2000), which mandated that VA assist claimants to substantiate their claims. In doing so, VA prescribed the assistance it would give a claimant to substantiate a claim to reopen by limiting its duty to obtain new and material evidence to obtaining ''existing evidence'', as distinguished from newly created evidence. 66 FR 17837–38, Apr. 4, 2001. VA did this to avoid the implication that, under the VCAA of 2000, it had a duty to create new evidence, for example through a medical examination. 66 FR 45628, Aug. 29, 2001 (''VA would not provide an examination or obtain a medical opinion to create new evidence''). VA intended ''existing evidence'' to mean ''evidence that is not newly generated by or with the help of VA''. 66 FR 17838, Apr. 4, 2001.

Nonetheless, if ''new'' evidence and ''material'' evidence both mean ''existing'' evidence, then initially proposed § 5.55(a) could be misconstrued to mean that VA would not accept any evidence newly created to reopen the claim because it is not ''new and material'' as defined. As initially proposed, the rule could produce the strange result, for example, of VA rejecting a new medical opinion that a claimant obtains and files to reopen a claim as not ''new and material evidence'', because it would not be ''existing evidence.'' We therefore propose to remove the term ''existing'' to avoid any potential for such misapplication.

There is no need to qualify ''new and material evidence'' as ''existing evidence'' to ensure that VA's duty to assist the claimant in obtaining new and material evidence is as limited as VA intends. In any claim, the claimant must identify existing evidence and provide VA the information necessary to obtain this evidence before VA is obligated to try to procure that evidence for the claimant. *See* proposed § 5.90(c). Nothing about asserting that the evidence is new and material or the fact that the claimant wants VA to obtain that evidence in order to reopen a claim exempts the claimant from his or her obligation. Consequently, the definition of new and material evidence does not need the qualifier ''existing'' to limit VA's duty to assist. Likewise, another paragraph of the ''duty to assist'' regulation provides that VA has no duty to assist a claimant seeking to reopen a claim by providing medical examinations or obtaining new medical opinions until new and material evidence is presented or secured. *See* proposed § 5.90(c)(4)(iii). Therefore, the definition of ''new and material evidence'' does not need the qualifier ''existing'' to proscribe a duty to provide medical examinations or obtain medical opinions for the claimant seeking to reopen a previously finally denied claim.

Finally, we propose to redesignate initially proposed paragraph (b), ''Effective date'', as paragraph (e). We propose to change the term ''awards'' to ''grants'', consistent with the use of ''grant'' in part 5 as a verb meaning to decide a claim affirmatively.

§ 5.56 Report of Examination, Treatment, or Hospitalization as a Claim

We propose to revise and reorganize this regulation for simplicity. We also propose to address several specific issues.

We propose to revise initially proposed paragraph (a) so that it simply states the purpose and effect of this section. It is necessary to explain that evidence construed as a claim in accordance with this section meets the claim requirement of § 5.51(a), because after VA receives such evidence, VA requires the claimant to take no further action to establish that he or she has filed a claim. In other words, the evidence constitutes a claim ''that is in the form prescribed by the Secretary'' for filing the claims to which this section applies.

We propose to add a new paragraph (b), ''Claims excluded'', which provides that VA's receipt of a report of examination, treatment, or hospitalization is a claim only under the circumstances named in paragraph (c) of this section. We emphasize this point by explicitly excluding from the scope of this section new claims for service connection.

In reviewing the initially proposed regulation, we noticed that in some places we referred to a report of examination or hospitalization and in others we referred to a report of examination or treatment. Our intent was to accept a report of examination, treatment, or hospitalization as a claim in the situations described. We propose to revise this regulation, including the title, to reflect that any of these types of medical reports may be a claim for increased benefits or for pension under the circumstances described. The revised title also represents the content of the regulation more accurately.

We propose to reorganize initially proposed paragraph (b) of this section and redesignate it as paragraph (c), ''Claims included''. We propose to replace the initially proposed language with four succinct statements, (c)(1), (2), (3), and (4). Each statement articulates a circumstance in which VA's receipt of

medical records is a claim and identifies what type of claim it is, for example, a claim for increased disability compensation. We propose not to repeat the language, ''or once a formal claim for disability compensation has been denied because the service-connected disability is not compensable in degree''. We also propose not to repeat the language, ''or an informal claim to reopen''. Both phrases are superfluous and potentially confusing to readers. VA formerly considered claims where VA granted service connection for an injury or disease, but rated the disability as 0 percent disabling as having been disallowed or denied. *See* Par. 4, VA Technical Bulletin 8–180, ''Claims for Increase and Reopened Awards'' (June 13, 1951). VA considered hospital treatment records as ''an informal claim to reopen'' such a claim in order to receive a compensable rating. *Id.*

VA currently considers claims for disability compensation to have been granted, notwithstanding that the disability is rated 0 percent, so long as VA granted service connection. This is because even a 0 percent rating can yield disability compensation or other benefits, such as medical treatment. *See* 38 CFR 3.324, ''Multiple noncompensable service-connected disabilities''. Because VA no longer considers such claims disallowed or denied, they cannot be ''reopened''. Instead, a claimant who believes he or she is entitled to more than a 0 percent rating need only file a claim for an increased rating. Hence, we propose to remove the above-referenced language from redesignated § 5.56(c). Furthermore, 38 CFR 3.157 has never applied to permit the reopening of a claim that was denied because the claimed injury or disease was not service connected. 38 CFR 3.157(b) applies only where ''a formal claim for . . . compensation has been allowed or . . . disallowed for the reason that the service-connected disability is not compensable in degree''. Removing the above-referenced language will remove any possible confusion on this point.

The reasoning for not using the term ''disallowed'' or ''denied'' or referring to a ''reopened'' claim in the context of a prior grant of service connection to a veteran rated 0 percent disabled also applies to claims under this section from veterans receiving retired pay. Proposed paragraph (b)(2) changed ''disallowed'' to ''denied'' in restating the § 3.157(b) rule about retirees. Section 3.157(b) provides for claims from ''a retired member of a uniformed service whose formal claim for pension or compensation has been disallowed because of receipt of retirement pay.'' ''Disallowed'' is used there in the same sense in which § 3.157(b) uses it to refer to nonpayment of disability compensation to a service-connected veteran rated 0 percent and for the reason discussed above; such a claim is not ''reopened.'' VA may grant service connection to a veteran, yet not pay disability compensation because the veteran elects to receive retired pay rather than VA disability compensation. VA would also not pay pension to the retiree in receipt of retired pay if the amount of retired pay is greater than the amount of income above which VA will not pay pension benefits. In neither instance is a claim under this section ''reopened'' or a claim to reopen. Our proposed restatement of initially proposed § 5.56(b)(2), to be redesignated as proposed paragraph (c)(3), includes a heading that accurately describes the circumstances in which the section applies to veterans receiving retired pay. It also describes the claims, simply, as for disability compensation or for pension.

Initially proposed § 5.56(c)(3) used the term ''retirement pay''. Upon further review, we noted that the terms ''retirement pay'' and ''retired pay'' were inconsistently used in part 3. To correct this inconsistency, we propose to use the term ''retired pay'' throughout part 5 when we are referring to ''payment received by a veteran that is classified as retired pay by the Service Department''. *See* proposed § 5.745(a), for the definition of ''military retired pay''.

We propose to redesignate initially proposed paragraph (c) as paragraph (d). Initially proposed § 5.56(c)(1)(i) read:

> The provisions of paragraph (c)(1) of this section apply only when the reports described in paragraph (c)(1)(ii) of this section relate to examination or treatment of a disability for which service-connection has previously been established or when a claim specifying the benefit sought is received within 1 year after the date of an examination, treatment, or hospital admission described in paragraph (c)(1)(ii) of this section.

We have not repeated the quoted language of initially proposed paragraph (c)(1)(i) in redesignated paragraph (d)(1)(i). The first clause of the initially proposed language, as with the equivalent language in § 3.157(b)(1), stated, ''The provisions of paragraph (c)(1) of this section apply only when the reports described in paragraph (c)(1)(ii) of this section relate to examination or treatment of a disability for which service-connection has previously been established''. The purpose of this language is to emphasize that medical records will not be considered a claim for service connection for a disability. As stated, however, it would preclude the reports described from being a claim for pension. VA has never applied the rule to reject records from a VA or uniformed service medical facility as a claim for pension following a prior grant or denial of pension. We therefore propose to remove the language to avoid such a misapplication of the rule.

The language in the quotation above (§ 5.56(c)(1)(i)) also tracks language from current § 3.157 that was intended to govern a situation in which a claimant obtained treatment for a service-connected disability and during that treatment, the examiner noted the existence of another disability. Before 1962, 38 U.S.C. 3011 had described an award of increased disability compensation or pension as ''an award of increased compensation . . . or pension (amending, reopening, or supplementing a previous award, authorizing any payments not previously authorized to the individual involved)''. 38 U.S.C. 3011 (1958). Thus, the law seemed to provide that a claim for increase included a claim for additional disability compensation based on a new disability, if the veteran was already receiving disability compensation. However, that language has long since been repealed. *See* Public Law 87–825, sec. 5(a), 76 Stat. 948, 950 (Oct. 15, 1962). Current law does not provide for the possibility of assigning a 1-year retroactive effective date of disability compensation awarded based on a new disability (unless the claim for disability compensation is received no later than 1 year after the veteran is discharged from service, *see* 38 U.S.C. 5110(b)(1)). In this and other respects, current law does not treat a claim for disability compensation based on a new disability in the same manner as a claim for increased disability compensation based on an increase in the severity of a disability that is already service connected. Thus, this regulation governing the consideration of medical evidence as a claim can no longer apply to a claim based on a disability not previously claimed. This is consistent with our analysis of the first sentence of current § 3.157(b), discussed above, in which we explained why the part 5 rule will not refer to a prior claim having been ''disallowed'' or to a claim needing to be reopened.

One commenter suggested that the meaning of the phrase ''or when a claim specifying the benefit sought'' that had been used in initially proposed § 5.56(c)(1)(i) should be explained more thoroughly. The commenter noted some confusion concerning its meaning based

on the dissent in *Ross* v. *Peake,* 21 Vet. App. 534 (2008) (Order denying full-court consideration) (Judge Kasold, dissenting).

As stated above, the language ''or when a claim specifying the benefit sought'' is a vestige of a statute that is no longer in effect. We are not using the phrase in part 5, and therefore we do not need to further explain its meaning.

Regarding the *Ross* dissent, Judge Kasold interpreted a similar provision in current § 3.157 as providing an earlier effective date for claims for secondary service connection. This view, however, directly contradicts the holding of the Federal Circuit in *MacPhee* v. *Nicholson,* 459 F.3d 1323 (Fed. Cir. 2006). Judge Kasold believed that § 3.157 ''envisions a claim for increased compensation based on a disability for which service connection has not yet been granted.'' *Ross,* 21 Vet. App. at 535. In *MacPhee,* however, the Federal Circuit held that an informal claim pursuant to § 3.157 ''must be for a condition that not only has been the subject of a prior claim, but the condition must also have been previously found to be service connected.'' *MacPhee,* 459 F.3d at 1326. Thus, § 3.157 does not support the assertion that a claim for benefits for a separate disability may be considered a claim for increased disability compensation.

The sources of evidence that can constitute a claim under paragraph (d)(1) (initially proposed paragraph (c)(1)) are regrouped in paragraph (d)(1)(ii) as (d)(1)(ii)(A) through (D), according to date of claim that results from submission of the particular evidence. Though this makes a fourth level of designation in the rule, it should enhance readability.

Initially proposed paragraph (c)(3)(i), regarding evidence from state and other institutions, stated, ''Benefits will be granted if the records are adequate for rating purposes; otherwise findings will be verified by official examination.'' We propose to change ''official'' to ''VA'', to make clear that the official examination to which the sentence refers is a VA examination. We also propose to add the phrase, ''and demonstrate entitlement to an increased rating, to pension, or to special monthly pension'' after ''rating purposes'' to clarify that mere receipt of such evidence does not establish entitlement to benefits.

Initially proposed paragraph (c)(3)(ii) included the phrase ''and entitlement is shown'', derived from current § 3.157(b)(3), as a condition on the date of VA receipt of evidence from state and other institutions as the date of a claim. Neither § 3.157(b)(1) nor (b)(2) contains such a restriction. We therefore propose to remove this language because if the claimant does not eventually establish entitlement to the benefit, then the date of receipt of the claim has no legal significance. Therefore, the language, ''and entitlement is shown'' is superfluous.

Finally, we propose to revise initially proposed paragraph (d), ''Liberalizing law or VA issue'', for clarity and to redesignate it as paragraph (e).

§ 5.57 Claims Definitions

We propose to revise the format of this regulation to be consistent with the format of other regulations that provide definitions. We propose to revise the title of the regulation to be, ''Claims definitions'', because it more clearly indicates the contents of the regulation.

We also propose to restate and expand the scope of the definitions. The initially proposed rule, like current § 3.160 from which it derives, stated that the definitions applied to claims for pension, disability compensation, and DIC. VA administratively processes claims under 38 U.S.C. chapter 18 in the same manner as VA processes pension, disability compensation, and DIC. Therefore, we propose to restate the scope of § 5.57 as applying to claims for disability benefits, death benefits, or monetary allowance for a veteran's child under 38 U.S.C. chapter 18. The proposed change to ''disability benefits'' and to ''death benefits'' (from ''pension, disability compensation, and dependency and indemnity compensation'') better harmonizes the scope of the regulation with the regulations on claims for disability and for death benefits. *See* §§ 5.51 and 5.52.

We propose to remove initially proposed paragraph (a), definition of ''formal claim''. As initially proposed, the definition, ''A claim filed on the application required'', was impracticable. There are benefits for which VA does not have an application, for example benefits under 38 U.S.C. 1151. Moreover, as a result of revision of several other proposed regulations, the term does not appear in part 5 other than in its definition. There is no need to define a term that is not used.

We propose to redesignate initially proposed paragraph (b), ''Informal claim'', as paragraph (a).

We propose to redesignate initially proposed paragraph (c), ''Original claim'', as paragraph (b). We propose to revise the definition to state, ''*Original claim* means the first claim VA receives from a person for disability benefits, for death benefits, or for monetary allowance under 38 U.S.C. chapter 18.'' This restatement eliminates the term ''formal claim''. It is the lack of a prior claim for any disability, death, or chapter 18 benefit that makes a claim the original claim for the benefit.

It is confusing to define the original claim as ''the initial formal claim''. More significantly, it is fallacious. Even if we kept the definition of ''formal claim'' as a claim filed on a prescribed application, the lack of an application for some benefits would make the initially proposed definition of ''original claim'' impracticable. If an original claim must be an application and there is no application for some benefits, then there cannot be an original claim for some benefits. That conclusion is untenable.

We also propose to add ''from a person'' to be clear that when two or more claimants each file a claim for the same benefit, each claim will be the original claim for that person. For example, two siblings each filing a claim for DIC based on the death of the same veteran would each have an original claim. This was not apparent in the initially proposed regulation.

We propose to remove initially proposed paragraph (e), ''Finally adjudicated claim''. It is essentially redundant of the definition of ''final decision'' in § 5.1. The definition of ''final decision'' in § 5.1 encompasses the definition of ''finally adjudicated claim'' in § 3.160(e), but it is more precise. The procedural posture of finality of VA decisions applies to VA claim adjudication more broadly than just to claims for pension, disability compensation, DIC, and monetrary allowances under 38 U.S.C. chapter 18. For that reason, it is more appropriate for the rule defining finality to be in § 5.1 than in § 5.57, which has a limited scope.

One commenter objected to the title of § 5.57(f), ''Reopened claim'', asserting that the title is misleading because the paragraph does not describe what a reopened claim is and is not consistent with how VA and the courts have used the term. This commenter felt that a better title would be, ''Claim to reopen.'' We agree that ''reopened claim'' is inaccurate. As noted by the commenter, this paragraph concerns submission of evidence, information, or an assertion of entitlement to a procedure applicable to a previously decided claim. Such submission of evidence, information, or an assertion of entitlement to a procedure applicable to a previously decided claim may not always result in the claim being reopened. We propose to use the suggested phrase ''claim to reopen''. However, we propose to do so in the context of moving the paragraph

to § 5.55(a), as we discussed above regarding § 5.55.

Duties of VA; Rights and Responsibilities of Claimants and Beneficiaries AL82

General Comment on VA Claims Process

One private individual submitted a comment concerning the length of time VA takes to process a claim and his dislike of the appeal process. This comment is outside the scope of these proposed regulations, and we therefore propose to make no changes based on this comment.

§ 5.80 Rights to Representation

Two commenters suggested that this initially proposed section was deficient in its scope. They expressed a belief that a claimant or beneficiary should be given notice of the right to representation throughout the adjudicative process, not only when VA sends notice of a decision or a proposed reduction, discontinuance, or other adverse action. Both expressed the opinion that VA should notify the claimant of the right to representation at the beginning of the claims process.

It has been VA's long-standing practice to provide notice to claimants of the right to representation in VA's initial response to the claimant after VA receives a substantially complete application. We propose to revise initially proposed § 5.80 to state that written notice concerning the right to representation will be included in the initial response VA sends to the claimant after receipt of a substantially complete application.

One commenter noted that initially proposed § 5.80 failed to set out in detail the crucial role of the representative in the adjudicative process. Another commenter urged VA to include in initially proposed § 5.80 the limitations on hiring an attorney.

Part 3 regulations do not describe the role of representatives in the adjudicative process or the limitations of hiring an attorney and we do not believe part 5 should either. The rights, duties, limitations and role of a representative are in 38 CFR 14.626—14.637. The first sentence of § 5.80 refers the reader to those sections. We are making no changes in the language of the regulation in response to these comments. We have, however, added a cross reference at the end of initially proposed § 5.80 to 38 CFR 19.25, ''Notification by agency of original jurisdiction of right to appeal'', which requires that VA include the right to representation in its notice of an adverse decision on a claim.

One commenter urged VA to include a provision acknowledging the right of both the claimant and the claimant's representative to automatically receive copies of evidence secured by VA. The commenter asserted that access to the evidence developed and relied upon by VA to reach its decision is crucial to proper notice and is a fundamental due process right.

A veteran and representative are entitled to a copy of the evidence or other written records contained within a veteran's claims file in accordance with the provisions of 38 U.S.C. 5701(b)(1), as implemented in 38 CFR 1.503. The veteran or representative must make a written request for the copies of the evidence in accordance with the provisions of 38 U.S.C. 5702(a). *See* 38 CFR 1.526. The procedures for a veteran and the representative to obtain copies of the evidence used in deciding a claim have been established by statute and VA has implemented these procedures in our regulations. If VA adopted the rule that the commenter urges, it would require VA to copy and mail every document it acquires regardless of its relevance to the veteran's claim. We do not believe that it would be an appropriate use of VA's limited resources to automatically provide both the claimant and the claimant's representative with copies of every piece of evidence that VA secures.

The procedures provided in current statutes and regulations do not infringe on the claimant's due process rights. The claimant has the right to notice of the evidence VA will attempt to obtain on the claimant's behalf, of the evidence the claimant has the responsibility to obtain and submit, and of the decision on the claim. If the decision is adverse, the notice must include a discussion of the evidence considered and the reasons and bases for the decision and it must include the claimant's appellate rights. The claimant may, upon written request, generally obtain a copy of the evidence used in making the decision on the claim. Since our regulations already provide for the result the commenter requested, though not in the manner urged by the commenter, we propose to make no changes based on this comment.

§ 5.81 Submission of Information, Evidence, or Argument

Initially proposed § 5.81(a), ''*Submissions included in the* record'', referred to submissions ''that a claimant offers. . .'' One commenter asserted that § 5.81(a) failed to specify that a claimant's recognized representative has the authority to raise issues on behalf of a claimant.

As stated in our response to a similar comment on initially proposed § 5.80, part 3 regulations do not describe the role of representatives in the adjudicative process or the limitations of hiring an attorney and we do not believe part 5 should either. Initially proposed § 5.81(a) was not intended to regulate the specific authority of a claimant's or beneficiary's representative. This information is codified in §§ 14.626–14.637, to which § 5.80 refers, and to include it in part 5 would be redundant. We therefore propose to make no change based on this comment.

In initially proposed § 5.81(a), we used the term ''record of proceeding'' twice. We have substituted the term ''evidence of record'' to be consistent with the other part 5 regulations. This regulation was the only one in part 5 to use the term ''record of proceeding''.

Initially proposed § 5.81(b) stated:

> Information, evidence, or argument may be submitted by a claimant or beneficiary, or, where applicable, through a guardian or fiduciary acting on his or her behalf. Unless specifically provided otherwise in this part, a claimant's or beneficiary's authorized representative may submit information, evidence, or argument pursuant to any section of this part that allows or requires submission of information, evidence or argument.

Two commenters expressed concern with this paragraph as implying some new restriction on a representative's authority to submit material on behalf of a client. One commenter argued that this section is inappropriate because an authorized representative stands in the same position as the client and should be allowed to submit evidence and arguments as if he is the claimant or beneficiary. The same commenter suggested inserting the phrase ''or their authorized representative'' after ''beneficiary'' and deleting the second sentence.

We did not intend to constrain an authorized representative's role or authority in the VA claims process. After reviewing initially proposed § 5.81(b) because of the comments received, however, we noted that all the information contained in the paragraph is also in other regulations. Section 1.524 provides for the right of a fiduciary, representative, attorney, or other authorized person to represent the claimant. Sections 13.1, et seq., and 14.626–14.637 provide specific provisions concerning these representatives. Because other regulations provide for the rights and duties provided in initially proposed § 5.81(b), and do so in greater detail,

§ 5.81(b) is redundant, and we propose to remove it.

§ 5.82 Right to a Hearing

We propose to add language to initially proposed § 5.82(a) to make clear that the section pertains only to hearings in claims at the agency of original jurisdiction level of adjudication. We propose to change ''claimants'' to ''claimants and beneficiaries'', except in paragraph (f), to make clear that the rules in § 5.82 apply to claimants and to current beneficiaries. Paragraph (f) pertains only to hearings in response to a VA proposal to take adverse action regarding a beneficiary's benefits. Finally, we propose to change ''claim'' to ''matter'' to clarify that if a beneficiary requests a hearing to give testimony or evidence on whether VA should take adverse action against the beneficiary's benefits, such a hearing is within the scope of § 5.82.

Further review of the initially proposed regulation revealed a contradiction between paragraphs (a)(1) and (f). Initially proposed paragraph (a)(1) provided for one hearing ''at any time on any issue''. Initially proposed paragraph (f) provided, as does current § 3.105(i) from which it derives, that a beneficiary must request a hearing on the issue of reduction, discontinuance or other adverse VA action within 30 days after receipt of a notice of VA's proposal to take the adverse action. Therefore, a hearing under paragraph (f) is not available ''at any time on any issue''. We propose to reconcile the two paragraphs by beginning paragraph (a)(1), ''Except as provided in paragraph (f),''. This is not a change from current regulation. Compare §§ 3.103(c) (''a hearing on any issue at any time'') with 3.105(i) (''a predetermination hearing [if] a request . . . is received within 30 days''). It merely clarifies the relationship between paragraphs (a) and (f). This relationship exists between §§ 3.103(c) and 3.105(i), but it becomes obvious when the provisions are consolidated in a single section.

We propose to revise the second to last sentence of initially proposed § 5.82(a), removing the statement entitling a veteran to a hearing before the Board of Veterans' Appeals (Board). Instead, we propose to add a cross reference to the introduction to make the reader aware of Board hearings and to distinguish between hearings at the AOJ and at the appellate levels of adjudication. We propose this change because 38 CFR part 20 provides for the right to a hearing before the Board, and it is not appropriate to regulate Board hearings in part 5.

The initially proposed rule allowed, ''one hearing before the agency of original jurisdiction at any time on any issue or issues involved in a pending claim before the agency of original jurisdiction'' and permitted one additional hearing ''if the claimant asserts that: he or she has discovered a new witness or new evidence to substantiate the claim; he or she can present that witness or evidence only at an oral hearing; and the witness or evidence could not have been presented at the original hearing.'' Four commenters asserted that the limitation in initially proposed § 5.82 on the number of hearings allowed was too restrictive. For the reasons stated in response to specific comments, we disagree that the regulation is too restrictive and we reject each of the reasons argued for keeping the current rule.

One commenter asserted that the ''one-hearing rule'' diminishes claimants' right to due process because it is inconsistent with the VA's tradition of giving claimants the opportunity to continue to produce and submit evidence or argument as a claim develops. It might be true that the one-hearing rule could inhibit ongoing production of evidence or argument throughout the time a claim is pending, if a personal hearing were the only way to submit evidence or argument to the record in a claim, but it is not. Section 5.81, the regulation governing submission of evidence and argument generally, could scarcely be more permissive regarding entering material into the record in a claim: A claimant may submit virtually anything, at almost any time, by nearly any means. Nothing in § 5.82 diminishes the right to submit material to the record in a claim throughout the time the claim is pending, except as limited by the rules of the Board of Veterans' Appeals for submission of material after the AOJ transfers a claim to the Board on appeal. 38 CFR 20.1304.

The same commenter asserted the rule is inconsistent with the current due process right to a hearing before the initial decision on a claim. The commenter requested that we include a provision informing the veteran of the right to a hearing before VA makes a decision on a claim. We interpret the comment to express concern that an adverse decision in a claim could bias a subsequent decision-makers, and that a claimant would have to overcome that bias in a subsequent hearing. Initially proposed paragraph (d) provided that ''a VA employee or employees having decision-making authority and who did not previously participate in the case will conduct the hearing.'' The comment offered no basis to believe that a VA official conducting a hearing would not be impartial, and we propose to make no change to preempt a bias that is not demonstrated.

To the extent the commenter is concerned about lack of notice to the claimant of the right to a hearing before the decision on a claim, VA does notify claimants of the right to a personal hearing at any time, including before VA has decided a claim. See, for example, VA Form 21–526, instructions page 6, Veteran's Application for Compensation and/or Pension (Jan. 2004), or VA Form 21–534, instructions page 2, Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child (Including Death Compensation if Applicable). Because VA already provides this information to claimants, we propose to make no change based on this comment.

Absent the discovery of a new witness or evidence, there is no valid reason to hold an additional hearing. A single hearing provides full and fair opportunity to place demeanor evidence in front of the decision maker, which satisfies a primary object of personal hearings. The one-hearing rule with its paragraph (a)(2) allowance for a second hearing under the stated circumstances provides a fair and rational balance between the rights of the claimant and the resources of the department. Repeated interruption of the adjudication process for hearings can result in confusion about the evidence to review and in interminable delay, both of the claims subjected to repeated hearings and to the progress of the claims of others who wait their turn. These are not inconsequential concerns. If a claimant wants to submit new arguments, he or she may do so in writing at any time. We therefore propose to make no changes based on these comments.

Another commenter asserted that the provision for an additional hearing is likely to result in VA arbitrarily refusing an additional hearing that a claimant would use to respond to evidence that entered the record subsequent to the first hearing, resulting in limiting a claimant to one hearing in almost all circumstances. After noting the criteria for a second hearing in paragraph (a)(2), the commenter asserted that paragraph (a)(2) should provide for additional hearings ''when warranted by circumstances'' or ''for good cause'' and authorize VA to refuse a second, third, or further additional hearing ''when clearly unwarranted.'' The commenter asserted that there are many

circumstances that would warrant an additional hearing that would not meet the criteria in paragraph (a)(2). The commenter asserted that the claimant should be able to testify to additional matters even though the testimony would not amount to newly discovered evidence or present a different witness. The commenter further asserted that paragraph (a)(2) would allow a claimant a second hearing for a new witness to testify in corroboration of prior testimony, that is, to provide cumulative testimony. The commenter concluded that the several requirements for a second hearing, including that the hearing be the only way to present the evidence or testimony, is a license for refusal by VA personnel to afford a supplemental hearing in virtually all cases.

We recognize the commenter's concern that the one-hearing rule will thwart a claimant's legitimate desire to respond to developments during the pendency of the claim. The threshold for obtaining a second hearing, however, is a mere assertion of the factors in the exception paragraph. We see no basis for the speculation that VA will probably refuse almost all requests. It seems likely that a claimant's desire to testify or present witnesses or evidence to rebut evidence that entered the record after a prior hearing is exactly a situation in which the claimant could not have adduced the new evidence or witnesses' testimony before the evidence it would rebut was of record.

We do not agree that the standards for obtaining a second hearing invite arbitrary or capricious refusal of requests for second hearings, or even that VA will deny most requests. Rather, the rule the commenter proposed ''where circumstances warrant,'' or ''for good cause,'' but ''not when clearly unwarranted'' are completely devoid of a standard of application; they seem far more likely to result in inconsistent application than do the paragraph (a)(2) criteria.

More basically, the commenter would have VA afford additional hearings even though the claimant would present no new witness or evidence; even though the claimant could present the testimony of a new witness, or new evidence, without a hearing; and even though the claimant knew of the witness, evidence or argument at the time of the first hearing and could have presented them. The commenter ''concede[d] that VA has a legitimate interest in preventing duplicative and unnecessary hearings,'' a point with which we do agree. We conclude that the one hearing rule with the paragraph (a)(2) exception provides full and fair hearing process to each claimant.

A commenter objecting that § 5.82(a) would limit a long-standing right to unlimited hearings, asserted that VA had not provided an adequate rationale for its proposed fundamental change in its historic and traditional hearing practice. The preceding paragraphs state additional rationale for the change. Additionally, we do not agree that the change is fundamental, because VA hearing practice will continue to serve every function it has under current § 3.103(c).

The commenter further asserted that ''Congress has codified and ratified the agency's traditional practice of providing claimants with multiple opportunities to appear for personal hearings.'' The commenter asserted that Congress is presumed to be aware of and adopt an administrative interpretation of a statute when it reenacts the statute without change, citing *Young* v.*Cmty. Nutrition Inst.,* 476 U.S. 974, 983 (1986). The commenter reiterated this point regarding additional hearings at the AOJ after the Board remands a claim if the claimant had a hearing before Board review of the claim. The commenter asserted that Congress intended VA to continue its existing practice regarding hearings at the AOJ when it enacted the Veterans' Judicial Review Act of 1988, Public Law 100–687, 102 Stat. 4105 (1988), and the Veterans Claims Assistance Act of 2000, Public Law 106–475, 104 Stat. 2096 (Nov. 9, 2000), without changing the law governing provision, number, or timing of VA personal hearings. The commenter did not identify a statute the reenactment of which constituted Congressional adoption of 38 CFR 3.103(c), from which § 5.82(a) derives. Neither of the statutes cited addresses VA hearing practice. We are aware of no statute that does.

The right-to-a-hearing rule in § 3.103(c) is VA's creation, promulgated under the Secretary's general rule-making authority in 38 U.S.C. 501(a). Moreover, as judicial precedent specific to VA clearly shows, congressional silence on a regulation is not necessarily adoption or endorsement of the regulation, or even an indication that Congress is aware of the regulation. *Brown* v.*Gardner,* 513 U.S. 115, 120–21 (1994) (Sixty-year congressional silence about VA regulation did not ratify it; language of statute was plain, record of congressional discussion preceding reenactment of the predecessor statute made no reference to VA regulation and there was no other evidence to suggest Congress was even aware of VA's interpretive provision). Certainly, where VA's rule on hearings does not derive from a statute on hearings, Congress's silence about the matter does not imply a congressional view of the regulation. The cases the commenter cited for the proposition that congressional failure to revise a regulation is endorsement of it were instances of congressional action on a statute to which a certain regulation related.

The commenter also asserted as fact that ''the legislative history associated with congressional oversight of the agency shows that Congress knew about VA's practices governing personal hearings and did not indicate that it disagreed with the agency's practices.'' As we noted above, congressional silence about a practice is not necessarily evidence of congressional endorsement. *Id.,* at 120–21. Silence about an agency practice in the context of congressional knowledge and consideration of a matter could, however, be significant. The House Committee on Veterans' Affairs was authorized by enactment of the ''Legislative Reorganization Act of 1946.'' Public Law 79–601, sec. 121(a). *See http://veterans.house.gov/history/* (World Wide Web site of the House Committee, visited Dec. 2, 2009). The Committee has oversight responsibility for VA, which it exercises through the Subcommittee on Oversight and Investigations. *See http://veterans.house.gov/oversight/* (World Wide Web site of the oversight subcommittee, visited Dec. 2, 2009). The commenter does not cite any history of the Subcommittee on Oversight and Investigations documenting its knowledge or viewpoint on VA hearing practice, or say when during the more than 60-year history of congressional oversight of veterans affairs an this expression of knowledge happened. We are not aware of any history of congressional oversight showing endorsement of VA hearing practice. Consequently, we propose to make no change in the initially proposed regulation based on the assertion that congressional oversight history shows that Congress has approved current practice.

The same commenter objected to the language in initially proposed § 5.82(a)(1) precluding a claimant who had a hearing prior to an appeal to the Board from having a second hearing if the Board remands the case, except as paragraph (a)(2) provides. The commenter quoted from the AL82 NPRM, emphasizing the discussion of current § 3.103(c), which stated, ''The VA official conducting the hearing is obligated to elicit any information or evidence not already of record in

support of the benefit claimed.'' 70 FR 24680, 24683, May 10, 2005. The commenter asserted that ''as is so often the case, the requirements of the law, [sic] are conveniently forgotten by VA litigation counsel when a veteran appeals to the U.S. Court of Appeals for Veterans Claims.'' The commenter cited the Secretary's brief in *Colon* v. *Nicholson,* 21 Vet. App. 96 (2006) (table, unpublished decision), WL 2105515 (text), as an example of VA excusing the failure of a hearing officer to execute the regulatory mandate to explain the issues and suggest evidence to submit. The commenter quoted a passage from the brief that asserted that the appellant could have cured the failure of the Regional Office hearing officer to consider and discuss an issue in the case by having another personal hearing or by other means after the Board had remanded the case. The commenter argued that VA's argument in *Colon* ''demonstrates . . . why VA should not limit a claimant's right to appear for personal hearings.''

VA's arguments or litigation strategy in a case on appeal to the court is beyond the scope of this rulemaking, Whatever the argument or reason for an argument raised in litigation, litigation of a VA claim is far downstream in the claims process from the hearings for which § 5.82 provides. The commenter asserted that VA's argument in Colon ''shows that [VA's] litigation counsel have no qualms whatsoever in presenting argument . . . to undermine the legal effect of the agency's binding regulations.'' The commenter essentially argues that VA should allow unlimited hearings because far downstream from the hearing the Secretary's counsel might argue to the court that a failure to follow a regulation was a harmless error in a specific case. We do not agree that a right to unlimited hearings is likely to preempt an argument at litigation, nor is that an appropriate object of regulation.

The commenter implicitly raised another point worth addressing, that is, whether there is a cure for a defective hearing, and if so, whether the one-hearing rule thwarts that right. In practice, another hearing would cure a defect in the original hearing, and the one-hearing rule will not inhibit that remedy. VA and its hearing officers have various duties in conducting hearings, such as to explain all issues and suggest the submission of evidence the claimant might have overlooked. A right to unlimited hearings is an overly broad remedy for a defective hearing, because it would result in many redundant hearings in cases in which the initial hearing had comprehensively addressed all issues and fully provided due process.

If a hearing was defective, the claimant can assert so to the AOJ, or on appeal to the Board. A defective hearing would not be legally sufficient to satisfy the claimant's right to one hearing. The claimant would be in the position of not having had a hearing. The one-hearing rule in paragraph (a)(1) would not bar repeating the hearing to cure the defect, and the claimant would not be subject to the criteria in paragraph (a)(2) to obtain the new hearing. The claimant could obtain this new hearing from the AOJ. If the claimant appeals an adverse decision to the Board, the claimant can assert the deficiency in the hearing. A Board remand to cure a deficiency in a personal hearing would not be subject to the rule against post-remand hearings in paragraph (a)(1), because it would require AOJ implementation of a specific order within the Board's authority. 38 CFR 19.9. Consequently, the one-hearing rule does not raise the specter of deficient hearings without a remedy for the claimant. Moreover, a remand from the Board alone is not sufficient reason for another hearing in light of the reasons expressed above for the one-hearing rule. If a remand from the Board orders development of evidence, or otherwise results in the conditions that meet the criteria for an additional hearing in paragraph (a)(2), then the claimant can obtain the additional hearing. We propose to make no change to the rule based on the comment.

We propose to reorganize initially proposed paragraph (a)(2) to make its three criteria visually clear by designating them (i), (ii), and (iii).

Initially proposed § 5.82(b) stated, in pertinent part, that, ''[t]he purpose of a hearing under this section is to provide the claimant with an opportunity to introduce into the record of proceedings, in person, any available evidence, arguments, or contentions which he or she considers important to the case.'' One commenter asserted that the term ''contention'' is redundant of the term ''argument,'' and that VA adjudicators often dismiss testimonial evidence as ''mere contentions'', citing *Hatlestad* v. *Derwinski,* 1 Vet. App. 164, 169–70 (1991).

Merriam-Webster's Collegiate Dictionary, 269 (11th ed. 2006), defines ''contention'' as ''a point advanced or maintained in a debate or argument''. The term ''argument'' includes the term ''contention''. We agree that it is unnecessary to include both terms in § 5.82(b) and we propose to remove the word ''contentions''.

We propose to make an additional change to initially proposed § 5.82(b) by removing the last sentence, that states, ''[t]estimony at a hearing will be under oath or affirmation.'' We propose this change because the requirement that the testimony be under oath or affirmation is also found in § 5.82(d)(2), where it is more clearly expressed. Including this requirement in § 5.82(b) is redundant and unnecessary. We propose to revise the title of this paragraph to remove the reference to the requirement for oath or affirmation.

Initially proposed § 5.82(d)(1) stated, in pertinent part, ''[t]he employee or employees will establish a record of the hearing and will issue a decision after the hearing'', which is substantially similar to the language in current § 3.103(c)(1). One commenter asserted that the phrase ''a record of the hearing'' is too vague and urged VA to clarify that testimony cannot be ''manipulated, paraphrased, or summarized like minutes of a meeting.'' The commenter urged that the witness's exact words and complete statements be made a part of the record.

VA normally transcribes the recording of the hearing and includes the transcript of the hearing in the record of evidence. However, it would be inappropriate to require by regulation that a transcript be prepared for every hearing. There are several reasons why the recording of the hearing may not be transcribed. For example, the VA employee conducting the hearing may determine that all benefits sought should be granted. If all benefits sought are granted, there is no reason to expend resources to transcribe the recording of the hearing or to delay the promulgation of the decision while waiting for the recording to be transcribed. The decision granting the benefit would summarize the hearing testimony. Also, the claimant may withdraw the claim during the conduct of the hearing. In such situations, there is no need for a transcript. In either of these examples, the claimant would gain nothing by the VA's expenditure of resources in transcribing the recording of the hearing. Finally, VA puts a transcript of the hearing in the claims file if the claimant or beneficiary initiates an appeal from a decision. The verbatim testimony is thus part of the evidence of record when the claimant or beneficiary seeks appellate review. To require by regulation that a transcript of the recording of every hearing be prepared would not assist the claimant and would unnecessarily expend VA resources.

Currently, VA prepares a transcript of the hearing if the VA employee

conducting the hearing needs one in making a decision on the claim, if the claimant (or the claimant's representative) requests a copy, or if the claim is to be sent to the Board of Veterans Appeals. If the recording of the hearing is not transcribed, the recording of the hearing is placed in the claims folder so that if the hearing needs to be transcribed later, the tape or other recording medium is available. The current procedures adequately protect the claimant's interests while providing VA with greater efficiency in using our resources. We propose to make no changes based on this comment.

One commenter urged VA to require in § 5.82(d)(3) that adjudicators conducting hearings make express credibility findings on the record concerning the sworn, personal hearing testimony of claimants and other witnesses. The commenter averred that VA hearing officials deciding claims regularly fail to state the reasons for rejecting sworn hearing testimony. The commenter asserted that a requirement that hearing officers make specific credibility findings is necessary to compel hearing officers to include the contribution of his or her assessment of the credibility of hearing testimony in the statement of reasons for a decision.

We decline to make this suggested addition. Such findings are already required by initially proposed § 5.83(a), which requires VA to send each claimant a decision that explains, ''[if] a claim is not fully granted, the reason for the decision and a summary of the evidence considered. . . .'' Additionally, if VA were to specifically require VA personnel conducting hearings to determine the credibility of oral hearing testimony, the requirement could be misconstrued as emphasizing that type of testimony over others, or that they need not make credibility findings on other types of testimony or evidence. A finding as to credibility of testimony, or of any evidence, is fundamental to all weighing of evidence. *See Barr* v. *Nicholson,* 21 Vet. App. 303, 310 (2007) (''On remand, the finder of fact must consider the credibility and weight of Mr. Barr's statement, and any other competent lay or medical evidence''); *see* also, *Layno* v. *Brown,* 6 Vet. App. 465, 469 (1994) (Credibility is a matter to consider after evidence or testimony has been admitted). We agree with the commenter's statement that testimony is evidence, and that the Secretary must consider ''all information and lay and medical evidence of record''. 38 U.S.C. 5107(b) (Benefit of the doubt). That does not mean that regulation must specifically require credibility findings as to hearing testimony. The lack of a finding of credibility of hearing testimony, as with a failure to assess the credibility of any testimony or evidence, can be the basis on appeal of an assertion that VA failed to state its reasons or bases for a decision. We propose to make no changes based on this comment.

Initially proposed § 5.82(e)(1) stated, ''Normally, VA will not schedule a hearing for the sole purpose of receiving argument from a representative.'' This was based on current 38 CFR 3.103(c)(2) which states, ''The Veterans Benefits Administration will not normally schedule a hearing for the sole purpose of receiving argument from a representative.'' In reviewing § 5.82 to respond to comments, we noted that paragraph (e)(1) provides no guidance on when VA will schedule a hearing for the sole purpose of receiving argument from a representative. Title 38 CFR 20.700(b) states, in pertinent part, ''Requests for appearances by representatives alone to personally present argument to Members of the Board may be granted if good cause is shown. Whether good cause has been shown will be determined by the presiding Member assigned to conduct the hearing.'' We believe that applying a good cause standard to hearings at the agency of original jurisdiction would be fair to claimants and beneficiaries, and administratively efficient for VA, so we propose to add that standard to paragraph (e)(1).

We propose to reorganize initially proposed § 5.82(e)(3) (now renumbered as paragraph (e)(4)) to make clear that it addresses failure to report for a hearing under any circumstance. Paragraph (e)(4)(i) addresses failure to report without good cause Paragraph (e)(4)(ii) addresses failure to report with good cause and the responsibility of the claimant or beneficiary to request rescheduling.

One commenter urged VA to add a provision to § 5.82(e) on rescheduling hearings upon receipt of a reasonable request from a claimant or beneficiary. VA's long-standing practice has been to inform claimants and beneficiaries, in the letter scheduling their hearing, how to contact VA to reschedule the hearing. Based on the comment, we have added a new paragraph (e)(3) stating, ''If a claimant or beneficiary is unable to attend a scheduled hearing, he or she may contact VA in advance to reschedule the hearing for a date and time which is acceptable to both parties.''

Similarly, another commenter argued that VA should provide a claimant with a right to reschedule a hearing if the claimant missed the originally scheduled hearing for good cause. In our view, a request to reschedule is reasonable if the claimant failed to report for good cause. VA's long-standing practice has been that if a claimant fails to attend the hearing with good cause, VA will reschedule the hearing. We agree with the commenter that it would helpful to include this in paragraph (e) and we now propose to add such language.

We reviewed initially proposed § 5.82 in connection with this comment, and determined that it might be unclear whether the hearing procedures discussed in paragraphs (a) through (e) apply to ''predetermination hearings'' under paragraph (f). We propose to revise (f) by adding the word ''Additional'' before the paragraph heading. It now reads, ''Additional requirements for hearings before proposed adverse actions.'' The paragraph provides that before VA takes adverse action regarding a benefit, VA will give the beneficiary notice of a right to a hearing, and that the beneficiary has 30 days to request a hearing. Reading the heading and the paragraph together makes it clear that the provisions of (f) modify the hearing procedures discussed in paragraphs (a) through (e). The modifications consist of VA's unique notice requirement and the beneficiary's 30-day limit to request a hearing. *See* discussion of distinction between paragraphs (a) and (f), above.

We have restated the rule in initially proposed paragraph (f) regarding the conditions under which VA will hold a hearing prior to adverse action so it reads in the affirmative, rather than in the negative. That is, stating ''VA will conduct a hearing . . . only if . . .'', rather than, ''VA will not conduct a hearing . . . unless . . . .'' This change is consistent with part 5's preferred style of stating rules in the affirmative. We have also removed the second sentence of initially proposed paragraph (f)(1) providing examples of good cause for failing to report for a hearing. It is the same as the last sentence of paragraph (e)(3). Paragraph (e) provides the rights and responsibilities of the beneficiary regarding hearings generally. The provision need not be repeated in paragraph (f), which comprises hearing requirements in addition to those elsewhere in § 5.82.

One commenter noted that initially proposed paragraph (f)(3) requires that VA ''send the notice of the time and place for the predetermination hearing at least 10 days before the scheduled hearing date'' and urged that VA provide similar advanced notice for hearings conducted under paragraph

(d). We agree with this suggestion. VA usually provides at least 10 days advanced notice of hearings, and we propose to revise paragraph (d) to provide the same 10 days notice as contained in paragraph (f).

One commenter urged VA not to use the term ''predetermination hearing'' in § 5.82(f), which describes hearings conducted after VA proposes to take some adverse action affecting benefits, but before rendering a decision. The commenter noted that a claimant may request a hearing at any time, including prior to the initial decision on a claim, which would also be a ''predetermination hearing.'' The commenter did not offer any suggestion as to what term VA should use in its place.

We agree that any hearing preceding a determination can accurately be called a ''predetermination'' hearing. The term ''predetermination hearing'' has been used in current regulation 38 CFR 3.105(i) for many years and is widely understood by VA adjudicators, veterans, and veterans' representatives. It is clear in § 5.82(f) what the term means and we are not aware of any other term that would be more clear to readers. Nonetheless, it is jargon and not essential. A hearing is a hearing. The same rules apply to the conduct of the hearing described in paragraph (f) as to any other hearing. The decision maker must give the same consideration to the testimony and evidence presented as with any other hearing. The unique effect of a request for a hearing prior to a possible adverse decision is that VA will not reduce or discontinue the benefit payments prior to hearing. It is this relationship of the request for a hearing to the timing of any action resulting from the decision whether to reduce or discontinue a benefit that gave rise to the term ''predetermination'' hearing. This rule is in the last sentence of § 3.105(i)(1), and initially proposed § 5.82(f)(4) restated it. The rule applies regardless of whether the hearing has a special name. For consistency throughout § 5.82, and to avoid any confusion of the sort the commenter highlighted, we propose to remove the modifying term ''predetermination'' prior to the term ''hearing'' in paragraph (f).

Initially proposed § 5.82(f)(3) stated that VA will send the notice of the time and place for a predetermination hearing at least 10 days beforehand and that this requirement may be waived by the beneficiary or representative. This 10-day notice provision is currently contained in 38 CFR 3.105(i). Three commenters asserted that this 10-day advanced notice period is often not adequate. They referred variously to the time it takes to deliver the mail, the distance a claimant or beneficiary must travel, and the time required to gather the funds or arrange for time off work to attend a hearing. One commenter urged VA to adopt a rule providing for ''negotiated appointments acceptable to both parties, with at least 30 days' notice unless otherwise agreed.''

Regarding the suggestion that we revise initially proposed § 5.82(f) to provide 30 days advanced notice of the date of the hearing; we decline to make this change. Ten days is sufficient time for beneficiaries to receive VA's scheduling letter and, if necessary, to contact VA to reschedule. VA already has the inherent discretion to resolve situations where a beneficiary needs more time. For example, if VA's letter arrived while the beneficiary was on vacation and the beneficiary was unable to reschedule before the hearing date, VA would reschedule the hearing when the beneficiary contacted VA. Second, we note that the 10-day provision has been contained in § 3.105(i) for over 15 years and there have been few, if any, complaints from beneficiaries about this provision. For these reasons, we propose to make no changes based on this comment.

We propose to revise initially proposed paragraph (f)(4), removing the term ''final'' before ''decision''. The decision that follows a proposal to reduce or discontinue a benefit is not a ''final'' decision as VA defines ''final'' in § 5.1. Like any other decision on entitlement to benefits, it is subject to appeal and can become final by expiration of the time allowed to appeal the decision, or because the Board of Veterans' Appeals has ruled on an appeal from the decision. The decision to which paragraph (f)(4) refers is the type of decision described in § 5.160 as ''binding''. Compare preamble to § 5.160, with § 3.104(a) (final and binding decision).

In the NPRM, we initially proposed not to include in § 5.82 the last sentence of current § 3.103(c)(2). We stated in the preamble of the NPRM that the provision is redundant because 38 U.S.C. 5103A(d), enacted in 2000, requires VA to provide a medical examination if it is ''necessary to make a decision on the claim''. This § 5103A(d) examination or opinion provision is now § 5.90(c)(4)(i), which derives from § 3.159(c)(4).

One commenter objected to our proposal not to include the provision concerning a visual examination by a physician in part 5. The commenter stated that there is significant difference between a claimant's right to request a visual examination during a hearing and a claimant's right to request an examination under 38 U.S.C. 5103A(d). The commenter expressed the opinion that under current § 3.103(c)(2), a claimant has the right to have a VA physician ''read into the record'' the physician's relevant observations but under 38 U.S.C. 5103A(d) there is no guarantee that VA will grant a request for a VA examination. The commenter also noted that under VA's current regulation implementing 38 U.S.C. 5103A(d), 38 CFR 3.159, now § 5.90, VA does not provide examinations for veterans seeking to reopen denied claims. The commenter urged VA to revise § 5.82 to authorize a visual examination by a physician.

Initially, we note that the claimant did not have a right to have a VA physician ''read into the record'' the physician's relevant observations, but could request a visual examination by a physician. Provision of the visual examination was at the discretion of the VA. The portion of the regulation providing for a visual examination by a physician at a hearing was included in the regulation at a time when the regional offices had physicians (medical members) on the staff, usually as part of the rating board. At that time, the medical member would either attend the hearing or be available nearby within the regional office if needed to conduct the visual examination. Regional offices rarely have a medical member on rating boards any more. Few regional offices have the capability of providing the visual examination by a physician at the hearing location. The provision for a visual examination during the hearing is an anachronism and no longer practical.

Additionally, while there is no ''guarantee'' that VA will grant a request for a VA examination, the language of 38 U.S.C. 5103A(d) (''necessary to make a decision on the claim'') provides sufficient assurance that VA will obtain needed medical examinations. If an examination is necessary to make a decision on the claim, one will be scheduled. If an examination is not necessary to make a decision on the claim, a visual examination at a hearing would be unlikely to assist the claimant. We also note that in most cases, it is preferable to have a claimant examined by a physician in a medical office (where testing equipment and privacy is available), rather than in a hearing room at a VA regional office. For these reasons, we propose to make no changes to initially proposed § 5.82 based on this comment.

Regarding the commenter's suggestion that VA revise current §§ 3.159 or 5.90

to require VA to provide examinations for veterans seeking to reopen denied claims, this suggestion was made in comments submitted during the initial promulgation of § 3.159. VA declined to make such a change, because it would not be an appropriate ''expenditure of its finite resources'' to do so. For the reasons stated in that rulemaking (66 FR 45628 (August 31, 2001)), we decline to revise § 3.159 or its part 5 counterpart, § 5.90.

§ 5.83 Right to Notice of Decisions and Proposed Adverse Actions.

One commenter asserted that the use of the phrase, ''the payment of benefits or the granting of relief'' could be interpreted as more narrow than the provision in 38 U.S.C. 5104(a), which reads, in pertinent part, ''[i]n the case of a decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and the claimant's representative) notice of such decision.'' The commenter urged VA to replace the phrase ''the payment of benefits or the granting of relief'' with ''the provision of benefits''.

We disagree that the phrase ''the payment of benefits or the granting of relief'' would permit VA not to give notice of decisions of which it would have to give notice if the regulation used the statutory language. The proposed language is taken verbatim from 38 CFR 3.103(b)(1) and is well understood to include VA decisions that involve monetary benefits and those that do not. Switching to the statutory language ''provision of benefits'' could be misinterpreted to mean only decisions involving monetary benefits. We therefore decline to make the change suggested by this commenter.

The same commenter also noted that the use of ''proposed adverse action'' in paragraph (a) was confusing. The commenter urged VA to strike the reference to proposed adverse actions and revise the second sentence of paragraph (a) for clarity.

In reviewing initially proposed § 5.83 in response to this comment, we have determined that paragraphs (a) and (b) should be reorganized for clarity. We have restructured these paragraphs so that (a) covers only notices of proposed adverse actions and (b) covers only notices of decisions. Consistent with this structure, we have listed the elements which are contained in each type of notice.

Another commenter stated that initially proposed § 5.83(b) (redesignated as paragraph (a)) would reduce the time VA allows to submit evidence from 1 year to 60 days, which is disadvantageous to veterans. The commenter apparently has mistaken the time VA allows for a beneficiary to submit evidence in response to a notice of a proposed adverse action with the time VA allows for a claimant to submit evidence in support of a claim for benefits. Compare 38 CFR 3.159(b) with 38 CFR 3.103(b)(2). Initially proposed § 5.83 is based on § 3.103, which also states that the time period for a claimant to submit evidence in response to a notice of adverse VA action is 60 days. Therefore, we propose to make no changes based on this comment.

In responding to these comments, we determined that the initially proposed rules failed to explain our omission of the substantively identical provisions found in paragraphs (d), (e), (f), and (h) of 38 CFR 3.105, which state that before notice of a proposed adverse action is sent to a beneficiary, ''a rating proposing severance will be prepared setting forth all material facts and reasons.'' We believe that these provisions confer no rights or duties and relate purely to internal agency procedures, so it is not necessary to include them in VA's regulations. The due process guarantee of advance notice contained in the second sentences of those paragraphs is included in proposed § 5.83(a).

§ 5.84 Restoration of Benefits Following Adverse Action.

One commenter asserted that both the current and proposed rules were ''contrary to law'' because they imposed a 30-day deadline in which the beneficiary is required to contest the decision in order for VA to retroactively restore benefits. The commenter noted that under 38 U.S.C. 7105(b)(1), a beneficiary has 1 year to initiate a corrective action for an erroneous decision or action by VA. This would be done by filing a Notice of Disagreement with the VA decision. The commenter also asserted that ''any action based on nonexistent facts or false information provided by a third party would be *void ab initio* [from the beginning], and there is no time limit for requesting corrective action,'' citing 38 U.S.C.A. 5109A(b) and 38 CFR 3.105(a). The commenter also noted that 38 CFR 3.156(b) and 3.400(q) require that when VA reverses a decision on appeal, the effective date will be set as if the decision had not been rendered.

We agree with the commenter that 38 CFR 3.156(b) and 3.400(q) require that when VA reverses a decision, the effective date will be set as if the decision had not been rendered. The intent of § 3.103(b)(4) (*see* 66 FR 20220 (Apr. 20, 2001)) for an explanation of the intent of this section) was not to deprive beneficiaries of the proper effective date for restoration of benefits nor has VA applied the rule so as to limit the rights of beneficiaries in this manner. Rather, § 3.103(b)(4) serves the purpose of allowing VA to reverse an erroneous decision without requiring the beneficiary to file a Notice of Disagreement. This relieves the beneficiary of the burden of preparing and filing a written Notice of Disagreement (including the elements required under 38 CFR 20.201, ''Notice of Disagreement''). The process under § 3.103(b)(4) does not replace the appeal process described in 38 U.S.C. 7105. Rather, it provides a convenient and more efficient alternative means for beneficiaries to have their benefits restored. We therefore disagree that current § 3.103(b)(4) or initially proposed § 5.84 is contrary to law.

However, in order to avoid any confusion that initially proposed § 5.84 limits the rights of beneficiaries as described above, we are adding the following language as a new paragraph (a)(2), ''[t]his paragraph (a) does not limit the right of a beneficiary to have benefits retroactively restored based on evidence submitted within the 1-year appeal period under § 5.153, 'Effective date of awards based on receipt of evidence prior to end of appeal period.' ''

Also to avoid confusion, we have inserted the word ''written'' before ''information'' in § 5.84 to distinguish that term from ''oral statements''.

§ 5.90 VA Assistance in Developing Claims.

In the NPRM, we stated:

> Title 38 CFR 3.159 is currently the subject of a separate VA rulemaking which will implement changes made by section 701 of Pub. L. 108–183, 117 Stat. 2670. When that rulemaking is complete, we plan to repeat the language of the amended § 3.159 as § 5.90. We therefore propose in this rulemaking to reserve space for proposed § 5.90.

(70 FR 24683 (May 10, 2005))

VA has published the final rule amending 38 CFR 3.159 and we are now inserting the current language of § 3.159 as § 5.90 (RIN 2900–AM17, ''Notice and Assistance Requirements and Technical Correction'', 73 FR 23353, Apr. 30, 2008, with amendment 73 FR 24868, May 6, 2008; based on § 3.159). We propose to remove the definitions of competent medical evidence and competent lay evidence, revise the definition of competent expert evidence, and place the definitions in § 5.1. We have reorganized § 5.90 accordingly and changed the references to part 3 regulations to refer to part 5 regulations.

In addition to the provisions of § 3.159, we propose to include in § 5.90 the provisions of current § 3.109(a). These provisions relate closely to the other provisions in § 5.90 and so it is logical to move them into that rule. However, we propose to clarify the sentence, ''Information concerning the whereabouts of a person who has filed a claim is not considered evidence'' in § 5.90(b)(3). This sentence means that if a claimant submits information or evidence concerning his or her mailing address, that is not considered information or evidence under paragraph (b). We propose to revise the sentence accordingly to clarify its meaning. The only other change we propose is that we have simplified the scope sentence stated in § 3.109(a)(2) so that it simply says that the rule applies to all part 5 applications.

Subsequent to the publication of proposed § 5.90, section 504 of Public Law 112–154 (2012) amended 38 U.S.C. 5103 by removing the requirement that a claimant submit ''a complete or substantially complete application'' as a prerequisite to VA providing notice of information and evidence needed to substantiate the claim. Section 504 also amended § 5103 to relieve VA of the requirement to provide such notice ''to any claim or issue where the Secretary may award the maximum benefit in accordance with this title based on the evidence of record.'' We propose to include these statutory changes § 5.90.

Section 505 of Public Law 112–154 (2012) extensively amended 38 U.S.C. 5103A regarding VA's duty to assist claimants. VA plans to conduct a rulemaking to implement § 505 in part 3 and will incorporate those part 3 regulations into part 5.

§ 5.91 Medical Evidence for Disability Claims.

One commenter urged VA to replace the word ''may'' with ''shall,'' concerning the acceptance of private medical evidence, because this would be consistent with the Congressional intent behind 38 U.S.C. 5125. Although that statute uses the word ''may,'' the commenter asserts that Congress meant to give VA authority to accept private medical examination reports in place of VA examination reports, but that once VA has determined to accept such private reports generally, it cannot accept or reject such reports ''on a whim''. The commenter asserted, ''[s]uch unwarranted discretion defeats the very purpose of the rule.''

We disagree that Congress' intent was merely to give VA authority to accept private medical examination reports generally. Rather, the plain language of 38 U.S.C. 5125 allows VA discretion to accept or reject such evidence in each individual case. We do not agree that this process defeats the purpose of the rule. This process allows VA the necessary discretion to reject private reports which, although technically ''adequate for purposes of adjudicating a claim'', VA considers to be potentially biased or unreliable. We therefore decline to make the change suggested by this commenter.

Another commenter suggested that VA revise § 5.91 to require VA regional offices to ''give a clear and precise explanation for why the claimant's medical evidence is not sufficient to render a VA examination unnecessary.'' We decline to adopt this suggestion because such an explanation would be of little use to claimants. VA has a duty to make reasonable efforts to obtain the evidence necessary to properly decide each claim. In addition to the medical evidence provided by the claimant, VA will schedule a VA examination if one is ''necessary to decide the claim.'' *See* 38 U.S.C. 5103A. *See* also § 5.90. VA obtains evidence from multiple sources in most cases and it would be unduly burdensome, and a waste of resources, for VA to be required to explain why it has obtained every piece of evidence. VA is required to explain the reasons for any decision adverse to the claimant and to include a summary of the evidence considered in making the decision on the claim. *See* 38 U.S.C. 5104. *See* also § 5.83. These procedures adequately inform the claimant of the relative probative value to any medical evidence submitted and we propose to make no changes based on this comment.

§ 5.92 Independent Medical Opinions.

In initially proposed § 5.92 we repeated the content of current 38 CFR 3.328 without change.

One commenter expressed concern that § 5.92 could be confusing by implying that VA will obtain independent medical opinions in place of VA medical examinations. We do not agree and we propose to make no changes based on this comment. Initially proposed § 5.92 did not state or imply that we would not comply with the provisions of § 3.159. The evidence obtained under the provisions of § 5.92 will generally supplement the other medical evidence with an independent medical opinion ''[w]hen warranted by the medical complexity or controversy''.

Another commenter noted that § 5.92(a) gave VA authority to obtain an independent medical opinion when ''warranted by the medical complexity or controversy'' while paragraph (c) stated that, in order for VA's Compensation and Pension Service to approve requests for such opinions, the claim must pose ''a medical problem of such obscurity,'' complexity, or controversy. We agree that it would be logical to state the criteria for such opinions using the same terminology in both paragraphs and we have removed the word ''obscurity'' from paragraph (c). Both paragraphs now use the language used in the authorizing statute, 38 U.S.C. 5109.

Another commenter urged VA to revise § 5.92 to require that VA provide claimants with copies of all communications between the VA regional office and the institution providing the independent medical opinion. The commenter asserted that, ''[s]uch a requirement for openness . . . will ensure the fairness and integrity of this new procedure.''

As a preliminary matter, we note that the procedure to obtain an independent medical opinion is not new and has been contained in § 3.328 since 1990. *See* 55 FR 18602 (May 3, 1990). VA is required by 38 U.S.C. 5109 to furnish the claimant with notice that an advisory opinion was requested and also a copy of the opinion when it is received by VA. *See* § 5.92(d). Furnishing the notice of the intent to request the independent medical opinion and a copy of the opinion to the claimant sufficiently advises the claimant of the status of the independent medical opinion request and results. We do not believe that it is necessary to furnish the claimant with notice or a copy of every communication VA may have with the individual or organization preparing the independent medical opinion. Such communications as a telephone call or an electronic mail message to clarify a typographic error or other minor issues would not assist the claimant in the presentation of the claim. Additionally, records of these communications may be obtained by the procedures discussed earlier concerning the procedures for a claimant to obtain copies of evidence. We propose to make no changes based on this comment.

One commenter urged VA to include a provision in § 5.92(d) allowing a claimant a specified period of time to respond to an independent medical opinion that is adverse to the claimant. We do not believe this change to be necessary because, at the time that VA is seeking the independent medical opinion, the claimant is informed that the independent medical opinion is being sought and also what specific information is being sought. This provides the claimant ample time and

opportunity to seek, obtain, and submit their own independent medical opinion should they wish to do so. We also note that once the claimant receives a copy of the independent medical opinion, even if the claim has been denied, he or she has the opportunity to respond. We propose to make no changes based on this comment.

§ 5.93 Service Records Which Are Lost, Destroyed, or Otherwise Unavailable

One commenter asserted that the force of § 5.93 is diminished due to the confusing use of terminology. The commenter argued that the phrase, ''alternative evidence'' should be replaced with, ''evidence from alternative sources.'' Upon review of the regulation, we propose to change the regulation according to the commenter's suggestion. As noted by the commenter, the evidence sought may be a copy of the missing evidence, not alternate evidence.

§ 5.99 Extensions of Certain Time Limits

In the AL82 NPRM, we inadvertently failed to include provisions contained in current 38 CFR 3.109(b). We are doing so now in § 5.99. This rule restates § 3.109(b) without substantive change. We are clarifying in § 5.99(c) that while late requests for extensions will be permitted under some circumstances, as is currently the case, no extension of time will be granted after VA has made a decision on the claim to which the information or evidence relates and the time to appeal that decision has expired.

§ 5.100 Time Limits for Claimant or Beneficiary Responses

One commenter felt that VA should specify that the holidays referenced in the regulation are Federal holidays. We agree and have added the word, ''Federal'' before holidays in § 5.100(a).

One commenter felt that this regulation should specify whether the date of mailing or the date of receipt by VA would be the ending date of the applicable time period provided to a claimant to respond to a VA communication. We propose to make no changes based on this comment. This regulation is intended to specify how to calculate a time limit. Within part 5, where a response is required to be submitted within a certain time, all the sections specify how the ending date of the applicable time period provided to a claimant will be calculated. This is generally the date of receipt by VA of whatever evidence or information is requested, if received within the applicable time period. To include the ending date information here would be redundant.

One commenter felt that VA should revise this regulation since the commenter felt that sometimes a VA letter may be signed after the last mail pickup for that day. The letter would not actually be mailed until the following workday. The commenter felt that this rule provided for a ''convenient and arbitrary assumption that disfavors claimants.'' A second commenter agreed, stating that the word ''considered'' should be removed from the second to last sentence in order to avoid having VA rely on a date that it may know to be erroneous.

We propose to make no changes based on this comment. This regulation provides that the first day of the specified time period will be excluded in computing the time limit for any action required of a claimant. This ensures that the claimant is generally provided the full time period. Additionally, the time periods provided allow ample time for the claimant to respond. While it is true that the 1-day grace period provided by not counting the date of the letter in the time period does not provide for those situations where the letter is dated on a Friday afternoon, but not actually posted until Monday, the claimant still has been provided sufficient time to respond to any requests for information or evidence.

One commenter urged VA to adopt a system of notice for determining the time periods for claimants or beneficiaries' responses similar to that found in 41 U.S.C. 609(a)(3), which provides that the period of time begins running when the notice has been received. VA currently begins the period of time from the date of mailing as shown by the date of the letter sent to a claimant or beneficiary. The commenter felt VA could better afford the minor expense of certified mail than could the claimant or beneficiary.

VA communicates with claimants and beneficiaries at various stages in the adjudication process, using various means. It would not be appropriate to regulate the manner of all such communications because VA needs discretion to use the most effective means of communications and because such means may change over time. Additionally, VA routinely sends hundreds of thousands of pieces of mail to veterans, claimants, and beneficiaries, as well as their representatives. While the burden for sending any one piece of mail by certified mail is small, the expense and time required to send all notices by certified mail would be overwhelming, both in increased monetary cost and human resources expended. Routinely sending certified mail to veterans, claimants, or beneficiaries is not necessary, nor, in most situations, helpful to the veterans, claimants, or beneficiaries. VA provides sufficient time for a veteran, claimant, or beneficiary to respond to the communications we send them. It is not burdensome for the veteran, claimant, or beneficiary to respond, when necessary, within the time limits specified in the communication. The additional two or three days that would be provided by starting the time period from date of receipt instead of date of mailing would rarely assist a veteran, claimant, or beneficiary. For these reasons, we decline to make any changes based on this comment.

§ 5.101 Requirement To Provide Social Security Numbers

Initially proposed § 5.101 explained the statutory requirement that claimants and beneficiaries must provide VA with their Social Security numbers and their dependents' numbers.

One commenter urged VA to excuse those claimants or beneficiaries who, for good cause, fail to provide their Social Security number. The commenter urged that, if VA reduces or discontinues benefits, it should resume the benefits retroactively from the effective date of the reduction, if the person had good cause for the failure.

We note that, as stated in initially proposed § 5.101(f), ''A claimant or beneficiary is not required to provide a Social Security number for any person to whom a Social Security number has not been assigned.'' Other than this, we are unaware of any reason which would constitute good cause for a claimant or beneficiary failing to provide VA with his or her Social Security number, nor does the commenter offer any such example. We therefore propose to make no change based on this comment.

Initially proposed § 5.101(d) stated, ''[i]f a claimant or beneficiary provides VA with the requested Social Security number, VA will resume payment of benefits at the prior rate, effective on the date VA received the Social Security number, provided that payment of benefits at that rate is otherwise in order.'' One commenter noted that under paragraph (d), if a claimant or beneficiary failed to furnish the required Social Security number within the deadline but later provided it, VA would pay benefits only from the date it received the Social Security number. The commenter noted that § 5.101 would treat claimants and beneficiaries disparately in that if they ultimately provided VA their Social Security

number, the former would have benefits granted from the date of claim, while the later would have benefits restored only from the date he or she provided the number. The commenter objected to this disparate treatment, asserting:

> When a claimant receiving benefits is requested to provide a social security number and does not promptly comply, VA may certainly administratively suspend payment ('terminate the payment') of benefits pursuant to § 5101(c), but the benefits should be resumed effective the date of suspension if the requested information is provided within 1 year. Such a rule would be consistent with the time an applicant has to provide the social security number under sections 5102(c) and 5103(b) and the general rule in 38 CFR 3.158 (2004) that a claim will be considered abandoned only if the requested information is not provided within 1 year.

The commenter asserted that this rule would be contrary to 38 U.S.C. 5102 and 5103, which do not explicitly authorize VA to reinstate benefits only from the date a beneficiary ultimately provides VA his or her Social Security number. In reviewing paragraph (d) in response to this comment, we noted that VA cannot ''resume'' payments to a claimant, since VA has not begun paying such a person. We therefore propose to remove the term ''claimant'' from this paragraph, so that it would relate only to beneficiaries and not to claimants.

Regarding the disparity noted by the commenter, we first note that it is not inconsistent with the relevant statutes, 38 U.S.C. 5101–5103. Sections 5102–5103 only cover claims, not running awards, so they are not germane to the disputed provision. Section 5101(c)(2) states that ''the Secretary shall deny the application of or terminate the payment of compensation or pension to a person who fails to furnish the Secretary with a social security number required to be furnished pursuant to paragraph (1) of this subsection. The Secretary may thereafter reconsider the application or reinstate payment of compensation or pension, as the case may be, if such person furnishes the Secretary with such social security number.''

This statute, and its implementing regulation 38 CFR 3.216, leave a gap regarding the effective date for the reinstatement of benefits. VA's long-standing practice has been to resume benefits effective the date the beneficiary ultimately provides the social security number. If the rule were changed as the commenter urges, VA would in such cases have to make retrospective determinations, in some cases going back many years, on whether the former beneficiary actually met all the entitlement criteria for the benefit during the entire retroactive period. This would consume considerable VA resources when compared with the rule proposed in § 5.101(d). Furthermore, there is no indication that our proposed rule creates a hardship for beneficiaries. For these reasons, we propose to make no change based on this comment.

Initially proposed § 5.101(e), entitled, ''Claimant's application for VA benefits'', stated, ''[i]f 60 days after VA requests a Social Security number, the claimant fails either to provide the requested Social Security number or to show that no Social Security number was assigned, VA will deny the claim.'' One commenter objected to this provision, noting that it did not include a provision allowing a claimant 1 year to submit his or her Social Security number. The commenter noted that 38 U.S.C. 5102 and 5103 allow a claimant 1 year to provide the information needed to complete an application. The commenter noted that while VA has the authority to deny the application earlier than the expiration of the 1 year period, if the information is received no later than 1 year after VA's request, VA must reconsider the application as if the information had been furnished on the application.

After reviewing the applicable statutes and VA's other regulations, we agree with the commenter that it would be appropriate to clarify that a claimant has 1 year in which to submit the requested Social Security number. We therefore propose to add a sentence to § 5.101(e), based on a provision from § 5.90(b)(1)(i) (based on current 38 CFR 3.159(b)(1). This new sentence states, ''[i]f VA denies the claim or denies benefits for the dependent, and the claimant subsequently provides the Social Security number no later than 1 year after the notice, then VA must readjudicate the claim.''

In making this proposed change based on the comment, we noted that the 60-day deadline in 38 CFR 3.216 applies only to beneficiaries, not to claimants. In order to be consistent with § 5.90(b)(1)(i), we propose to revise the 60-day period in § 5.101(e) to 30 days. In addition to being consistent with § 5.90(b)(1)(i), we believe that 30 days is sufficient time for claimants to provide VA with requested Social Security numbers.

Subsequent to the publication of proposed § 5.101, section 502 of Public Law 112–154 (2012) amended 38 U.S.C. 5101 by adding a new paragraph stating if an individual has not attained the age of 18 years, is mentally incompetent, or is physically unable to sign a form, a form filed under paragraph (1) for the individual may be signed by a court-appointed representative, a person who is responsible for the care of the individual, including a spouse or other relative, or an attorney in fact or agent authorized to act on behalf of the individual under a durable power of attorney. If the individual is in the care of an institution, the manager or principal officer of the institution may sign the form. The term 'mentally incompetent' with respect to an individual means that the individual lacks the mental capacity—

- To provide substantially accurate information needed to complete a form; or
- to certify that the statements made on a form are true and complete.

Section 502 also added Taxpayer Identification Number (TIN) to the Social Security number requirement in § 5101. We have updated § 5.101 to reflect these statutory changes.

§ 5.103 Failure To Report for VA Examination or Reexamination

The preamble to initially proposed § 5.103 stated that part 5 would not repeat § 3.655(a) because it is unnecessary. 70 FR 24680, 24685, (May 10, 2005). To clarify, that statement correctly applies only to the first sentence of § 3.655(a). The examples of good cause in § 5.103(f) derive from the second sentence of § 3.655(a).

One commenter felt that the examples provided in the regulation to determine what constitutes ''good cause'' for failure to report for a scheduled VA examination were too narrow and may lead VA to apply too high a standard to determine what constitutes ''good cause''.

The examples of ''good cause'' for failure to report for a scheduled VA examination in initially proposed § 5.103(f) are the same examples included in the full revision of § 3.655(a), effective December 31, 1990. 55 FR 49520, Nov. 29, 1990. The last sentence of § 5.103(f) is new and requires that VA consider each reason given for missing a VA examination on a case-by-case basis. Use of the examples that have been in place since 1990, together with the last sentence, ensures that determinations concerning whether the veteran had ''good cause'' for not reporting to the examination will not change. We propose to make no changes based on this comment.

One commenter recommended not repeating § 3.655 in part 5. We disagree because if VA did not repeat this rule, there would be no rule about how to proceed with adjudication if a claimant

fails to report for an examination that VA has concluded is necessary to decide the claim. The commenter did not state how it would benefit claimants or VA to do without it. Omission of this rule would risk disparate treatment of claimants with similar claims. Avoiding disparate results in similar situations is an important object of regulations. To promote this objective, VA will repeat the rule in part 5.

The same commenter recommended, alternatively, significantly revising the regulation to eliminate several problems he said it has. The commenter asserted there is no logical reason to distinguish between original and other claims. We interpret the comment to mean that VA should treat a failure without good cause to report for a VA examination the same whether the examination is for an original disability compensation claim or for any other claim.

Before 1991, § 3.655 was silent about VA examinations in original disability compensation claims. 38 CFR 3.655 (1990). It applied only to rating action to be taken upon a failure to report for examination of a beneficiary with an ongoing award of benefits, providing for discontinuance of payments. *See Wamhoff* v. *Brown,* 8 Vet. App. 517, 520 (1996) (discussing historical § 3.655). VA amended § 3.655 in 1990 to include the requirement to report for VA examination (formerly in § 3.329, which it rescinded) and to provide for unique treatment of original disability compensation claims upon the claimant's failure to report for examination.

There are good and practical reasons to treat the failure to report for an examination in an original claim for disability compensation differently than in other claims. Establishing that a disability is service connected is an element of an original claim for disability compensation that precedes determination of the severity of disability. *See Barrera* v. *Gober,* 122 F.3d 1030, 1032 (Fed. Cir. 1997) (explaining ''up stream'' and ''down stream'' elements of veterans benefits claims); *Grantham* v. *Brown,* 114 F.3d 1156, 1158–59 (Fed. Cir. 1997). Evidence sufficient to decide whether a disability is service connected is likely to be of record without the examination, for example, in the case of a battlefield amputee or a veteran who contracted a presumptively service-connected chronic disease. Even though the evidence of record might be uninformative about the current extent of disability, it is practicable and efficient to decide such a claim on the evidence of record without the examination, even at the risk of an imprecise initial rating. In contrast, current medical information is likely to be lacking and indispensable to deciding the other types of claims named in the regulation.

The predicate for ordering an examination is that the information to be gained from it is necessary to establish entitlement or confirm continued entitlement to a benefit. In other words, if VA has determined that it cannot decide a claim, or an element of a claim, without the evidence derived from the examination, it would squander resources valuable to the entire veteran community to adjudicate the claim, and it preserves resources to deny the claim upon failure to report for the examination without good cause. We therefore propose to not make any changes in response to this comment.

The object of a VA examination in an original disability compensation claim could be to address one of the elements of proof of service connection, *see* § 5.243, ''Establishing service connection for a current disability.'', to ascertain the current severity of disability (a determination VA initially makes upon finding that a disability is service connected), or both. Though the examination could be indispensable to making the most accurate current rating, the benefit to the claimant and practicality of deciding the service-connection element of the claim warrants the unique treatment of original compensation claims.

The same commenter asserted the distinction between types of claims invites fraud. The commenter did not explain how the distinction would invite fraud. We propose to make no changes based on this comment.

The same commenter noted that we had not defined the terms, ''other original claim'' and ''new claim.'' The commenter noted that neither term is found in the applicable statutes. The commenter felt this section should be revised so that the terms are understood by claimants and so that the terms fit within the regulatory framework.

In § 5.57, we defined several types of claims. We defined ''original claim'' in § 5.57(b) as ''the first claim VA receives from an individual for disability benefits, for death benefits, or for monetary allowance under 38 U.S.C. chapter 18.'' Although not defined in the statutes, the term ''original claim'' is found in 38 U.S.C. 5110 and 5113. Consistent with how the term is used in current 38 CFR 3.655(b), our use of ''other original claim'' was intended to mean any original claim arising under part 5 other than an original disability compensation claim. This would include, for example, a claim for a monetary allowance based on spina bifida under 38 U.S.C. chapter 18. We believe that when read in conjunction with § 5.57(b), this term is logical and understandable.

We have not defined the term ''new claim''. Based on this comment, we are removing the term from § 5.103(b)(2). We have determined that the term is not needed to assist the reader in understanding what is intended by this regulation.

In addition to the comment about specific terms, the commenter asserted that VA should revise the regulation so its terms are understandable to laypersons and ''fall within the rest of the regulatory framework.'' The commenter further asserted that the regulation does not fit within the existing statutory framework and opinions of the [VA] General Counsel. The commenter did not explain how the regulation fails to fit within VA's statutory or regulatory framework or cite any precedent opinion of the General Counsel that the regulation violates. Consequently, we do not find anything in this comment to which VA can respond, and we propose to make no changes to the regulation in response to it.

Finally, the commenter recommended an ''escape clause'' that precludes ''endless good cause.'' The object would be to permit VA to decide a claim after a year if a claimant fails to report for an examination for a good cause of indefinite duration, such as being in a coma. The commenter suggested that the regulation should provide for VA to reschedule an examination missed for good cause if that good cause ends within 1 year. We construe the commenter to mean that if the good cause for failure to report for a VA examination persists for more than a year after the date of the examination appointment the claimant did not keep, VA would decide the claim on the evidence of record.

We will not add the suggested provision for five reasons. First, the suggestion would abrogate the distinction between original disability claims and other claims. Whether the claimant failed to report for good cause or no cause, without the examination that VA determined is necessary to decide a claim (other than an original disability compensation claim), the status of the evidence would still be such that VA could not grant the claim without the examination. Second, it is to the advantage of a claimant to suspend the claim until the contingency that prevented the claimant from reporting for the examination is removed, because it leaves the claimant

in control of his or her claim. Third, there is negligible cost or burden to VA to suspend adjudication while the good cause of the claimant's inability to report for an examination persists. Fourth, there is no advantage to VA to decide a claim it has determined lacks crucial evidence. Deciding a claim sooner rather than later under these circumstances is not sufficient reason for the rule the commenter suggests. The failure to report for an examination for good cause is not like the failure to submit requested evidence that VA may consider abandonment of a claim. § 5.136, ''Abandoned claims''. Finally, the claimant can always eliminate the need for a VA examination by submitting other medical reports sufficient to serve as a VA examination. § 5.91(a), ''Medical evidence rendering VA examination unnecessary.'' If the claimant submits a medical report that VA accepts as adequate to the needs of the claim, the examination for which the veteran cannot report would cease to be one necessary to establish entitlement to the benefit claimed. The question of how VA should respond to a failure to report for a necessary VA examination for good cause would be moot.

In reviewing initially proposed § 5.103, we noted that the last two sentences of paragraph (d)(1) stated, ''The letter [proposing to reduce or discontinue benefits] must include the date on which the proposed discontinuance or reduction will be effective, and the beneficiary's procedural rights. *See* §§ 5.80 through 5.83.'' We believe it would be more precise to refer the reader to the procedural rights which are listed in such a letter. We therefore propose to restate the sentences as ''The notice must include the date on which the proposed discontinuance or reduction will be effective, and the beneficiary's procedural rights as listed in § 5.83(a)(1) through (4).''

In responding to these comments, we noted that the initial NPRM failed to explain our addition of the third sentence of § 5.103(a): ''If a claimant or beneficiary, with good cause, fails to report for a VA examination or reexamination, VA will reschedule the examination or reexamination.'' Though §§ 3.326(a) and 3.327(a) provide for scheduling VA examinations, and § 3.655 prescribes VA action upon a claimant's failure to report for a necessary examination without good cause, nothing in part 3 specifically states that VA will reschedule an examination a claimant missed with good cause, which is VA's standard procedure. We propose to set forth this important point in paragraph (a).

§ 5.104 Certifying Continuing Eligibility to Receive Benefits

In initially proposed § 5.104(c), we removed the reference to the effective date provisions. In part 5, the effective date provisions are not contained within one regulation, but are located with the regulation concerning the benefit to which the provisions apply. To include these provisions would result in an extremely long and complex paragraph which would not be helpful to the claimants or beneficiaries.

Changes in Terminology for Clarity and/or Consistency

The changes in terminology in this final rulemaking are made primarily for purpose of achieving consistency throughout our part 5 regulations. We replaced the word ''evaluation'' with ''rating;'' the term ''on behalf of'' with ''for'' or ''to or for'' where appropriate; and the word ''notify'' with ''send notice to''. As noted earlier, we are removing the modifying term ''predetermination'' prior to the term ''hearing''.

General Evidence Requirements, Effective Dates, Revision of Decisions, and Protection of Existing Ratings AM01

In a document published in the **Federal Register** on May 22, 2007, we proposed to amend Department of Veterans Affairs (VA) regulations governing general evidence requirements, effective dates, revision of decisions, and protection of existing ratings, to be published in part 5. 72 FR 28770, May 22, 2007. We provided a 60-day comment period that ended July 23, 2007. We received submissions from five commenters: Paralyzed Veterans of America, Vietnam Veterans of America, Disabled American Veterans, and two members of the general public.

§ 5.130 Submission of Statements, Evidence, or Information Affecting Entitlement to Benefits

We propose to revise and reorganize initially proposed § 5.130 for clarity. We propose to add the word ''claimant'' to the regulation to accurately reflect that this regulation covers submissions by both claimants and beneficiaries. Proposed § 5.130 was derived from § 3.217, which was originally issued to permit modification of existing awards based on electronic and oral reporting of changes, including, but not limited to, income and dependents. *See* 66 FR 20220, Apr. 20, 2001. The reference to ''beneficiary'' reflects that original, limited purpose. However, given the broad language of the regulation and our stated intent to cover all types of submissions, we are explicitly including claimants. All claimants and beneficiaries, or their representatives or fiduciaries, must meet all requirements of this section, such as using a specific form providing specific information, providing a signature, or providing a certified statement.

The initially proposed rule referred to ''other electronic means'' of submissions. We propose to add ''that the Secretary prescribes'' in paragraphs (a)(1) and (b)(1), to clarify that VA will determine the means or medium of submission it will accept. Additionally, this phrase allows for technological changes over time.

Whereas the initially proposed regulation did not address claimants, it did not distinguish between them and beneficiaries. We propose to revise the regulation to distinguish between the media that claimants may use to file statements, evidence, or information, and the media that beneficiaries may use. VA currently accepts email and oral submissions only from beneficiaries, not from claimants. As revised, paragraph (a) would address submissions from claimants and provide the acceptable media for those submissions. Paragraph (b) would address submissions from beneficiaries and allow submissions, either orally or by email. Paragraph (b)(4) would prescribe VA action upon receipt of an oral statement.

One commenter questioned why we used the word ''may'' instead of ''will'' when referring to how VA will use verbal information provided by a beneficiary or fiduciary. We explained in the preamble to the proposed rule that the word ''may'' was more accurate because ''VA may determine that the information or statement needs to be verified through other means''. However, the commenter pointed out that VA will use the evidence, even if it is just to ''initiate an investigation to . . . confirm and continue an existing award'', or to contradict prior evidence. We agree with the commenter as the comment applies to the proposed use of ''may'' in proposed paragraphs (c)(1)(iii) and (2)(v). We propose to change ''may'' to ''will'' in redesignated paragraphs (b)(4)(iii) and (iv)(E). We have also decided that the phrase ''VA may take action'' used in proposed paragraph (b) is more accurately stated as ''VA will take appropriate action'', and propose to make this change accordingly. That is because whether VA takes any action that affects entitlement to benefits and what type of action it will take will depend on the content of the submission.

We also propose to change ''affecting the [claimant's or beneficiary's] entitlement to benefits based upon'' to ''in response to''. This is because a submission might not affect entitlement to benefits. The entire clause now reads, ''VA will take appropriate action in response to the statement, evidence, or information.'' We have made this change, and the change discussed in the preceding paragraph, in paragraphs (a)(3) and (b)(3), which are parallel provisions applying to claimants and to beneficiaries, respectively.

Based on this comment, we have also decided that it would be more accurate to say that VA will use the statement described in proposed paragraphs (b)(4)(iii) and (iv)(E) ''to determine entitlement'' as well as ''to calculate benefit amounts''. Accordingly, we propose to add the phrase ''to determine entitlement'' in those paragraphs as redesignated. We also propose to revise this sentence from passive voice to active voice.

Initially proposed § 5.130 used the term ''form''. This term is no longer used in part 5. For consistency, we propose to change the term from ''form'' to ''application'', which is currently defined in § 5.1.

Initially proposed § 5.130(a)(1) stated:

> It is VA's general policy to allow submission of statements, evidence, or information by email, facsimile (fax) machine, or other electronic means, unless a VA regulation, form, or directive expressly requires a different method of submission (for example, where a VA form directs claimants to submit certain documents by regular mail or hand delivery). This policy does not apply to the submission of a claim, Notice of Disagreement, Substantive Appeal, or any other submissions or filing requirements covered in parts 19 and 20 of this chapter.

In reviewing this paragraph in responding to comments, we determined that the last sentence might be misconstrued to mean that a claimant may not file a claim, a Notice of Disagreement (NOD), a Substantive Appeal, or other item covered in 38 CFR parts 19 or 20 electronically. This was not our intent. Section 5.130 concerns submission of a statement, evidence, or information, and not submission of claims. Filing requirements for an NOD and for a Substantive Appeal are in parts 19 and 20. To avoid this possible misconstruction, we propose to remove this sentence.

§ 5.131 Applications, Claims, and Exchange of Evidence With Social Security Administration—Death Benefits

One commenter noted a typographical error in the preamble language of the initially proposed rule. The error was in the misspelling of the word ''belief''. We acknowledge the typographical error but find no need to make the suggested change because the error is not substantive and is contained within the preamble language to the proposed rule which will not be published again.

§ 5.132 Claims, Statements, Evidence, or Information Filed Abroad; Authentication of Documents From Foreign Countries

Initially proposed § 5.132(a) incorrectly grouped together claims, statements, information, and evidence, leading to the absurd implication that, under the terms of the regulation, a claim could be filed in support of a claim. Therefore, we propose to revise § 5.132(a) to separate a ''claim'' from a ''statement, information, and evidence.'' Additionally, we reviewed § 3.108, the part 3 provision from which proposed § 5.132(a) is derived, and now propose to reinsert the introductory clause from that section. The introductory clause of § 3.108 explains that certain Department of State representatives in foreign countries are authorized to act as agents for VA. We believe that this information, which was not in initially proposed § 5.132(a), will be valuable to the reader in understanding the agency relationship between the Department of State and VA, and we propose to add it to paragraph (a).

Finally, the regulation text in initially proposed § 5.132 limits evidence of establishing birth, adoption, marriage, annulment, divorce, or death to copies of ''public'' or ''church'' records without referencing other religions or religious institutions. We propose to add ''other religious-context'' records to the regulation text in proposed § 5.132(c)(5) in order to recognize that other religions or religious records, besides church records, may suffice.

§ 5.134 VA Acceptance of Signature by Mark or Thumbprint

One commenter noted that the style of the title of this section as a question was inconsistent with other section titles throughout this part. The commenter suggested an alternative title that ''would more closely parallel that of the other proposed sections'', specifically ''VA acceptance of signatures by mark or thumbprint''. We agree with the commenter's suggestion and propose to adopt the proposed language as the section title with a slight modification.

The commenter also suggested revising the content of this section. The commenter questioned whether the regulation, as written, would produce unintended results, such as a situation where ''an individual who can write his or her name may choose to make a mark or sign by thumbprint''. We recognize the possibility of the hypothetical posed by the commenter, however, it is unlikely that a person who is capable of signing would choose the more burdensome witness/certification process. Even if that occurred, the witness/certification process would be adequate to verify the person's identity and therefore not cause a problem. We decline to make any change based on that comment.

§ 5.135 Statements Certified or Under Oath or Affirmation

One commenter noted that initially proposed § 5.135(b) only applied to evidentiary requirements for claims for service connection, even though we stated in the preamble that we proposed to apply the evidentiary requirements equally to all claims for compensation or pension benefits. We agree with the commenter and therefore propose to remove the restrictive language ''for service connection'' in § 5.135(b). Any documentary evidence or written assertion of fact filed by the claimant or on his or her behalf, for purpose of establishing a claim, must be certified or under oath or affirmation. However, as the rest of the subsection provides, VA may consider a submission that is not certified or under oath or affirmation if VA considers certification, oath, or affirmation unnecessary to establish the reliability of a document. The language of the subsection has been revised for clarity.

In initially proposed § 5.135(b) we stated, ''Documentary evidence includes records, examination reports, and transcripts material to the issue received by VA from State, county, or municipal governments, recognized private institutions, or contract hospitals.'' We have determined that the phrase ''material to the issue'' is inaccurate because this paragraph applies regardless of whether the evidence is material or not. We therefore propose to remove this phrase.

§ 5.136 Abandoned Claims

In the proposed rulemaking, we reserved § 5.136. 72 FR 28770, May 22, 2007. We have now decided to name it ''Abandoned Claims'', which is derived from § 3.158(a). We propose to make several changes to the language derived from § 3.158(a) to increase clarity. The scope of the current rule is limited to ''an original claim, a claim for increase or to reopen or for purpose of determining continued entitlement''. We propose to expand the scope of § 5.136 to include any claim. This is

consistent with VA's interpretation and use of current § 3.158(a) and makes the rule more concise. The scope of current § 3.158(a) is also limited to ''pension, compensation, dependency and indemnity compensation, or monetary allowance under the provisions of 38 U.S.C. chapter 18''. For the same reasons we propose to expand the scope of § 5.136 to include all benefits under part 5. We also propose to change the word ''filing'' to ''receipt'' in keeping with our practice of using consistent terminology in part 5.

§ 5.140 Determining Former Prisoner of War Status

One commenter noted a typographical error in proposed *§ 5.140*(a)(3). We agree with the commenter that there should not be a hyphen between the terms ''service'' and ''department'', and propose to change the language accordingly.

The commenter also pointed out a typographical error in the preamble language concerning this section. The error referred to a mischaracterization of the term ''regional office decisions''. We acknowledge the typographical error, but propose not to make the suggested change because the preamble language to the initially proposed rule will not be published again.

In reviewing initially proposed § 5.140, we determined that it would be helpful to readers for all part 5 provisions regarding how VA determines former POW status to be in one section. Therefore, we propose to remove the definition of former POW from § 5.1, ''General definitions'', and place it in § 5.140. In combining these two provisions, we have removed redundant material that was contained in initially proposed §§ 5.1 and 5.140.

§ 5.150 General Effective Dates of Awards or Increased Benefits

Several commenters questioned the use of the phrase ''date entitlement arose'' in place of the phrase ''facts found''. In the preamble to the proposed rule, we explained our decision to use ''date entitlement arose'' by the need for consistency throughout part 5 as well as our understanding that the two terms meant the same thing and are used interchangeably. One commenter did not agree that ''facts found'' and ''date entitlement arose'' were interchangeable terms. Rather, the commenter asserted that ''facts found'' is an alternative to ''date entitlement arose'' because the latter presumably arises as a matter of law, such as once a claim is actually filed, but is only compensable beginning from a date that is supported by the factual evidence. We believe that the phrase ''date entitlement arose'' will be clearer to lay persons than the phrase ''facts found'', and that § 5.150(a)(2) makes clear that the phrase ''date entitlement arose'' refers to what the factual evidence shows rather than to procedural requirements such as filing claims. Also, VA regulations have long used ''date entitlement arose'' without the confusion the commenter described. We note that we do not intend any substantive changes to the determination of the effective dates for benefits based on this substitution of phrases.

The same commenter also felt that it would be unnecessary and possibly confusing to a Veterans Service Representative to pick the latter of either the ''date of receipt of the claim'' under paragraph (a)(1) or ''date entitlement arose'' under paragraph (a)(2). The commenter felt that the date of receipt of a claim would presumably always be the later date, since veterans usually experience a disability before filing a claim of entitlement to compensation. The commenter asserted that VA adjudicators sometimes assign ''the later effective dates based on the reasoning that increased disability was not factually ascertainable until proven by a VA examination or medical opinion.''

We propose not to make any changes based on this comment because while (a)(2) acknowledges that the date entitlement arose usually precedes the filing of a claim, this may not always be the case. For example, a veteran may file a claim but have it properly denied due to lack of evidence. However, if the veteran later files new evidence that shows that the veteran did not meet all the criteria for a benefit on the date the claim was received, but his or her medical condition changed so that the criteria were satisfied while the appeal was still pending, the date entitlement arose will be after the claim was received. Regarding the assertion that VA adjudicators sometimes assign later effective dates because an increased disability was not factually ascertainable until proven by a VA examination or medical opinion, we note that VA has authority to accept non-VA medical records or lay statements as a basis for setting an effective date.

In responding to these comments, we noted that the first sentence of paragraph (a)(2) could be clarified. In the NPRM, it read, ''For the purposes of this part, 'date entitlement arose' means the date shown by the evidence to be the date that the claimant first met the requirements for the benefit awarded.'' We now propose to simplify this sentence to read, ''For purposes of this part, 'date entitlement arose' means the date that the claimant first met the requirements for the benefit as shown by the evidence.''

Another commenter suggested keeping the phrase ''facts found'' because he did not think the phrase was ambiguous or unclear. We have reconsidered the replacement of ''facts found'' with ''date entitlement arose'', however, we decline to keep the phrase ''facts found''. As discussed above, the phrase ''date entitlement arose'' is easier to interpret and apply as it is more instructive as to how VA will make an effective date determination. Furthermore, we do not intend this substitution of the phrases as a substantive change in determining effective dates for benefits.

One commenter suggested that VA should assume that entitlement to benefits arises as of the date of receipt of the claim rather than before the receipt of the claim. In the commenter's view, ''this would prevent a conflict with 38 U.S.C. 5110(b)(2)''. We disagree with the commenter and do not see a conflict between the regulation and statute. Indeed, if VA assumed that entitlement to benefits arises as of the date of receipt of the claim, rather than beforehand, that would deprive veterans of potential entitlement to earlier effective dates under § 5110(b)(2). We therefore propose to make no changes based on this comment.

Changes to § 5.150 Not in Response to Comments

We omitted the provisions of current § 3.400(h)(3) from the AM01 NPRM without any explanation in the preamble. For the reasons discussed below, we propose to omit them from part 5.

Section 3.400(h)(3) states, ''As to decisions which have become final (by appellate decision or failure to timely initiate and perfect an appeal) and reconsideration is undertaken solely on Department of Veterans Affairs initiative, [the effective date of an award based on such a reconsideration will be] the date of Central Office approval authorizing a favorable decision or the date of the favorable Board of Veterans[‘] Appeals decision.'' The current structure of § 3.400(h) first appeared in the CFR in 1969. *See* 38 CFR 3.400(h) (34 FR 8703, June 3, 1969). VA maintained the previous distinction between non-final and final decisions, and also created distinct provisions governing final decisions based on the method used to reconsider or reopen the case. VA Regulations, Compensation and Pension, Transmittal Sheet 437 at I,

132–3R (May 21, 1969). Paragraphs (h)(1) and (2) cover the most common difference of opinion situations and distinguish between non-final and final decisions. *See id.* Paragraph (h)(3) was added to apply to those admittedly ''rare instances in which there has been final adjudication and no application for consideration or reopening has been submitted.'' *Id.*

For claims that the Board reconsiders and grants ''on its own initiative'', there is no distinct effective date rule. VA Central Office reconsiders only non-final decisions under its ''difference of opinion'' authority (*see* § 5.163), not final decisions. Indeed, it has no statutory or regulatory authority to reconsider final decisions. We are therefore not restating the (h)(3) Central Office provision in part 5.

The initially proposed rule mistakenly omitted the provisions of § 3.400(*o*)(1) (second sentence). This rule states that ''[a] retroactive increase or additional benefit will not be awarded after basic entitlement has been terminated, such as by severance of service connection.'' We propose to correct this omission by adding a paragraph (b) and redesignating proposed paragraph (b) as paragraph (c).

As stated in the AM01 NPRM, proposed § 5.150(b), now § 5.150(c), is a table of the location of other effective-date provisions in part 5, which are exceptions to the general effective date rule of proposed paragraph (a). As stated in the proposed rulemaking, the table is for informational purposes. We propose to add the sentence, ''This table does not confer any substantive rights'', to clarify that it is a reference tool, and not a substantive rule.

Also, as stated in the preamble to the initially proposed rule, the table showed both already published and as yet unpublished part 5 regulations, which were subject to change. In this NPRM, we have updated the table to reflect the updated part 5 citations. We have also moved the references to effective dates of reductions and discontinuances to a separate table in § 5.705(b). As a result, proposed § 5.150(b), now § 5.150(c), contains only effective date provisions for awards or increased benefits. Having separate tables for each type of effective date will enable readers to more easily locate the section they need.

§ 5.151 Date of Receipt

One commenter proposed adopting a mailbox rule instead of the current date-of-receipt rule for purposes of filing claims. The commenter pointed out that the Board of Veterans' Appeals (the Board) accepts the postmark date as evidence of a document having been timely filed, and suggested that VA should adopt a similar rule for claims. *See* 38 CFR 20.305 (concerning how the Board will calculate the time limit for filing). We decline to adopt the commenter's suggestion because VA is prohibited by statute from awarding an effective date for a claim earlier than the date of receipt of the application or claim, unless specifically authorized. According to 38 U.S.C. 5110(a), ''[u]nless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.'' Having a date-of-receipt rule provides for certainty and consistency in determining when a document relating to a claim is received.

Initially proposed paragraph (b) consisted of one 93-word sentence. We propose to break the paragraph into three sentences, which will make the paragraph easier to read and understand.

§ 5.152 Effective Dates Based on Change of Law or VA Issue

One commenter suggested that we reconsider our decision to restate § 3.114(a) without change. The commenter believed that § 3.114(a) was very difficult to understand and was neither claimant-focused nor user-friendly. In response to this comment, we propose to revise initially proposed § 5.152 to state the provisions in the active voice, replace unnecessarily technical language with more commonly understood language, and reorganize the provisions into a more logical order.

The commenter set forth a detailed fact pattern and then correctly explained how the rule applied to those facts. The commenter then suggested that ''*any* documented handling of a veteran's claims folder following a liberalizing change in law [should] constitute a claim for the newly available benefit'' (emphasis in original). The commenter's concern was with VA's regulation authorizing retroactive payment of benefits for a period of 1 year prior to the date of receipt of a claim or the date of a VA-initiated review, if the claimant requests a review or VA initiates a review more than 1 year after the effective date of the law or VA issue. The commenter believed that such payments should be retroactive to the date of the first documented handling of the claims file following the effective date of the law or VA issue.

We decline to make any such change because it would be administratively burdensome and an extremely inefficient method of claims processing. The term ''claim'' is defined in § 5.1 as ''a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit under this part.'' In other words, a claimant must identify the benefit sought. It would be unreasonable to require that, for example, the date of receipt of a change-of-address request, which would result in a handling of the claims file unrelated to a claim for compensation, serve as the effective date for retroactive benefits in a compensation claim.

The commenter also suggested that we define the phrase ''administrative determination of entitlement''. The commenter did not explain how he believes the phrase is confusing, but the ordinary dictionary meaning of those words is clear. We note that a court has previously held that the meaning of this phrase is clear and consistent with its authorizing statute. *McCay* v. *Brown,* 106 F.3d 1577, 1580 (Fed. Cir. 1997). We therefore propose to make no changes based on this comment.

In initially proposed § 5.152(b) we used the term ''payment''. We have determined that this term is too narrow because it excludes benefits that have no payment, for example a service-connected disability that was rated noncompensable. We have, therefore, used the term ''benefits'' instead, which is defined in § 5.1 as ''any payment, service, commodity, function, or status, entitlement to which is determined under this part.''

In § 5.152(d)(2), we propose to replace the phrase ''the award will be reduced or discontinued effective the last day of the month in which the 60-day period expired'' with ''VA will pay a reduced rate or discontinue the benefit effective the first day of the month after the end of the notice period''. This change in terminology does not affect the payment made to a beneficiary based on a reduction or discontinuance. The purpose of this change is to remedy any confusion that Veterans Service Representatives or beneficiaries may have experienced in interpreting the former part 3 language, as well as to establish uniform language for describing how to calculate effective dates.

§ 5.153 Effective Date of Awards Based on Receipt of Evidence Prior to End of Appeal Period or Before a Final Board Decision

One commenter suggested that we define the term ''appeal period''. The term ''appeal period'' does not need a definition. The ordinary dictionary meanings for the words are sufficient to define the term. The commenter also recommended that the term ''appeal period'' be defined as any time ''after a timely [Notice of Disagreement] and timely Substantive Appeal have been received''. We decline to make such a change because the suggested definition is incorrect. A timely Notice of Disagreement (NOD) and Substantive Appeal are the triggers that initiate appellate review by the Board. The ''appeal period'', however, begins with the date of mailing of notice to a claimant concerning a decision made by the agency of original jurisdiction. *See* 38 CFR 20.302 through 20.306. The ''appeal period'' ends 1 year after the notice date if no NOD is received. *Id.* We agree, however, that proposed § 5.153 needs a cross-reference to 38 CFR parts 19 and 20 in order to instruct the reader on how to appeal to the Board. This proposed change will eliminate the need to define ''appeal period'' in part 5, as suggested by the commenter.

We believe that the heading of this section may have caused confusion. Therefore, we propose to revise the heading of § 5.153 to make clear that the regulation refers to both the appeal period and the time period after an appeal has been filed but before a final decision has been rendered.

The commenter also suggested that all evidence received between the date of receipt of a claim and expiration of the appeal period must be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period, and, in claims for increase, evidence received during the 1-year period before the date of receipt of the claim must also be considered. Proposed 5.4(b) states that ''VA will base its decisions on a review of the entire record.'' Therefore VA must consider the evidence described by the commenter.

One commenter believed that proposed § 5.153 would not prescribe the same effective date for an award based on evidence received during an appeal period as would have applied ''had that evidence been submitted and been of record at the time of the decision under appeal''. Proposed § 5.153 prescribed the effective date used in proposed § 5.150 (the general effective date provision for awards or increased benefits) for calculating an effective date based on information or evidence received during the appeal period. The intent in referencing this general effective date provision is to use the same effective date for awarding a benefit as if the final decision being appealed had not been decided. We disagree with the commenter that proposed § 5.153 would lead to a different result than its part 3 predecessors, §§ 3.156(b) and 3.400(q)(1). However, based on the comment, we have reviewed the last sentence of initially proposed § 5.153 and propose to clarify it by replacing it with the language in the last sentence of current § 3.400(q)(1), which states, ''The effective date will be as though the former decision had not been rendered.'' This change would still lead to the same result as the proposed rule because § 5.150 is still the applicable general effective date provision. We therefore propose to replace the reference to § 5.150 in our regulation text with a cross reference.

This same commenter had several concerns about the preamble discussion of proposed § 5.153 which the commenter believed would cause ''misapplication of the law''. The commenter expressed concern with our statement that ''if the evidence is submitted within the appeal period or before an appellate decision is rendered, then the effective date of the award can be as early as the date VA received the 'open' claim.'' 72 FR 28778, May 22, 2007. The commenter noted that ''an effective date can be *earlier* than the date VA first received the open claim.'' The commenter is correct to the extent that the commenter's statement is consistent with 38 U.S.C. 5110, and we did not intend any conclusion to the contrary.

Similarly, the commenter questioned VA's explanation regarding the removal of the qualifier ''new and material'' from proposed § 5.153, which is based on current § 3.156(b). 72 FR 28778, May 22, 2007. Specifically, the commenter disagreed with our statement that ''if VA were to treat all evidence submitted after the appeal period has begun as 'new and material evidence,' then the effective date could not be earlier than the date VA received that evidence (which could be construed as a claim to reopen).'' *Id.* We note that any ambiguity in this statement is addressed by our other statement in the preamble to the proposed rule that ''[t]he current regulation [, § 3.156(b),] can be read to suggest that new and material evidence is needed while the claim is still 'open.' However, in such cases there is no claim to 'reopen' because the claim has not been 'closed' (that is, the claimant could still prevail on that claim).'' 72 FR 28778, May 22, 2007. We therefore propose to make no change based on this comment.

Finally, we propose to not include current §§ 3.400(p) and 3.500(u) in part 5. These paragraphs are merely cross-references to effective-date provisions (currently in 38 CFR 3.114) are not necessary in part 5.

§ 5.160 Binding Effect of VA Decisions

One commenter questioned our decision not to repeat the 38 CFR 3.104(b) phrase ''made in accordance with existing instructions'' in proposed § 5.160(b). The commenter was concerned that our removal of the language would allow VA employees to disregard their procedural manuals and other VA guidance documents. As explained in our preamble discussion of the proposed rule, our reason for not including the language in our rewrite was because the ''references to internal procedural manuals and other VA-generated documents that lack the force and effect of law are not appropriate for inclusion in the regulations''. 72 FR 28770, May 22, 2007. The problem we addressed by removing the phrase ''made in accordance with existing VA instructions'' is that substantive rules in procedural manuals and other VA documents that were not promulgated in accordance with the Administrative Procedure Act (APA) are not enforceable against claimants or beneficiaries. Where VA issuances confer a right, privilege, or benefit, or impose a duty or obligation on VA beneficiaries or other members of the public, VA continues to be bound by notice and comment requirements under the APA. *See Fugere* v. *Derwinski,* 1 Vet. App. 103 (1990). Therefore, we propose not to make any changes based on this comment.

§ 5.161 Review of Benefit Claims Decisions

We received several comments regarding this proposed regulation. One commenter suggested that ''whether a hearing is ordered or not, [§ 5.161] should be amended to require the Service Center Manager or Decision Review Officer who conducts post-decision review to be subject to the same duty-to-inform obligation as VA hearing officers are now required under 38 CFR [3.103(c)(2)]''. The commenter mistakenly cited to 38 CFR 3.301(c)(2), but the duties of VA employees who conduct hearings are set forth in § 3.103(c)(2).

We agree with the commenter that VA should assist a claimant or beneficiary in developing his or her claim whenever possible and that the duty-to-inform is not limited to situations where a claimant requests a hearing. In practice, VA reviewers already suggest additional sources of evidence during informal conferences. Therefore, we propose to add a sentence to § 5.161(c) stating that, ''In an informal conference, the reviewer will explain fully the issues and suggest the submission of evidence the claimant may have overlooked that would tend to prove the claim.''

One commenter questioned the accuracy of the statement, ''The review will be conducted by a Veterans Service Center Manager or Decision Review Officer, at VA's discretion.'' The commenter believed this statement was incorrect and referred to a VA application which the commenter believed provided ''a right of election in these matters''. We decline to make a change based on this comment. Proposed § 5.161 pertains to a review before the agency of original jurisdiction, which is usually conducted by a Decision Review Officer (DRO). However, where a DRO is unavailable, VA reserves the right to have a Veterans Service Center Manager (VSCM) conduct the review. Proposed § 5.161 is based on § 3.2600, which contains this language as well.

One commenter questioned whether paragraphs (a) and (e) contain contradictory provisions. According to the commenter, ''If the reviewer may only review a decision that has not yet become final, . . . how [can] this same reviewer . . . [also] reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final) . . . on the grounds of [clear and unmistakable error]'' (internal quotations omitted). We disagree that paragraphs (a) and (e) are contradictory. While it is true that the scope of review under proposed § 5.161(a) is limited to the decision with which the claimant has expressed disagreement in the NOD, prior decisions are always subject to reversal or revision for clear and unmistakable error (CUE). As proposed § 5.162(d) explains, CUE is a very specific and rare kind of error reserved for situations where reasonable minds cannot differ about the nature of the error. Specifically, while a reviewer may not be looking for such CUE during the review, if the reviewer encounters one, paragraph (e), as well as § 5.162, allow for reversal or revision of the decision containing that error. We therefore propose to make no changes based on this comment.

In initially proposed § 5.161(b), we stated that VA will, ''notify the claimant in writing of his or her right to review under this section.'' Because we have defined ''notice'' in § 5.1 as ''a written communication VA sends a claimant or beneficiary at his or her latest address of record, and to his or her designated representative and fiduciary, if any'', we propose to revise paragraph (b) to state that VA will ''send notice to the claimant . . .'', to be consistent with our definition.

§ 5.162 Revision of Agency of Original Jurisdiction Decisions Based on Clear and Unmistakable Error

In reviewing comments received regarding initially proposed § 5.162, we determined that this section should be revised and reorganized to improve readability. We propose to add new paragraphs (a) ''Scope''; (b) ''Review for clear and unmistakable error (CUE)''; (c) ''Binding decisions and final decisions''; and (d) ''What constitutes CUE''; and redesignate initially proposed paragraph (b) as paragraph (e).

We also determined that § 5.162 mistakenly omitted the provision in 38 CFR 3.400(k), which states, ''*Error* (§ *3.105*). Date from which benefits would have been payable if the corrected decision had been made on the date of the reversed decision.'' We have added this provision to § 5.162(f), restated for better clarity: ''In such cases, benefits are payable effective on the date from which benefits would have been payable if the corrected decision had been made on the date of the reversed decision.''

We received several comments based on this proposed regulation. One commenter suggested that we define the terms ''reversed'' and ''revised''. We decline to adopt this suggestion because we prefer to rely on the common dictionary meanings of these terms and do not wish to deviate from these commonly understood meanings.

The same commenter noted that the cross reference to 38 CFR 20.1403 in proposed paragraph (a) is inadequate for purposes of adjudicating compensation and pension claims. The commenter suggested that VA should create a new subpart in part 5 that ''will expressly set out for claimants and their representatives what it takes to file, raise, and prevail in a [claim] of clear and unmistakable error''. We agree with the commenter that it will be helpful to include the relevant portions of § 20.1403 in part 5. Newly proposed paragraph (d) includes language from the first paragraph of § 20.1403 by explaining what CUE is. We decline, however, to make the proposed change in a new subpart because such a change is beyond the scope of this project. We are also removing the cross reference so readers will not infer that § 20.1403 applies to CUE claims at the AOJ.

One commenter urged that VA include in § 5.162, ''[t]he filing and pleading requirements that are necessary in presenting successful CUE claims . . .'', but offered no rationale for the suggestion. The same commenter urged that VA include provisions stating the ''relationship of clear and unmistakable error claims to other statutes, regulations and legal doctrines'', but offered no rationale for the suggestion.

VA has established procedures for filing claims (§§ 5.50 through 5.57). Claims for CUE require the same procedures. Proposed paragraph (d) clearly informs claimants what they must show in order to prove CUE. Regarding the suggestion about the relationship of CUE to other statutes, regulations and legal doctrines, this type of analysis is not germane to the regulation because it would not inform the public about VA's duties or claimants' rights or duties. We therefore propose to make no changes based on these two comments.

In the NPRM preamble discussion of § 5.162, we stated that the intent of the section is to convey that VA adjudicative agency decisions that are final will be presumed correct unless there is a showing of CUE. We also stated:

> The requirement of a showing of CUE applies only to a ''final decision,'' as defined by proposed § 5.2 to mean ''a decision on a claim for VA benefits with respect to which VA provided the claimant with written notice'' and the claimant either did not file a timely Notice of Disagreement or Substantive Appeal or the Board has issued a final decision on the claim. *See* 71 FR 16464, 16473–74 (March 31, 2006). We also proposed to incorporate 38 U.S.C. 5109A(c) and (d), which state that a CUE claim may be instituted by VA or upon request of the claimant and that a CUE claim may be made at any time after a final decision is made.

One commenter interpreted proposed § 5.162 as meaning that only final decisions can be reviewed for CUE. The commenter noted that the term ''final'' is not contained in the CUE statute, 38 U.S.C. 5109A, which states, ''A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.''

The commenter asked why, if a claimant has filed a notice of disagreement and has not elected review

under proposed § 5.161, VA should be unable to correct the decision if it is found to be clearly and unmistakably erroneous. The commenter further asked why, if VA discovered a CUE after a ''binding'' decision but before it became final under § 3.160(d), the decision should not be subject to immediate correction.

The commenter asserted, ''The law does not limit a claim of CUE to a final VA decision, but rather more accurately contemplates a 'binding' decision as defined in proposed § 5.160(a),'' which is based on 38 CFR 3.104(a). The commenter further asserted that ''[t]his would also be consistent with proposed § 5.161(e) [based on § 3.2600(e)], which permits decision review officers to review a binding, but non-final, decision that has been timely appealed and revise that decision on the basis of CUE.'' The commenter urged VA to change initially proposed § 5.162 to state that CUE can be the basis to correct a ''binding'' decision even if the decision has not yet become ''final''. We agree with the commenter and propose to revise proposed § 5.162 as discussed below.

The courts have consistently stated that a ''final [AOJ] decision'' is a prerequisite for a CUE collateral attack. *Hines* v. *Principi,* 18 Vet. App. 227, 236 (2004). Courts have repeatedly found that because an AOJ decision was final it was susceptible to reversal or revision based on CUE. *See Knowles* v. *Shinseki,* 571 F.3d 1167, 1168 (Fed. Cir. 2009) (where RO decision was presumptively final because veteran acknowledged notice and did not timely appeal, veteran properly raised claim of CUE); *Hines,* 18 Vet. App. at 235–36 (Court assumes RO decision became final where veteran filed NOD but not substantive appeal, and ''[s]uch a final decision is a prerequisite for a CUE collateral attack'').

Concomitantly, courts have repeatedly found claims of CUE in AOJ decisions improper when that decision was not final, and that CUE may not be used to correct non-final decisions. In *Norris* v. *West,* 12 Vet. App. 413, 422 (1999), the court held, ''as a matter of law that a [total disability rating based on individual unemployability] claim was reasonably raised to the RO and was not adjudicated. Thus, there is no final RO decision on this claim that can be subject to a CUE attack.'' *See Best* v. *Brown,* 10 Vet. App. 322, 325 (1997) (RO decision not final where RO failed to notify veteran, therefore veteran cannot raise CUE with respect to that rating decision).

The courts have not, however, ruled on whether, in order to be subject to correction based on CUE, a decision must be ''final'' as that term is used in § 3.160(d) (which is based on 38 U.S.C. 7105(c)). Section 3.160(d) states that a ''finally adjudicated claim'' is a decision on a claim, ''the action having become final by the expiration of 1 year after the date of notice of an award or disallowance. . . .'' We are unaware of any judicial precedent holding that, for purposes of CUE review, a decision becomes final only after the time to appeal has passed.

When VA amended 38 CFR 3.105(a) to add the term ''final and binding'', it intended the term to have the same meaning in that section as it has in § 3.104(a). Specifically, VA meant that decisions that are binding on all VA field offices at the time VA issues written notification in accordance with 38 U.S.C. 5104 are subject to revision for CUE. It did not mean ''final'' under 38 CFR 3.160(d) (that the decision was not timely appealed or was affirmed by the Board.

A review of the regulatory history of § 3.105(a) shows that VA added the ''determinations which are final and binding'' language in a 1991 rulemaking. 56 FR 65845, Dec. 19, 1991. Prior to that rulemaking, 38 CFR 3.104(a) used the ''final and binding'' language, but § 3.105(a) used the language ''determinations on which an action was predicated. . . .'' In the preamble to the proposed rule, VA stated, ''The proposed amendment is intended to clarify that decisions do not become final until there has been written notification of the decisions to the claimants. . . .'' 55 FR 28234, July 10, 1990. Similarly, in the preamble to the final rule, VA stated that the purpose of the amendment was, ''to establish by regulation the point at which a decision becomes final and binding on all VA field offices.'' It went on to state, ''That point is reached when VA issues written notification on any issues for which it is required that VA provide notice to the claimant. . . .'' 56 FR 65845, Dec. 19, 1991.

In *Smith* v. *Brown,* 35 F.3d 1516 (Fed. Cir. 1994), the issue before the court was whether an AOJ could reverse or revise a Board decision for CUE. In that context, the court analyzed the term ''final and binding'' as used in both in §§ 3.104(a) and 3.105(a) and found that the terms were intended to mean the same thing. *Id.* at 1523–25.

Congress codified 38 CFR 3.105(a) as 38 U.S.C. 5109A when it enacted Public Law 105–111, sec. 1(a)(1), 111 Stat. 2271 (1997). *Disabled American Veterans* v. *Gober,* 234 F.3d 682, 686 (Fed. Cir. 2000). As the court noted in *Donovan* v. *West,* 158 F.3d 1377, 1383 (Fed. Cir. 1998), ''Although more detailed than [§ 3.105(a)], the basic substantive provision in [section 5109A] is the same as that in the regulation.'' As the commenter noted, Congress did not include any finality requirement in that statutory language.

It has been long-standing VA practice to correct CUE in decisions that are ''final and binding'' under 38 CFR 3.105(a), even though they have not ''become final by the expiration of 1 year after the date of notice [of a decision], or by denial on appellate review, whichever is the earlier.'' 38 CFR 3.160(d). We codified this practice in 38 CFR 3.2600(e), which states the ''reviewer may reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final due to failure to timely appeal) on the grounds of clear and unmistakable error (see § 3.105(a)).'' The ''decision being reviewed'' under § 3.2600(e) is one that has not ''become final due to failure to timely appeal''.

Finality under proposed § 5.1 is not a prerequisite for correction of a decision based on CUE, and we therefore propose to write new paragraph (b) to clearly state that final or non-final decisions may be corrected under the CUE doctrine. We propose to clarify this point in § 5.162(b) by stating that, ''At any time after the AOJ makes a decision, the claimant may request, or VA may initiate, AOJ review of the decision to determine if there was CUE in the decision.''

Current § 3.105(a) states, ''[W]here an award is reduced or discontinued because of administrative error or error in judgment, the provisions of § 3.500(b)(2) will apply.'' While this provision tells the reader what effective date provision applies in such cases, it is unclear that the standard governing the decision is clear and unmistakable error. The intended meaning of this sentence is seen in the regulatory history. When VA implemented the effective date rule for 38 U.S.C. 5112(b)(10), it explained that, ''Payments will be terminated under this subparagraph on the basis of clear and unmistakable error. (*See* VA Regulation 1105(A).)'' VA Regulations, Compensation and Pension, Transmittal Sheet 271 at iv (Dec. 1, 1962). Although the quoted language referred only to ''terminated'' benefits, it cited VA Regulation 1105(A), which at that time included both reductions and discontinuances of VA benefits. VA Regulations, Compensation and Pension, Transmittal Sheet 267 at 37–2R (Dec. 1, 1962). In order to clarify this

point in part 5, we propose to state explicitly in § 5.162(e) that when VA reduces or discontinues a benefit resulting from a VA administrative error or error in judgment, it applies the clear and unmistakable error standard.

In the AM01 NPRM, we initially proposed to add a new definitions section that would define ''administrative error'' and ''error in judgment,'' in § 5.165(c)(2). We have determined that, because proposed § 5.165 (now renumbered as § 5.166) is an effective date regulation and this provision is substantive, it is more logical to place it in new § 5.162(e).

Initially proposed § 5.165(c)(2) included a list of examples of administrative errors or errors in judgment. That list included, ''(iii) Failure to follow or properly apply VA instructions, regulation, or statutes.'' We have determined that the term ''instructions'' is unnecessary. Historically, VA used the term ''instruction'' to describe the Administrator's binding guidelines for implementing newly enacted laws. VA has not issued such ''instructions of the Administrator'' since the 1960s. Because VA has not issued such instructions since the 1960s, it is not useful to include references to them in a list of examples of common sources of administrative error or error in judgment.

Finally, in paragraph (f), ''Effect of reversal or revision on benefits'', we propose to add a cross reference to § 5.167(c), the effective date rule for reduction or discontinuance of benefits based on VA administrative error or error in judgment. This will alert the reader that the effective date of such reductions or discontinuances differs from the general rule that the revision of a decision containing CUE is effective as if the original decision were correctly made.

§ 5.163 Revision of Decisions Based on Difference of Opinion

Initially proposed § 5.163 was one 89-word sentence. To improve readability we propose to divide it into three sentences. We also propose to specify that the revised decision must be more favorable to the claimant.

§ 5.164 Standard of Proof for Reducing or Discontinuing a Benefit Payment or for Severing Service Connection Based on a Beneficiary's Act of Commission or Omission

We have revised the proposed section heading of § 5.164 to apply to the several types of adverse actions VA can take upon determining a beneficiary obtained a benefit by an act of commission or omission. We have revised the headings of §§ 5.167 and 5.177 similarly.

In initially proposed § 5.162(b), we stated, ''[F]or reductions or discontinuances based on CUE resulting from an act of commission or omission by the beneficiary or with the beneficiary's knowledge, VA will apply § 5.165(b).'' In doing so, we mistakenly overlooked that the first sentence of 38 CFR 3.105 states, ''The provisions of this section apply except where an award was based on an act of commission or omission by the payee, or with his or her knowledge. . . .'' Since § 3.105 includes the provisions on CUE, CUE is not the proper standard for a reduction or discontinuance of a benefit, or for severance of service connection, obtained through an act of commission or omission.

We have revised the proposed regulation to include severance of service connection among the adverse actions VA will take upon finding an act of commission or omission by a preponderance of the evidence, rather than by clear and unmistakable evidence. This would be consistent with the holding in *Roberts* v. *Shinseki,* 23 Vet. App. 416 (2010), where the court concluded ''that the provisions of § 3.105 [(d)] do not apply to cases involving severance of service connection based on fraud.'' *Id.,* at 428.

Neither the statutes nor the regulations provide a standard for reduction or discontinuance of a benefit obtained through an act of commission or omission. In such cases, VA applies its default standard of proof, which is preponderance of the evidence. When VA implemented 38 U.S.C. 5112(b)(9) in VA Regulation 1500(b)(1) (currently 38 CFR 3.500(b)(1)), it explained that in determining whether benefits were based on an act of commission or omission ''[t]he benefit of any doubt will be resolved in favor of the payee.'' VA Regulations, Compensation and Pension, Transmittal Sheet 271 at iii (Dec. 1, 1962). Thus, when the evidence is in equipoise, VA cannot reduce or discontinue benefits. But when the evidence against the beneficiary outweighs the evidence supporting the beneficiary, the benefit of the doubt doctrine does not apply (*Gilbert* v. *Derwinski,* 1 Vet. App. 49, 55–56 (1991)), and VA will reduce or discontinue.

Proposed § 5.3(b)(4) states that, ''A fact or issue is established by a 'preponderance of evidence' when the weight of the evidence in support of that fact or issue is greater than the weight of the evidence against it.'' The preponderance standard is relatively easy for VA adjudicators to apply. It is also a high enough standard to protect beneficiaries from arbitrary or capricious reductions or discontinuances by VA. We also note that before reducing or discontinuing benefits under § 5.164, VA must provide due process to the beneficiary under § 5.83(a).

It will be helpful to inform the public that VA applies the preponderance standard in a reduction or discontinuance of a benefit obtained through an act of commission or omission. We therefore propose to add a new § 5.164, which states, ''VA will reduce or discontinue a benefit, or sever service connection, if a preponderance of the evidence shows that it resulted in whole or in part, from an award based on an act of commission or omission by the beneficiary or an act of commission or omission done with the beneficiary's knowledge.''

Although section 5112(b)(9) does not specify, VA has long interpreted it to mean that it applies when an award was based in whole or in part on the act of commission or omission. VA General Counsel's opinion VAOPGCPREC 2–90, 55 FR 27756 (July 7, 1990). We propose to include the phrase ''in whole or in part'' in paragraph (a) to make this point.

As stated in § 5.162(b), in a CUE claim, VA's review will be based ''only on the evidence of record and the law in effect when the AOJ made the decision.'' However, no such restriction applies when VA reduces or discontinues a benefit, or severs service connection, for reasons other than CUE. To ensure that readers are aware of this, we propose to insert the following sentence into § 5.164(a), ''The review will be based on the law in effect when the agency of original jurisdiction (AOJ) made the decision and on all evidence currently of record, regardless of whether it was of record at that time.''

In proposed § 5.164(b), we provide readers with examples of an act of commission or omission by the beneficiary or an act of commission or omission done with the beneficiary's knowledge. We selected all but the fourth of these examples because they are some of the most common situations in which VA reduces or discontinues benefits. We included the fourth example, service connection obtained by fraud, because severance of service connection greatly affects a veteran's benefits. Paragraph (b) is not an exclusive list of acts of commission or omission.

§ 5.167 Effective Dates for Reducing or Discontinuing a Benefit Payment, or for Severing Service Connection, Based on Omission or Commission, or Based on Administrative Error or Error in Judgment

In initially proposed § 5.165 (now renumbered § 5.167) we inadvertently omitted severance of service connection in the list of actions for which initially proposed § 5.165 provided effective dates. The regulation was incomplete without it, because VA will sever service connection if a claimant obtained it by an act of commission or omission, or if VA granted service connection because of its administrative error or error in judgment. We therefore propose to add this severance provision.

We propose to add a new § 5.164 and renumber initially proposed § 5.166 as § 5.165, and therefore we have renumbered initially proposed § 5.164 as § 5.166 and initially proposed § 5.165 as § 5.167. One commenter suggested that initially proposed § 5.165(c) effectively would permit VA to ''take adverse action against claimants on much lower showings of VA error than the law governing CUE permits''. We disagree with this comment. This paragraph merely implements the statutory provision in 38 U.S.C. 5112(b)(10). It does not address the standard applicable to VA decisions to reduce or discontinue benefits.

The commenter apparently believed that CUE and VA administrative error are similar in that both can result in a decision to reduce or discontinue an award, with VA administrative error having to meet a lower standard than CUE. That is not correct. Proposed § 5.165 is an effective date provision which sets different dates for reduction or discontinuance of benefits depending on whether the beneficiary or VA made an error. When CUE or severance of service connection and is based on a beneficiary's act of commission or omission, VA corrects the award retroactively. When CUE results in a reduction or discontinuance of an award or severance of service connection and is based solely on VA error, VA corrects the award prospectively. VA is not lowering the standard for finding error that result in the reduction or discontinuance of benefits and these part 5 rules would not cause such an effect. We therefore propose to make no changes based on this comment.

Lastly, initially proposed § 5.165(c)(2) provided a list of administrative errors or errors in judgment. VA does not intend this list to be exclusive, so we propose to add the phrase ''but are not limited to'' to this provision, which is now included in § 5.162(e), in order to avoid that mistaken impression.

§ 5.170 Calculation of 5-year, 10-year, and 20-year Periods to Qualify for Protection.

In the preamble to initially proposed § 5.170, we failed to state that paragraph (a) is a new scope provision informing the reader of the rules gathered in § 5.170 (§§ 3.344, 3.951, and 3.957).

One commenter suggested that proposed § 5.170(a) was unclear because a rating has to be ''in effect'' for 10 years before service connection is protected, but a rating has to be ''continuous'' for 5 years for a disability to be considered stabilized and ''continuous'' for 20 years for the disability level to be protected. The commenter suggested that we use either ''in effect'' or ''continuous'', or explain why we use different terms.

For the following reasons, we decline to make a change based on this comment. We use different terms because different rights are being protected. As noted in the preamble to the initially proposed rule, a precedent opinion, VA General Counsel's opinion VAOPGCPREC 5–95, 60 FR 19808 (Apr. 20, 1995), held that a disability could be considered ''continuously rated'' at or above a specified level for purposes of 38 U.S.C. 110 only if there was no interruption or discontinuance of the compensation being paid based on that rating for a period of 20 years or more. The statute provides this protection because veterans become dependent on a certain level of compensation when it has been paid without interruption for such a long period of time.

Similarly, when a disability has been continuously rated at the same level for 5 years or more, VA considers it to be stabilized. This provides some measure of protection in that the veteran is less likely to experience a reduction in compensation in the future or be subjected to repetitive examinations that yield the same result time after time. In both cases, when the term ''continuous'' is used, the protection provided concerns the level of compensation.

On the other hand, the term ''in effect'' is used only in connection with the 10-year protection afforded by 38 U.S.C. 1159 for service-connected status. There is no discussion of interrupted compensation payments breaking the continuity of a rating. Once service connection has been granted for a disability, that status is unaffected by variations in the level of compensation. If that status remains ''in effect'' for 10 years, service connection cannot be severed in the absence of fraud or military records showing the person did not have the requisite service or character of discharge. Since disability level and service-connected status are different concepts, it is appropriate to use different terms when discussing their protection criteria.

Initially proposed § 5.170(b) stated, ''A protection period begins on the effective date of the rating decision and ends on the date that service connection would be severed or the rating would be reduced, after due process has been provided.'' We believe the term ''protection period'' could be misinterpreted to mean that a rating is protected during this period. It is merely a qualifying period that triggers the protections in §§ 5.171, 5.172, and 5.175. We have revised this paragraph to clarify that point and reorganized the language to improve readability.

The same commenter suggested that the language in initially proposed § 5.170(c) was unclear because it did not explain whether the continuity of a rating resumes after a veteran is discharged from active military service. Currently, proposed § 5.170(c) provides that ''a rating is not continuous if benefits based on that rating are discontinued or interrupted because the veteran reentered active service.'' As noted above, in the preamble discussion for the proposed rule, we cited to VAOGCPREC 5–95, which held:

> Where compensation is discontinued following reentry into active service in accordance with the statutory prohibition on payment of compensation for a period in which an individual receives active-service pay, the continuity of the rating is interrupted for purposes of the rating-protection provisions of 38 U.S.C. 110 and the disability cannot be considered to have been continuously rated during the period in which compensation is discontinued.

Moreover, VA generally does not have the ability to examine veterans once they have returned to active duty, nor does it have a reason to do so, so VA generally cannot determine whether their condition has improved during that time. Such veterans can still satisfy the protection criteria of 38 U.S.C. 110, but the qualifying period for protection must begin anew upon resumption of compensation. We therefore propose not to adopt the change suggested by the commenter.

Another commenter questioned whether receipt of active duty for training (ACDUTRA) pay breaks the continuity of payment for purposes of protection. The former part 3 cross reference (§ 3.654) that followed § 5.170(c), which has since been updated with its part 5 counterpart § 5.746, clarifies that ''active military service pay means pay received for active duty, active duty for training or

inactive duty training''. Therefore, receipt of ACDUTRA pay is considered to be receipt of active military service pay, which operates to break continuity of payment for purposes of breaking continuity of a rating. We therefore propose not to make any changes to § 5.170 based on this comment.

§ 5.171 Protection of 5-Year Stabilized Ratings

One commenter observed that the NPRM misquoted sentence 5 of § 3.344(a) as follows: ''. . . sentence 5, which states, '*lists those diseases that* will not be reduced . . . '' (emphasis in comment) 72 FR 28782, May 22, 2007. The commenter is correct, the quoted language actually paraphrased sentence 5 of § 3.344(a). We rewrote sentence 5 of § 3.344(a) as proposed paragraph (d)(2), reorganized for clarity. The comment, though accurate, does not require any change from the proposed regulation.

This commenter asserted that § 3.344 is a very difficult regulation full of outdated, superfluous verbiage, much of which we could discard. The commenter however, gave one example, specifically the eighth sentence of § 3.344(a) (initially proposed as § 5.171(d)(6)), which the commenter asserted was meaningless. That sentence stated, ''When syphilis of the central nervous system or alcoholic deterioration is diagnosed following a long prior history of psychosis, psychoneurosis, epilepsy, or the like, it is rarely possible to exclude persistence, in masked form, of the preceding innocently acquired manifestations.''

We disagree that this provision is meaningless, but we conclude it is not useful because it does not provide any instruction, impose any duty, or convey any right. The sentence essentially informs VA employees who perform disability ratings that syphilis and alcoholic deterioration diagnosed after a long prior history of ''psychosis, psychoneurosis, epilepsy, or the like,'' can mask the persistent prior disease, and therefore the focus of the rating decision should be the ''preceding innocently acquired manifestations.'' Initially proposed paragraph (d)(6) does not actually instruct VA to take any specific action. It does not impose any specific duty different than does paragraph (d)(2) for diseases subject to episodic improvement, and it does not convey any rights in addition to those stated in paragraph (d)(2). Consequently, we agree that it is confusing surplus and propose not to repeat the eighth sentence of § 3.344(a) in part 5.

One commenter asked us to clarify that improvement in a veteran's disability condition must be demonstrated before VA can reduce a stabilized disability rating. The commenter suggested that before VA can reduce a disability rating, not only must it be determined that an improvement to a disability has actually occurred, but also that the improvement reflects an improvement in the veteran's ability to function under ordinary conditions of life.

In response to this comment, we note that initially proposed § 5.171(c) stated, in pertinent part, that VA will not reduce a stabilized rating unless there is evidence of material improvement and VA may reduce a stabilized rating when an examination shows sustainable material improvement, physical or mental, in the disability, and the evidence shows that it is reasonably certain that the material improvement will be maintained under the ordinary conditions of life.

As a practical matter, it is doubtful that there would be a case in which the evidence shows that it is reasonably certain that the material improvement will be maintained under the ordinary conditions of life unless there had already been material improvement under the ordinary conditions of life. Therefore, we propose to add ''under the ordinary conditions of life'' to proposed paragraph (c)(1), to read, ''An examination shows material improvement in the disability, under the ordinary conditions of life . . .''

In addition, we propose to remove the word ''sustainable'' because it refers to the veteran's future condition, which is covered by paragraph (c)(2). We propose to change the word ''when'' to ''if'' in the second sentence of paragraph (c) because ''when'' incorrectly implies that the veteran's condition will eventually improve. Lastly, we propose to remove the phrase, ''physical or mental''. It is unnecessary because all disabilities are either physical or mental.

One commenter suggested that paragraph (d) is vague and ambiguous because it does not explain when medical examinations for purposes of determining material improvement would be administered. The commenter also thought that the paragraph failed to explain whether ''VA will follow any standards or rules when it chooses certain veterans for a new examination, or if VA will use subjective criteria in its selection''.

Initially proposed § 5.171 does not include the standards VA applies when determining whether and when to reexamine a veteran because these standards are described in detail in proposed § 5.102, ''Reexamination requirements''. Based on this comment, we propose to add a cross reference to § 5.102 at the end of § 5.171.

One commenter questioned whether proposed paragraph (d) would create tension with the standard governing reduction of total disability ratings under § 3.343. Section 3.343 pertains to the rule governing continuance of total disability ratings and outlines a list of mandatory considerations that VA must take into account before reducing such total disability ratings. The commenter expressed concern over whether adoption of § 5.171(d) would in effect ''allow adjudicators to bypass the established protections of § 3.343 in favor of reducing a total evaluation by . . . more lenient conditions''. Proposed § 5.171(d) would not have such an effect. It is a rewrite of § 3.344(a), which simply provides guidance on factors that VA will consider before reducing disability ratings that have either become stable or otherwise were made on account of diseases that are subject to temporary or episodic improvement. The part 5 counterpart to § 3.343 is § 5.286, which will govern the continuance of total disability ratings. We therefore propose to make no changes based on this comment.

One commenter suggested that the organization of paragraph (d)(1) could be improved by separating the topic of ''how VA will determine whether there has been material improvement'' from ''what types of evidence a complete medical record consists of''. The commenter recommended reorganizing the last sentence of paragraph (d)(1) and its paragraphs into a new paragraph (d)(5) after our discussion concerning what constitutes material improvement. We agree with this suggestion and propose to add a new paragraph (d)(5) consisting of the last sentence of paragraph (d)(1) and its paragraphs. We propose to redesignate initially proposed paragraph (d)(5) as (d)(6).

One commenter suggested that we replace the term ''medical record'' with ''evidentiary record'' in regard to initially proposed paragraph (d)(4), which pertains to when VA will determine material improvement exists for purposes of decreasing disability ratings. The commenter was concerned that the term ''medical record'' may unduly restrict VA's current practice of considering all evidence in the record, including lay evidence. We agree with the commenter and propose to adopt the suggested change.

In reviewing initially proposed § 5.171(e) based on this comment, we noted that in the preamble of the proposed rulemaking, 72 FR 28770, May

22, 2007, we failed to explain that we had omitted from paragraph (e) the following, contained in current § 3.344(b): ''the rating agency will determine on the basis of the facts in each individual case whether 18, 24, or 30 months will be allowed to elapse before the reexamination will be made.'' We omitted this language because VA schedules reexaminations for various future dates (based on the factors described in § 5.102) and these dates are not limited to 18, 24, or 30 months in the future.

We also determined that the scope of paragraph (e) (which is based on current § 3.344(b)) needed clarification. We therefore propose to revise paragraph (e) to clarify that it only applies to cases involving a change in diagnosis.

§ 5.173 Protection Against Reduction of Disability Rating When VA Revises the Schedule for Rating Disabilities

Initially proposed § 5.173(b) described how VA modifies a rating that was assigned under the 1925 Schedule for Rating Disabilities. There are no longer any veterans being compensated under the 1925 Schedule. We therefore propose to remove the last phrase in paragraph (a) and all of paragraph (b) because these concerned revisions to ratings under the 1925 Schedule.

§ 5.175 Severance of Service Connection

Initially proposed § 5.175(a)(1) and (2) provided that the protection from severance of 10 year old service connection applies to grants of disability compensation and to dependency and indemnity compensation (DIC), respectively. As initially proposed, § 5.175 did not address whether this protection applies to benefits under 38 U.S.C. 1151.

In August 2010, the U.S. Court of Appeals for Veterans Claims in *Hornick* v. *Shinseki,* 24 Vet. App. 50, 56 (2010), held that the preclusion in 38 U.S.C. 1159 against severing service connection in effect for 10 years or more pertains to disability compensation payments awarded under 38 U.S.C. 1151 (Benefits for persons disabled by treatment or vocational rehabilitation). We propose to add the following at the end of initially proposed paragraph (a)(2): ''and to disability compensation or DIC granted under 38 U.S.C. 1151'' to afford this protection to these benefits. Adding ''disability compensation . . . under 38 U.S.C. 1151'' implements the holding in *Hornick.* We are also adding ''or DIC granted under 38 U.S.C. 1151'', to be consistent with sections 1151 and 1159, which both apply to DIC. This addition is also consistent with *Hornick.*

One commenter suggested that we separate this section into two regulations, one to address the protection of service connection and the other to address the severance of service connection. We decline to make this change because the paragraphs are appropriately titled regarding when protection of service connection applies versus when severance of service connection applies. Further, when taken as a whole, the entire section addresses the single issue of whether and when VA may sever service connection.

The commenter further asserted that VA should not adopt the proposed regulation § 5.175(b)(2) because ''the law of clear and unmistakable error bars a veteran from submitting, and the VA from considering, any new medical opinion evidence (or any new evidence for that matter), in order to establish the existence of CUE''. The commenter also stated that because the law that governs CUE ''does not permit the veteran to successfully argue that a change in diagnosis can be accepted as a basis for the award of service connection 'based on clear and unmistakable error . . .', VA cannot be permitted to sever an award of service connection based on the same sort of medical evidence.'' The commenter asserted that this proposed provision ''reflects inconsistent and arbitrary agency action''. The commenter asserted that the courts have clearly held that ''when an allegation is made that a VA decision contains CUE, that VA's decision on the allegation is strictly limited to the evidence that was before the VA adjudicator at the time VA made the decision being challenged as containing CUE.'' The commenter cited *Russell* v. *Principi,* 3 Vet. App. 310 (1992), for the proposition that new medical evidence that corrects an earlier diagnosis that was a basis for an earlier decision by the agency of original jurisdiction cannot be considered in a CUE case.

The commenter also noted that the Board of Veterans' Appeals (Board) regulation contained in 38 CFR 20.1403(d) states, ''(d) Examples of situations that are not clear and unmistakable error—(1) Changed diagnosis. A new medical diagnosis that 'corrects' an earlier diagnosis considered in a Board decision.''

For the following reasons, we propose to make no change based on this comment. The commenter fails to recognize the distinction between § 3.105(a) and § 3.105(d). As used in § 3.105(d) and proposed § 5.175(b), the phrase ''clearly and unmistakably erroneous'' is intended to describe the high standard of proof that must be met before VA can sever service connection. The phrase ''clearly and unmistakably erroneous'' is not intended to incorporate the procedural rule applicable to claims under § 3.105(a) that collateral review of a prior final decision must be based solely on the evidence that was before VA at the time of that decision. The provisions of § 3.105(a) and § 3.105(d) involve different procedural standards because § 3.105(a) concerns collateral review and retroactive correction of a final decision. In contrast, § 3.105(d) involves only review of the veteran's entitlement to benefits prospectively. VA recognizes that the use of the same high standard, clear and unmistakable error, might be confusing to some laypersons. For that reason, VA has consistently made clear in its regulations that severance determinations under § 3.105(d) may be based on consideration of evidence obtained subsequent to a prior determination.

Furthermore, we note that the provision in proposed § 5.175(b)(2) is not new; it is based on a substantially similar provision in current 38 CFR 3.105(d). The courts have held that, as a general principle, when an allegation is made that a VA decision contains CUE, VA's decision on the allegation is strictly limited to the evidence that was before the VA at the time VA made the decision being challenged as containing CUE. The U.S. Court of Appeals for Veterans Claims set forth this principle in the *Russell* case (*id.* at 314).

However, *Russell* involved a CUE claim under 38 CFR 3.105(a), not severance of service connection under § 3.105(d). Section 3.105(d) states, in pertinent part that ''[s]ubject to the limitations contained in §§ 3.114 and 3.957, service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government). . . . A change in diagnosis may be accepted as a basis for severance action if the examining physician or physicians or other proper medical authority certifies that, in the light of all accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous. This certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion. . . .''

Thus, § 3.105(d) does not state that decisions will be reversed because they were based on CUE. These are dealt with in § 3.105(a). Rather, § 3.105(d) states that a veteran's service-connected status will be severed if it is clearly and unmistakably erroneous. Since it is a review of the veteran's current status,

VA naturally must consider current evidence.

The courts have consistently upheld the long-standing provision in 38 CFR 3.105(d) that evidence concerning a change in diagnosis (which was not of record when service connection was granted) may be considered in determining whether service connection is clearly and unmistakably erroneous. *See Stallworth* v. *Nicholson,* 20 Vet. App. 482, 488 (2006); *Daniels* v. *Gober,* 10 Vet. App. 474, 480 (1997); *Venturella* v. *Gober,* 10 Vet. App. 340, 343 (1997). As the court has noted, if VA were not permitted to consider post-decisional evidence in a severance case, VA ''would be placed in the impossible situation of being forever bound to a prior determination regardless of changes in the law or later developments in the factual record.'' *Venturella,* 10 Vet. App. at 343.

The commenter's reliance on 38 CFR 20.1403(d) is inapposite to the question of the validity of § 3.105(d). Section 20.1403 implements 38 U.S.C. 7111 which relates to the review of Board decisions based on clear and unmistakable error. In the proposed rulemaking for § 20.1403, 63 FR 27535, May 19, 1998, VA noted that, ''the term 'clear and unmistakable error' originated in veterans regulations some 70 years ago, *see* generally *Smith (William)* v. *Brown,* 35 F.3d 1516, 1524–25 (Fed. Cir. 1994), and is now incorporated in VA regulations governing VA RO determinations. 38 CFR 3.105(a).'' VA also noted (at 63 FR 27536, May 19, 1998) that the legislative history for section 7111 ''indicates that the Congress expected the Department would implement section 1(b) of the bill in accordance with current definitions of CUE. H.R. Rep. No. 52, 105th Cong., 1st Sess. 3 (1997) (report of House Committee on Veterans' Affairs on H.R. 1090) (''Given the Court's clear guidance on this issue [of CUE], it would seem that the Board could adopt procedural rules consistent with this guidance to make consideration of appeals raising clear and unmistakable error less burdensome''); 143 Cong. Rec. 1567, 1568 (daily ed. Apr. 16, 1997) (remarks of Rep. Evans, sponsor of H.R. 1090, in connection with House passage) (''The bill does not alter the standard for evaluation of claims of clear and unmistakable error.'')''

Thus, § 20.1403 was intended to codify a statute whose basis was § 3.105(a), not § 3.105(d). As such, there is no reason why § 3.105(d) or § 5.175 must contain the same procedures as those in § 20.1403.

For the reasons stated above, we propose to make no changes based on this comment.

We propose, however, to revise the heading of initially proposed paragraph (b) to read, ''Standard of proof to sever service connection—general rule'', and to add paragraph (c), ''Standard of proof to sever service connection—fraud''. The new paragraph (c) comprises a cross reference to proposed § 5.164. It serves, without repeating proposed § 5.164, to inform the reader that VA's burden of proof to sever service connection obtained by fraud is the same as to sever service connection obtained by any other act of commission or omission. Fraud is distinguishable from other acts of commission or omission in that a claimant's fraud will breach the protection established after service connection has been in effect for 10 years, whereas other acts of commission or omission will not.

These changes would correct a misstatement in the proposed rule that the dissenting opinion in *Roberts* v. *Shinseki,* 23 Vet. App. 416, 435–39 (2010) (Hagel, J., dissenting) called to our attention. In that case, the dissent first noted that, in rewriting §§ 3.957 (protection of service connection in place 10 years or longer) and 3.105(d), ''VA intends to 'clarify' and recodify 38 CFR 3.957 and the provisions of 38 CFR 3.105(d) that govern when service connection may be severed at 38 CFR 5.175, entitled 'Protection or severance of service connection.'''' *Id.* at 436. The dissent also noted that our proposed regulations did not except severance of service connection based on fraud from the due process or burden of proof elements of §§ 3.957 or 3.105(d). *Id.* at 436, 440. Finally, the dissent noted that the NPRM stated that it explained any substantive changes between part 3 and part 5, 72 FR 28771–72, May 22, 2007, and that there was nothing in the NPRM ''indicating that the rewriting and restructuring of the regulations [pertaining to severance of service connection for fraud] are intended as substantive changes.'' *Id.* at 437–39. From these observations, the dissent reasoned, the NPRM revealed VA's interpretation of §§ 3.957 and 3.105(d) as requiring application of both the process and burden of proof provisions of § 3.105(d) before severing service connection.

Any disparity between the NPRM and the Secretary's position in the *Roberts* litigation results from our misstatements in the NPRM. In discussing initially proposed § 5.175 in the NPRM, we described that paragraph (a) would provide that service connection in effect for 10 years or more ''may not be severed unless . . . (1) The original grant was obtained through fraud.'' We further explained that proposed paragraph (b) ''provided that severance of service connection may also occur when evidence establishes that it is clearly and unmistakably erroneous. . . .'' 72 FR 28783, May 22, 2007. By stating ''also'', we intended to state that § 5.175(a) and (b) would be alternatives for severing service connection. We did not mean that they would be a sequence of events: first, piercing the 10-year protection by showing fraud, and second, finding clear and unmistakable error in the grant of service connection obtained by fraud. We propose to correct the error in initially proposed § 5.175 by explicitly distinguishing the procedures and the burden of proof that apply to sever service connection that a claimant obtained by fraud.

§ 5.176 Due Process Procedures for Reducing or Discontinuing Disability Compensation Payments or for Severing Service Connection

One commenter suggested that we revise the introductory paragraph to enlarge the scope of § 5.176 to include situations where VA reduces or discontinues a disability rating but compensation benefits are not affected. Currently, proposed § 5.176 and its part 3 predecessor, § 3.105(e), require that VA provide notice of a contemplated adverse action followed by a 60-day period for the presentation of additional evidence only in situations where a lower rating would result in a reduction or discontinuance of compensation payments currently being made. However, where compensation benefits are not affected, where there is no adverse action, VA will provide only contemporaneous notice. *See* § 5.83(a).

We decline to make the suggested change to enlarge the scope of initially proposed § 5.176 because in cases where VA decreases the rating of any disability or disabilities but does not reduce the veteran's overall disability rating, there is no reduction of monetary benefits. In such cases, VA has no statutory duty to send advanced notice of its decision. *Stelzel* v. *Mansfield,* 508 F.3d 1345 (Fed. Cir. 2007). Further, due process concerns are not implicated because the veteran suffers no loss of benefits. Moreover, we note that along with the contemporaneous notice, VA also provides the veteran with information on procedural and appellate rights regarding the decision.

Another commenter believed that the initially proposed rule would eliminate the due process procedure of having an impartial VA employee participate in

the review process for reducing ratings. The commenter noted that such procedures are already followed in the context of predetermination hearings, *see* § 3.105(i), and since the reduction of ratings also have an adversarial character, the practice ''should be carried over to the new regulations''. While we agree that proceedings involving proposed adverse actions should be conducted by VA personnel who were not directly involved in proposing the adverse action, we decline to make changes based on this comment. The reason is that this due process procedure is already recognized in proposed § 5.82(d) which states that if the hearing arises in the context of a proposed reduction, discontinuance, other adverse action or an appeal, a VA employee or employees having decision-making authority and who did not previously participate in the case will conduct the hearing.

Proposed § 5.82(d) applies to a claimant's or beneficiary's right to a hearing upon being notified of a proposed reduction, discontinuance, or other adverse action under proposed § 5.83. Therefore, it is unnecessary to repeat the language of proposed § 5.82(d) in proposed § 5.176 because § 5.82(d) outlines an overarching VA policy that applies in all situations where a hearing is based on a proposed reduction, discontinuance, other adverse action, or on an appeal.

In addition, the commenter also urged that VA include in proposed § 5.176 the overarching duty to assist claimants in their claims by ''suggest[ing] the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position''. The commenter urged that proposed § 5.176 be amended to require that VA inform beneficiaries of what type of evidence they should file to show ''that service connection or a rating should be maintained.'' The commenter provided an example, urging that VA inform a beneficiary if a notice of disagreement as to the reduction satisfies the requirement and would toll the 60-day period so that the veteran has more time to file additional evidence if needed.

As a preliminary matter, we note that it would be impossible for a beneficiary to file a valid notice of disagreement until VA had issued a decision, not merely a notice of a proposed decision. Initially proposed § 5.176(c) stated that in proposing a reduction or discontinuance, VA will notify the beneficiary that they may file, ''evidence to show that service connection should be maintained, the rating should not be reduced, or the benefits should remain intact.'' If such notices were to attempt to specify the exact type of evidence that is relevant, they might inadvertently omit relevant evidence that the beneficiary might file. Rather, it is more helpful to clearly explain ''the contemplated action and furnish detailed reasons for the proposed reduction or discontinuance'' (as stated in initially proposed § 5.176(b)) and allow the beneficiary to determine what evidence they can obtain or identify for VA to obtain.

The commenter also suggested that the 60-day time period for a beneficiary to present evidence when disputing a proposed severance of service connection or reduction in ratings is too short. The commenter claimed that ''if VA expects veterans to file medical or scientific evidence to support their claims, the 60-day period will be too short and veterans will be effectively deprived of their procedural due process''. We decline to change the time period within which beneficiaries must present evidence to challenge a proposed adverse action. Beneficiaries generally are able to meet the 60-day deadline. Furthermore, VA already has procedures and regulations in place to extend the 60-day period if good cause is shown. *See* § 5.99, ''Extensions of certain time limits'', based on § 3.109(b).

Finally, the commenter remarked that ''many veterans subject to reduction or elimination of benefits have previously been found to be profoundly disabled.'' The commenter expressed concern that ''VA should recognize that in reduction actions it is dealing with some of the more helpless segments of the entire veteran population and should tailor its procedures accordingly.'' VA beneficiaries subject to reduction of benefits have varying degrees of disability and our procedures are intended to provide fair treatment to all disabled veterans. To the extent that a beneficiary subject to a proposed reduction may have difficulty responding due to a profound disability, the veteran may request a good cause extension under § 5.99. We therefore propose to make no changes based on this comment.

In reviewing initially proposed § 5.176 to respond to comments, we noted that it is largely redundant of initially proposed § 5.83(a), Right to notice of decisions and proposed adverse actions. We therefore propose to delete § 5.176 and leave that number as reserved. We propose to include the following sentence from initially proposed § 5.176 in § 5.83: ''If VA receives no additional evidence within the 60 days, or the evidence received does not demonstrate that the action should not be taken, VA will provide notice to the beneficiary that VA is taking the action.'' We propose to omit the phrase ''Prepare a rating proposing the adverse action and'' because this is a administrative action that provides no due process to the beneficiary which is not already provided by the notice of the proposed adverse action.

§ 5.177 Effective Dates for Reducing or Discontinuing a Benefit Payment or for Severing Service Connection

We redesignated initially proposed § 5.177(c) as § 5.177(i) to move the paragraph explaining the exceptions of the regulation to the end of the section. We accordingly redesignated initially proposed § 5.177(d) through (i) as § 5.177(c) through (h), respectively.

In relation to the comment on initially proposed § 5.176 regarding enlarging the scope of situations where VA will provide advance notice of adverse actions, the commenter also suggested revising initially proposed § 5.177(f) for the same reasons. We decline to make this change because, as explained in our discussion on proposed § 5.176, where a decision does not result in adverse action, VA will follow the notification procedure in proposed § 5.83(b). Because the decision will not adversely affect compensation payments or other benefits, the notification procedure outlined in § 5.83(b) is adequate to preserve the veteran's procedural and appellate rights if the veteran disagrees with the decision.

One commenter questioned whether initially proposed § 5.177(f) would effectively reduce a veteran's compensation benefits by default ''whether or not a final decision authorizing that reduction has been issued''. The commenter mistakenly believed that VA would reduce benefits before issuing a final decision on the matter. We decline to make any change based on this comment because § 5.177 clearly provides for two 60-day periods before a reduction or discontinuance takes effect: the first following a notice of a proposed adverse action (*see* § 5.83(a), the second following the notice of the final decision.

In initially proposed paragraphs (d), (e), and (f), we stated that VA will sever service connection or reduce or discontinue benefits ''effective the first day of the month after a second 60-day period beginning on the day of notice to the beneficiary of the final decision.'' We propose to revise the language in each of those paragraphs to clarify that after applying the 60-day notice period, VA will apply a second 60-day period which begins on the day VA sends notice to the beneficiary of the final

decision. VA will then take the appropriate action to modify benefits, effective the first day of the month after the second 60-day period.

As with initially proposed § 5.175, discussed above, the dissent in *Roberts,* 23 Vet. App. at 435–39, revealed that initially proposed § 5.177 did not clearly accomplish our intent, or, at least, it was ambiguous when read together with the regulation on effective dates for correcting erroneous awards (initially proposed § 5.165, redesignated § 5.167). We therefore propose to revise the first sentence of initially proposed paragraph (d), redesignated as paragraph (c), to read: ''Unless severance is based on the beneficiary's act of commission or omission that resulted in VA's grant of benefits, this paragraph applies when VA severs service connection.'' We also propose to add a cross reference to § 5.167 stating, ''See § 5.167 for effective date of severance of service connection obtained by fraud.''

The *Roberts* dissent noted that ''VA reports that proposed § 5.165 'applies only to reductions or discontinuances of erroneous awards.' 72 Fed. Reg. 22,779.'' *Id.* at 438, fn 13. The next sentence in the NPRM stated, however, ''If a payment has not been authorized by a rating decision, then VA has not made an award of such an erroneous payment and therefore recovery of that payment is not a reduction or discontinuance of an 'erroneous award' under 38 U.S.C. 5112(b)(9) or (10).'' In other words, initially proposed § 5.165 distinguished ''reductions or discontinuances'' of ''erroneous awards'' from ''reductions or discontinuances'' of other types of payments that are not ''awards,'' and did not distinguish ''reductions or discontinuances'' from severance for fraud as an act of commission or omission. The proposed revision to redesignated § 5.177(c) and the additional cross reference to § 5.167 should make perfectly clear that the effective date of severance of service connection obtained by fraud is governed by proposed § 5.167 and is not 60 days after VA provides notice of the final decision severing service connection.

As initially proposed, § 5.177(g) stated that VA would reduce or discontinue pension payments because of a change in disability or employability status effective the first day of the month after a second 60-day period beginning on the day of notice to the beneficiary of the final decision. This statement conflicts with 38 U.S.C. 5112(b)(5), and current 38 CFR 3.105(f). The beneficiary is not afforded a second 60-day period before his or her benefits are to be reduced. We, therefore, propose to correct paragraph (g) in redesignated paragraph (f) to state that the effective date for the reduction or discontinuance of pension because of a change in disability or employability status is the first day of the month after notice to the beneficiary of the final decision.

We propose to move the effective date provision in initially proposed paragraph (h) from § 5.177 to § 5.591(b)(5), to consolidate all the effective date rules on Chapter 18 monetary allowance into one section.

IX. Subpart D: Dependents and Survivors AL94

In a document published in the **Federal Register** on September 20, 2006, we proposed to revise VA's regulations governing dependents and survivors of veterans, to be published in a new 38 CFR part 5. 71 FR 55052. We provided a 60-day comment period that ended November 20, 2006. We received submissions from three commenters: Disabled American Veterans, and two members of the general public.

§ 5.181 Evidence Needed To Establish a Dependent

In the NPRM, we proposed §§ 5.181 and 5.182 as separate sections. Because we have combined the contents of initially proposed §§ 5.181 and 5.182, as explained in § 5.182 below, we propose to renumber initially proposed § 5.180 as § 5.181. We propose to mark § 5.180 as reserved.

We also propose to reorganize and simplify the contents of initially proposed § 5.180 into § 5.181.

Proposed paragraph (a) simplifies the initially proposed ''purpose'' paragraph to clearly state that this regulation is limited to rules governing adding dependents, and with the exception of paragraph (d), does not govern changes to existing dependents. Also, in proposed paragraph (b)(1), we have eliminated the applicability of this rule to a case involving death, because death does not establish a dependent. Similar conforming changes were made to § 5.182, which governs only changes to the status of existing dependents. We proposed these changes for clarification purposes; we do not intend to change the persons to whom these rules would have applied as initially proposed.

We also propose to change paragraph (b)(1) by inserting '', day,'' after ''month'' and ''(city and state, or country if outside of a state)'' after ''place''. This information is necessary for VA to properly document marriages, termination of marriages, and births.

In initially proposed paragraph (c), we stated ''VA will require additional supporting evidence to establish a veteran's marital status or a parent/natural child relationship . . . if any of the following factors are true: . . . (3) VA questions the validity of all or part of the statement;''. In comparing paragraph (c) with other sections in subpart D, we determined that the term ''validity'' means having legal effect or force. Our intent in paragraph (c)(3) was simply to include a question of the accuracy of a statement as one of the reasons for requiring additional evidence. We have, therefore, replaced the term ''validity'' with ''accuracy''.

In paragraph (c)(5), we propose to change the rule that a statement is not sufficient to establish dependency when there is an indication of fraud or misrepresentation. Thus, we intend to change ''in the other evidence in the record'' to ''in other evidence in the record'', removing the word ''the'' that appeared before ''other evidence''. This change eliminates any suggestion that the reasonable indication of fraud or misrepresentation must appear in the totality of the evidence. VA will require additional evidence if any individual piece of evidence indicates fraud or misrepresentation, or if the evidence in its entirety gives such indication. This revision would make proposed paragraph (c)(5) better conform to proposed paragraph (c)(4), which would provide that a statement is not sufficient to establish dependency if the ''statement conflicts with other evidence in the record . . .''

For reasons explained in the preamble to initially proposed § 5.181(c), 71 FR 55052, 55055, we are omitting certain provisions of § 3.213(b) from part 5, subpart D. Because we now propose to consolidate initially proposed § 5.181(c) and other initially proposed provisions in currently proposed § 5.184(d), we would repeat only the first sentence of § 3.213(b) in § 5.184(d). The restoration of benefit provisions of § 3.103(b)(4), restated in § 5.84, is more comprehensive than the restoration provision of § 3.213(b). Consequently, all but the first sentence of § 3.213(b) is superfluous, and § 5.184(d) would restate only that first sentence.

Initially proposed § 5.180(d) stated:

> The types of additional supporting evidence required by paragraph (c) of this section are set forth in §§ 5.192 through 5.194, 5.221, 5.229 and 3.211 of this chapter. Where evidence is set forth in a particular section in the order of preference, VA may accept evidence from a lower class of preference if it is sufficient to prove the fact at issue.

This language was confusing. The rule was intended to explain that certain types of evidence are needed to

establish specific facts. For example, in proposed § 5.192(c), a copy of a public record of marriage is generally more reliable and consequently preferred over an affidavit from the official who performed the marriage ceremony, and therefore, VA will not accept the latter unless the former is unobtainable. These rules of preference are more thoroughly explained in the individual paragraphs that set forth the hierarchy of preferred evidence, so we struck the language from initially proposed § 5.180(d). The only text that remained were the cross-references to the actual rules that describe the additional evidence that may be provided to establish specific facts. Therefore, we propose to move those cross-references into § 5.181(c) and renumber initially proposed § 5.180(e) as § 5.181(d). We further propose to add language to the specific regulations cited in proposed § 5.181(c), which include §§ 5.192(c), 5.221, 5.229, and 5.500. In addition, we have determined that the list of cross references was incorrect. We propose to correct the list in § 5.181(c).

Several initially proposed rules in RIN 2900–AL94 inadvertently added a requirement that a claimant's or beneficiary's statement filed as proof of marriage, termination of marriage, or birth of a child must be ''written''. No such requirement exists in current §§ 3.204(a)(1) or 3.213(a) and (c). We have therefore not included this requirement in §§ 5.151(c), 5.181(b), 5.182(a), 5.183(a) or (b), 5.192(c), 5.193, 5.221(b), or 5.229.

§ 5.182 Changes in Status of Dependents

We propose to combine the contents of initially proposed §§ 5.181 and 5.182 into § 5.182, and reorganize and simplify the rules. In the revised rule, we refer in proposed § 5.182(a) to a beneficiary's duty to report a ''[c]hange in status of a living child affecting who no longer meets the definition of a dependent''. This language replaces language in the initially proposed § 5.182(a)(2) that had specifically discussed discontinuance of school attendance. The broader language in the proposed rule more accurately describes a beneficiary's duty to report any change in a child's status that makes the child no longer a dependent of the beneficiary.

In initially proposed paragraph (a), we stated that a beneficiary must provide VA a statement containing the details of any change in dependency that could lead to a reduction or discontinuance of VA benefits. We required that the beneficiary report the month and year of the change. VA now requires the day, as well as the month and year of the change. We also require the city and state, or country if outside of a state, where the change occurred. See VA Form 21–686c, Declaration of Status of Dependents. We propose to amend paragraph (a) to conform to VA's current practice.

We propose to remove the cross reference to § 3.217, ''Submission of statements or information affecting entitlement to benefits'', which was contained in initially proposed § 5.181(b) because § 5.182 contains all the relevant information needed to understand changes in dependency and so the cross reference is unnecessary.

We propose to move what was initially proposed paragraph § 5.181(c) to proposed § 5.184(d) because it is an effective-date rule specific to § 5.184.

§ 5.183 Effective Date of Award of Benefits for a Dependent

Initially proposed § 5.183 stated that the effective date for adding a dependent is the date VA receives notice of the existence of the dependent. We propose to change ''notice'' to ''information''. In proposed § 5.1, we define notice as a written document that VA sends to the claimant or beneficiary. To state that VA receives notice of the dependent would be contrary to our proposed definition of the term. We mean to say that a dependent will be added upon receipt of information of the existence of such dependent. We also propose to state that the ''information'' must be filed by the claimant or beneficiary. As stated in proposed § 5.181, this regulation is limited to adding dependents, therefore, a claimant or beneficiary may establish a dependent to a new or existing award. This clarification does not constitute a change from the proposed rule.

Initially proposed § 5.183(a) stated that evidence of dependency must be received within 1 year ''of'' VA's request. We propose to clarify the regulation to state that the evidence must be received ''no later than 1 year after'' VA's request in order to eliminate ambiguity with regards to the date of submission of evidence. We have made similar changes throughout this regulation, and throughout this document, where we previously stated ''1 year of'' to now state ''1 year after''. These additional changes to this rule are intended to simplify the general rule and the exceptions thereto. Notably, we propose to move paragraph (c) into paragraph (a) and reorganize paragraph (a).

Initially proposed § 5.183(b)(3) stated the effective date for establishing the dependency of an adopted child. However, it did not specify that in order for these dates to apply, VA must receive information of the adoption no later than 1 year after the event. We therefore propose to correct this omission by stating ''For an adoption, the earliest of the following dates, as applicable, if VA receives information about the adoption no later than 1 year after the adoption''. This change is consistent with § 3.401(b)(1)(i) and current practice.

§ 5.184 Effective Dates of Reductions or Discontinuances Based on an Event That Changes Dependency Status

We propose to combine the effective date provisions of initially proposed §§ 5.181(c), 5.184, and 5.198 into one section to make them easier to find and to avoid redundancy. We propose to mark § 5.198 as reserved.

As initially proposed, we referred to a marriage, divorce, annulment, or death as a ''change'' in dependency status. However, these are ''events'' that result in ''changes'' in dependency status. For clarity, we propose to refer to these as an ''event that changes'' dependency status.

In initially proposed § 5.198(b), we stated, ''VA will pay the reduced rate or discontinue benefits effective the first day of the month that follows the month in which the divorce or annulment occurred.'' We have determined that the term ''occurred'' was ambiguous because under some states' laws, the divorce or annulment does not take effect immediately after the court issues the decree. We therefore propose to revise this language to state, ''VA will pay . . . in which the death occurred or in which the divorce or annulment became effective.'' For the same reason, we propose to make a conforming change to § 5.205(b)(1) and (2), regarding annulment, and (c)(1) and (2), regarding divorce.

§ 5.190 Status as a Spouse

We have determined that there is no need to establish a rule for ''status'' as a spouse. First, the term is plain language and does not need a specialized definition for VA purposes (unlike, for example, the term ''surviving spouse'', which does have a specialized meaning). There can be no question that a reference to a ''spouse'' is a reference to a person's marriage partner. Second, proposed § 5.191 more than adequately defines a valid marriage for VA purposes. To the extent that proposed § 5.190 had implemented the 38 U.S.C. 101(31) requirement that a spouse be of the opposite sex, that requirement is contained in proposed

§ 5.191. Hence, we propose to delete this rule and mark § 5.190 as reserved.

§ 5.191 Marriages VA Recognizes as Valid

Initially proposed § 5.191 referred to deemed-valid marriages as an exception to the general rule set forth in this section. However, a deemed-valid marriage is not an exception to the types of marriages recognized by VA; rather, it is one type of such marriages. Therefore, we propose to restructure § 5.191 and add a paragraph (c). In addition, we propose to change the term ''is'' valid to ''was'' valid. Because the laws of the states may change, we want to specify that the marriage had to be valid at the time that it occurred. Finally, we propose to change the phrase ''the right to benefits'' in § 5.191(b) to ''entitlement to benefits''. This change improves clarity and is consistent with the language of other part 5 VA regulations.

Initially proposed § 5.191(a) and (b) used the term ''parties'' to mean ''persons'', as stated in the introductory sentence. In order to avoid confusion, we propose to change the term ''parties'' to ''persons'' in paragraphs (a) and (b).

§ 5.192 Evidence of Marriage

As stated in our discussion of § 5.181 above, VA requires the first type of evidence listed in the relevant section as proof of a certain relationship, if it is obtainable. If it is unobtainable, then VA will accept the next listed type of evidence that is obtainable to prove the relationship. In part 3, this basic principle is stated in 38 CFR 3.204(b), which refers the reader to §§ 3.205 through 3.211. It is helpful to state this principle in each section where it applies, and we therefore propose to state it in §§ 5.192(c), 5.221(b)(2), 5.229, and 5.500.

§ 5.193 Proof of Marriage Termination Where Evidence Is in Conflict or Termination Is Contested

We propose to make minor revisions to § 5.193 for clarity.

§ 5.194 Acceptance of Divorce Decrees

We propose to make minor revisions to § 5.194 for clarity.

§ 5.196 Void or Annulled Marriages

We propose to combine initially proposed §§ 5.195 and 5.196 to improve clarity and eliminate the need for users to refer to two regulations to address the issue of void or annulled marriages. The content of both initially proposed regulations would now appear in § 5.196. Section 5.196(a)(1) was initially proposed as § 5.195. Section 5.196 was initially proposed as § 5.196(a). We propose to mark § 5.195 as reserved.

One commenter questioned VA's authority to determine whether a marriage was void in accordance with the law of the place that governs the marriage's validity. The commenter opines that 38 U.S.C. 103(c) does not appear to provide VA with jurisdiction or authority to make an independent adjudication on the validity of a veteran's marriage.

As stated in the preamble to the initially proposed rule, current part 3 includes references to ''void'' marriages, but it does not explain the meaning of a ''void'' marriage. *See* 38 CFR 3.207(a). Under 38 U.S.C. 103, VA does have the authority to make adjudicative decisions on the validity or legality of a marriage when determining whether or not a person is or was a spouse of a veteran for VA purposes. The commenter's suggested interpretation that the statute merely allows for the recognition of marriage notwithstanding contrary state law is not consistent with the ''whether or not'' wording of the statute or with VA's long-standing interpretation of the statute. The statute provides that determinations of validity of marriage be made according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued. This does not mean VA is adjudicating the status of the marriage for purposes of state civil law, which the commenter seems to misunderstand VA to be doing. We therefore propose to make no changes based on this comment.

This commenter further suggests that any new rule regarding VA's authority to determine the validity of a marriage as it pertains to a veteran's surviving spouse or a veteran's child, should include a procedural reference of such questions to the Regional Counsel because VA adjudicators are generally not equipped to research and determine such matters. We agree with this suggestion. In fact, VA has long-standing procedural guidelines for determination of a void marriage. In such cases, the Veterans Service Representative collects all of the pertinent information and evidence from the claimant and files the case with Regional Counsel for a legal opinion as to whether or not the marriage is void. To implement this suggestion, we have revised proposed § 5.196 to indicate that VA Regional Counsel will make the determination concerning whether a marriage is void under the law of the place that governs the validity of the marriage.

§ 5.200 Surviving Spouse: Requirement of Valid Marriage to Veteran

We propose to reorganize initially proposed §§ 5.200 and 5.201 to eliminate redundancy and potentially confusing cross referencing, and to significantly clarify the rules. First, we propose to renumber initially proposed § 5.201 as § 5.200. We have also renamed the rule as, ''Surviving spouse: Requirement of valid marriage to veteran.'' This title is more descriptive of the rules within this section. This reorganization is for clarity and simplification.

In § 5.200(a), we propose to simplify several initially proposed paragraphs to state that in order to qualify as a surviving spouse, the marriage between the veteran and the person by or for whom surviving-spouse status is sought must have met the requirements of § 5.191, unless the ''deemed valid'' exception in paragraph (b) applies.

In § 5.200(b)(1), we clarify that there must have been an attempt at legal marriage and that the person seeking surviving-spouse status must have believed that a valid marriage resulted and lasted until the veteran died. This is not a change from current practice. We also clarify that the marriage must have lasted for 1 year unless the person had a child with the veteran. The proposed rule had required that a child have been both ''of or before the marriage''; however, because the marriage must have continued until the veteran died, the result is that the child may have been born at any time. Thus, the simplified language in § 5.201(b)(1) is not substantively different from the current and proposed rules.

Initially proposed § 5.201(c) did not clearly define the phrase ''no knowledge of legal impediment''. We propose to clarify the definition of legal impediment in initially proposed § 5.201(c), which is now renumbered as § 5.200(b)(2). This clarification is consistent with current practice. We also propose to clarify the evidence that the person must file under § 5.192(c), the requirements of which must be met under § 5.200, without any contradictory evidence.

We also propose to reword the regulation text in § 5.201(e), which is now renumbered as § 5.200(b)(4), for clarity.

§ 5.201 Surviving Spouse: Requirements for Relationship With the Veteran

We propose to renumber initially proposed § 5.200 as § 5.201, and rename the section, ''Surviving spouse: Requirements for relationship with the

veteran''. This title is more descriptive of the rules within this section. This reorganization was made for clarity and simplification.

Initially proposed § 5.200(a)(2) (now renumbered as § 5.201(a)) specified that to qualify as a surviving spouse, that person must have been a member of the opposite sex from the veteran. Because § 5.191, ''Marriages VA recognizes as valid'', requires that a valid marriage must be to a person of the opposite sex, that provision is unnecessary in § 5.201(a) and we propose to remove it. We also propose to make several changes to improve clarity and consistency with the language of other VA regulations.

We propose to move the content of initially proposed § 5.430(b), ''Marriage date requirements for Improved Death Pension'', to § 5.201(b)(1), ''More than one marriage to the veteran.'' The content is based on 38 U.S.C. 103(b), which is not limited to just Improved Pension.

We propose to clarify the provision concerning whether a separation was temporary, initially proposed as § 5.200(b)(3). In § 5.201(b)(4) we propose to add the term ''with estrangement'' to modify ''separation'' to accurately reflect the circumstances to which paragraph (b)(4) applies.

§ 5.203 Effect of Remarriage on a Surviving Spouse's Benefits

The preamble to initially proposed § 5.203(a) stated that it would be a new provision, restating part 38 U.S.C. 101(3), the statutory definition of surviving spouse. Part 3 restates the statutory definition of surviving spouse in § 3.50(b). As a result of the elimination of initially proposed §§ 5.200 and 5.202, and the incorporation of some of those initially proposed provisions in currently proposed § 5.203, we now propose to restate § 3.50(b)(2) in § 5.203(a)(2).

Initially proposed § 5.202 concerned the effect of a Federal court decision on a remarriage determination. We propose to mark § 5.202 as reserved, and include this rule in § 5.203(a)(1). We also propose to change the regulation text in proposed § 5.203(a)(1) from ''In determining eligibility for pension, death compensation, or dependency and indemnity compensation'' to ''In determining eligibility for benefits'' to clarify that the rule applies to all benefits based on surviving-spouse status. It simplifies the regulation.

We propose to revise the language of initially proposed paragraph (c)(4), now redesignated as (d)(4), by removing the phrase ''openly to the public''. That phrase is unnecessary because that provision is already stated in paragraph (a)(2). For the same reason, we have removed that phrase from initially proposed paragraph (d)(1)(iii), now redesignated as paragraph (e)(1)(iii).

One commenter questioned why there was a rule that allowed reinstatement of benefits to a surviving spouse who is no longer remarried because of the death of the second spouse, but there was no rule that allowed the surviving spouse to establish her initial entitlement to benefits after the death of her second spouse. The commenter provided the following example. A surviving spouse is married to the veteran for over 30 years. The veteran subsequently dies and the surviving spouse remarries, but the surviving spouse's second husband dies after several years of marriage. After the death of her second husband, the surviving spouse wants to claim VA benefits. The commenter further indicated that VA allows for the surviving spouse to receive benefits only if her second husband died before November 1, 1990, but in the scenario that was presented, the veteran died in January 1991. The commenter contends that the surviving spouse would not be entitled to benefits because this is not considered to be a reinstatement of benefits, but rather a first-time application. Initially proposed § 5.203(c) stated that the surviving spouse of the veteran may be entitled to receive benefits if the remarriage ended before November 1, 1990. This rule corroborates the commenter's statement. However, initially proposed § 5.203(d) (now § 5.203(e)) allowed a surviving spouse to be eligible for benefits if he or she was otherwise ineligible for DIC under the laws in effect prior to June 9, 1998, because of the surviving spouse's remarriage after the veteran's death. Although the surviving spouse's eligibility to DIC is said to be reinstated under § 5.203(e), this section applies to reopened as well as original claims. The limitation is that no payments may be issued for any period before October 1, 1998. Because proposed § 5.203(e) already addresses the concerns of the commenter, we propose to take no action based on this comment.

We propose to clarify § 5.203(e)(2) to state that no payments may be made for any period before October 1, 1998. The regulation text stated the month, and year, but failed to state the date. The exact date is needed in order to avoid an erroneous payment.

We also propose to clarify § 5.203(f)(2) to state that no payments may be made for any period before January 1, 2004. The regulation text stated the month and year, but failed to state the date. The exact date is needed in order to avoid an erroneous payment.

§ 5.220 Status as a Child for VA Benefit Purposes

We propose to reword the introductory text in § 5.220 for clarity by improving sentence structure.

Initially proposed § 5.220(a), began with the exception prior to the rule. To improve readability, we propose to place the exception at the end of the general rule.

In nitially proposed § 5.220(b)(2)(i), which is now paragraph (b)(1), we referred to a child who is ''incapable of self-support through his or her own efforts by reason of physical or mental disability''. We propose to eliminate the phrase ''through his or her own efforts'' because it is redundant of ''self-support'' and might be misinterpreted to mean that the child intentionally caused his or her incapacity, which is clearly not what we intended.

We propose to move the content of initially proposed § 5.220(c)(2) to § 5.226(c). Section 5.226(c) elaborates on the criteria set forth in § 5.220(c)(2). This approach also enables us to eliminate the need to refer back to § 5.220 in § 5.226(c). We will leave § 5.220(c)(2) as a cross-reference to § 5.226.

We propose to add a new paragraph (d) to proposed § 5.220. In accordance with § 3.503(a)(2), this new paragraph would provide that a person is still considered a child of a veteran even if the person has entered active duty.

§ 5.221 Evidence To Establish a Parent/Natural Child Relationship

We propose to reword the regulation text in § 5.221(a)(2) for clarity.

We propose to delete § 5.221(a)(2)—Note. The content of the Note is adequately covered in § 5.220(c)(2), so it is unnecessary.

Initially proposed § 5.221(b)(2)(iii)(A) limited evidence of paternity to church records of baptism without referencing other religions. We propose to revise the rule to allow any ''religious-context record documenting the birth of the child'' in order to eliminate any perceived bias for or against a particular religion or faith. We propose to add similar language to § 5.229(b).

§ 5.222 Evidence To Establish an Adopted Child Relationship

We propose to add a sentence to the initially proposed undesignated first paragraph to state the purpose of this section. We propose to make technical revisions to § 5.222 to clarify that this rule is an exception to § 5.181(b). We

propose to make similar clarifications to §§ 5.223 and 5.224.

We propose to add an order of preference of types of evidence VA requires to prove an adopted child relationship. We explained orders of preference for evidence in our discussion of § 5.181.

§ 5.223 Child Adopted After a Veteran's Death

Originally proposed § 5.223 (a) (now (b)) required, inter alia, that, ''The person adopted was living in the veteran's household at the time of the veteran's death . . .'' This language was based on § 3.57(c)(1). Upon further review, we note that § 3.210(c)(2) uses the phrase ''was a member of the veteran's household'' to describe the same criteria for children adopted after a veteran's death. To make § 5.223(b) consistent with similar provisions in part 5 (§§ 5.220, 5.226, 5.233, 5.332) we propose to change the paragraph to read, ''was a member of the veteran's household''. We therefore propose not to restate the language of § 3.57(c)(1) and (3) in part 5 because it is redundant of the language in § 3.210(c)(2).

§ 5.225 Child Status Based on Adoption Into a Veteran's Family Under Foreign Law

Our definition of ''State'' in § 5.1 includes territories and possessions of the US. Therefore it is unnecessary to include the Commonwealth of the Northern Mariana Islands in this section. We propose to remove it.

§ 5.227 Child Status Based on Permanent Incapacity for Self-Support

We have clarified the regulation text in § 5.227(b)(1)(iv). The initially proposed rule said that ''evidence that a person was not employed before or after reaching 18 years old tends to show incapacity for self support when the lack of employment was due to the person's physical or mental disabilities and not due to unwillingness to work or other factors unrelated to the person's disability.'' We believe that the phrase ''before or after reaching 18 years old'' could be unclear and we therefore propose to clearly state that the rule applies to a person who ''has never been employed''.

We propose to revise initially proposed § 5.227(c) to clarify that this rule does not exclude from consideration any particular evidence or require that any evidence should be treated more favorably. The rule simply provides guidance to VA employees and to the public about likely sources of evidence relevant to the question whether a person is permanently incapacitated.

§ 5.228 Exceptions Applicable to Termination of Child Status Based on Marriage of the Child

We propose to add an introductory sentence to give context to initially proposed § 5.228.

§ 5.229 Proof of Age or Birth

We propose to revise initially proposed § 5.229 to clearly state that the evidence described therein must be provided in accordance with the order of preference in which it is listed, as discussed earlier in proposed § 5.192, and have also reorganized the rule to improve readability.

In addition, we propose to remove the cross reference to § 5.180(e) (now § 5.181(d)), ''Acceptability of photocopies''. That paragraph applies equally to all of the sections listed in § 5.181(c), so there is no need to reference it in any of those sections.

In the initially proposed paragraph (a)(4) we inadvertently changed the persons who could certify a birth. We stated that a claimant or beneficiary could prove age or birth with ''[a]n affidavit or certified statement from a physician or midwife present during the birth''. However, 38 CFR 3.209(d), from which this paragraph derives, allows proof of age or birth with an ''[a]ffidavit or a certified statement of the physician or midwife in attendance at birth''. We propose to use this language because it is a more precise statement of the requirement.

§ 5.230 Effective Date of Award of Pension or Dependency and Indemnity Compensation to, or for, a Child Born After the Veteran's Death

We propose to reword the section for clarity.

§ 5.234 Effective Date of an Award, Reduction, or Discontinuance of Benefits Based on Child Status Due to Permanent Incapacity for Self-Support

We propose to restructure initially proposed § 5.234(a), by creating separate paragraphs (a)(1) and (2) for effective dates of awards and for reductions and discontinuances. We believe this structure will better inform readers on the contents of this section.

§ 5.238 Status as Veteran's Parent

In initially proposed § 5.240(c) we stated that the term ''parent'' includes a natural mother or father of an illegitimate child ''if the usual family relationship existed.'' Upon further review, we have determined that there is no statutory or regulatory authority for this provision, and we therefore propose to remove it.

Comment Relating to a Different Portion of This Rulemaking

A comment was submitted by a member of the public concerning title 32 National Guard troops suggesting that their active duty for training be considered as ''active duty'', thereby allowing them veteran status. This comment is outside the scope of this proposed rule published under RIN 2900–AL94, but is relevant to another NPRM, RIN 2900–AL67, ''Service Requirements for Veterans''. This comment was addressed together with all of the other submissions received in connection with RIN 2900–AL67.

Changes in Terminology for Clarity and/or Consistency

We also propose to correct our use of the terms ''claim'' and ''application''. Under 38 CFR 3.1(p), ''Claim—Application'' is defined as ''a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit''. As stated in initially proposed § 5.1, for purposes of part 5, ''claim means a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a VA benefit under this part'' and as stated in proposed § 5.1, ''application means a specific form required by the Secretary that a claimant must file to apply for a benefit''. We similarly propose to edit the part 5 regulations proposed in AL94 to correct other inconsistencies in terminology.

X. Subpart E: Claims for Service Connection and Disability Compensation Service-Connected and Other Disability Compensation

A. Service-Connected and Other Disability Compensation

In a document published in the **Federal Register** on September 1, 2010, we proposed to revise VA regulations governing service-connected and other disability compensation. *See* 75 FR 53744. We provided a 60-day comment period that ended November 1, 2010. We received submissions from 10 commenters: National Organization of Veterans Advocates, National Veterans Legal Services Program, Paralyzed Veterans of America, Vietnam Veterans of America, and six members of the general public.

One AM07 commenter commended VA ''for the hard work and dedication that its personnel have put into this important project'' and stated that,

''Overall . . . VA did achieve its goals to make its service-connected regulations 'logical, claimant-focused and user friendly[.]' ''

One commenter stated that while the general idea of the proposed rule is good, some of the proposed changes may be adverse to veterans. However, the commenter did not specifically explain which changes might be adverse. The commenter also urged that VA offer online access to court decisions cited in its rulemaking documents.

Because the commenter did not specifically explain which changes might be adverse to veterans, we cannot respond to that assertion, and we propose to make no change based on that comment. Regarding the suggestion on court decisions, we note that decisions of the U.S. Court of Appeals for Veterans Claims are available on their Web site at *www.courts.cavc.gov* and decisions of the U.S. Court of Appeals for the Federal Circuit are available at *http://www.cafc.courts.gov*. We therefore propose to make no changes based on these comments.

Another commenter asserted that because of the complexity of the regulations proposed in AM07, veterans will incur very expensive legal costs in order to interpret them and determine what benefits they are entitled to. The commenter urged VA to add a section at the end of part 5 outlining what a veteran's options are if the veteran disagrees with a VA decision. The commenter also suggested that VA provide a telephone number to call in the event that a veteran does not understand the final rule on part 5.

VA's intent in rewriting these regulations was to make them less complex. To the extent that commenter believes that he or she requires assistance in preparing a claim for benefits, VA has recognized 87 Veterans Service Organizations (VSO) for purposes of providing no-cost assistance with claims for VA benefits. Each of these VSOs has accredited representatives available to help veterans in preparing claims. A searchable list of recognized VSOs and accredited representatives is available at *http://www.va.gov/ogc/apps/accreditation/index.asp*.

The regulations on how to file a notice of disagreement with a VA decision are found in 38 CFR parts 19–20, not in part 3, so that comment is outside the scope of this rulemaking. VA does not offer a phone number for purpose of explaining its regulations; we do not believe that would be an efficient use of government resources. But VA does have a number where veterans can call to inquire about the status of their benefits claims (1–800–827–1000), which veterans find very helpful. For these reasons, we propose to make no changes based on this comment.

One commenter stated that he is opposed to ''patient registries'' in the prescription process and that all drugs should be taken or not at the discretion of the patient with the advice of his or her doctor. Because this comment is outside the scope of this rulemaking, we propose to make no change.

One commenter urged that VA suspend its Regulation Rewrite Project until it is shown how the implementation of part 5 will interact with certain other VA programs: Virtual VA, Virtual Regional Office and the Veterans Benefits Management System. We do not believe that the implementation of part 5 will disrupt those information technology systems because they were designed to accommodate changes in law or regulation. VA will attempt to implement part 5 in a manner that causes the minimum possible disruption to VA claims processing operations. We believe that over the long term, having clear regulations for our employees to apply will significantly improve timeliness and accuracy in claims processing.

§ 5.242 General Principles of Service Connection

Initially proposed § 5.242(a) states that ''VA will give due consideration to any evidence of record concerning the places, types, and circumstances of the veteran's service . . .'' One commenter suggested that we insert the phrase ''and records constructively in the VA's possession'' after ''evidence'', to ensure that VA complies with the constructive possession rule set forth in *Bell* v. *Derwinski,* 2 Vet. App. 611 (1992).

We do not believe it is necessary to include *Bell's* constructive possession rule in VA regulations, and doing so might actually confuse readers. Any evidence that is constructively in VA's possession would already be encompassed by the rule in § 5.4(b) that VA decisions will be based on a review of the entire record. Adding that this includes evidence within VA's possession and which could reasonably be expected to be a part of the record could imply a requirement that the agency of original jurisdiction (AOJ) must consider material that is not actually in the record, which would be impossible. Furthermore, if the AOJ is aware of such evidence and it is ''necessary to substantiate the claim'', then the AOJ is already under a duty to obtain it and add it to the record (see 38 CFR 3.159, to be codified in part 5 as § 5.90). We therefore propose to make no change based on this comment.

One commenter expressed concern that we did not repeat in proposed § 5.242 the following language from 38 CFR 3.303(a): ''Determinations as to service connection will be based on review of the entire evidence of record, with due consideration to the policy of the Department of Veterans Affairs to administer the law under a broad and liberal interpretation consistent with the facts in each individual case.''

We inadvertently failed to explain why we did not include this language in initially proposed § 5.242. Because proposed § 5.4(b) would clearly state that ''VA will base its decisions on a review of the entire record'', we believe it would be redundant and possibly confusing to restate this principle in specific sections in part 5 (as does part 3). Similarly, § 5.4(b) states:

> It is VA's defined and consistently applied policy to administer the law under a broad interpretation, consistent with the facts shown in every case. VA will make decisions that grant every benefit that the law supports while at the same time protecting the interests of the Government.

Since this language is substantially the same as the language quoted by the commenter, and it applies to all VA claims rather than just service connection, there is no need to repeat it in § 5.242.

One commenter urged VA to establish a new policy by revising initially proposed § 5.242 to create a presumption based on H.R. 1490, 110th Congress, 1st session. The commenter suggested that VA include the following language in § 5.242(c):

> (1) A claimant presenting a claim for benefits with respect to a service-connected disability or death shall be presumed to have presented a valid claim of service connectedness, subject to the requirements of subparagraph (2), unless the Secretary determines that there is clear and convincing evidence to the contrary.
>
> (2) A claimant presenting a claim described under subparagraph (1) shall be required to support such claim with proof of service referred to in such claim, and a brief description of the nature, including the connection to such service, of the disability or claim.

The commenter asserted that this presumption would allow VA to quickly process backlogged claims.

The purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA

policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.243 Establishing Service Connection.

Two commenters expressed concern that VA's use of the term ''proximately caused'' in proposed § 5.243(a) would improperly narrow the criteria for showing incurrence or aggravation. One of these commenters believed that using the term would improperly import a restrictive tort law concept into VA's regulations on service connection. Although this was not our intent, to avoid any such misinterpretation, we propose to revise the term to ''due to or the result of'' as suggested by one of the commenters. For the same reason, we propose to make the same revision in §§ 5.246 and 5.247.

One of these commenters also rejected the use of term ''caused by'' in proposed § 5.241(a) and (b), which the commenter suggested be changed to '' 'incurred' or 'aggravated' '' (as in current 38 CFR 3.1(k) and 3.303(a)) or ''related to''. The commenter similarly, urged VA to replace ''proximately caused'' in proposed § 5.243(a) with ''related to'' and ''causal link'' in proposed § 5.243(a)(3) with ''relationship.'' The commenter acknowledged that, as we noted in the preamble to proposed § 5.243, the court in *Shedden* v. *Principi,* 381 F.3d 1163, 1166–67 (Fed. Cir. 2004) explained that service connection requires ''a causal relationship between the present disability and the disease or injury incurred or aggravated during service'' (citing *Caluza* v. *Brown,* 7 Vet. App. 498, 505 (1995)). Nevertheless, the commenter believed that use of the causation terms that VA proposed in §§ 5.241 and 5.243 will cause confusion by imposing a ''strict medical standard'' in cases where it would be ''inappropriate and excessive.'' The commenter asserted that diseases such as tempromandibular joint syndrome and ulcers ''may not be susceptible to definitive proof that the disease was 'caused by' the incident in service.'' The commenter also noted that VA has determined that there is a positive association between herbicides and three medical conditions ''even though there is no proof that exposure to herbicides caused veterans to develop the conditions.''

As a preliminary matter, we note that the language ''proximately caused'' in proposed § 5.243(a) was merely a recitation of the title of proposed § 5.246, rather than regulation text. More fundamentally, we note that the ''causal relationship'' principle set forth in the *Caluza* case is a well established principle of veterans law and no court has held that it is in any way inconsistent with the regulatory language in §§ 3.1(k) or 3.303(a). We disagree with the assertion that the use of the terms that VA proposed will cause confusion by imposing a ''strict medical standard'' in cases where it would be ''inappropriate and excessive'' and the commenter offers no support for this assertion. We likewise disagree with the assertion that the proposed rules would impose some new ''definitive proof'' standard for diseases such as temporomandibular joint syndrome and ulcers, and again the commenter offers no support for this assertion. Regarding the commenter's statement that VA has determined that there is a positive association between herbicides and three medical conditions ''even though there is no proof that exposure to herbicides caused veterans to develop the conditions'', we note that this determination was made pursuant to an entirely different statute (38 U.S.C. 1116) than the statutes that authorize the causation terms used in §§ 5.241 and 5.243 (38 U.S.C. 1110 and 1131). Our use of the causation terms in §§ 5.241 and 5.243 will express the same concepts as stated in §§ 3.1(k) or 3.303(a), with no substantive change, and in a way that is more clear to those using the regulations. For these reasons, we propose to make no changes based on these comments.

One commenter urged that, in order to comply with the standard for continuity of symptomatology contained in *Savage* v. *Gober,* 10 Vet. App. 488, 498 (1997), VA should revise initially proposed § 5.243(d) by inserting ''injury or disease'' before ''or signs or symptoms'' in paragraphs (d)(1) and (2) and also in paragraph (d)(3). For the same reason, the commenter also suggested that VA revise paragraph (d)(3) to read, ''(3) Competent evidence relates a present injury or disease or present signs or symptoms to the injury or disease or signs or symptoms which occurred during service or during an applicable presumptive period for a disease.''

Regarding the suggested additions to paragraphs (d)(1) and (2), we note that the *Savage* court summarized the continuity provision of 38 CFR 3.303(b) as follows:

> In sum, then, the rule here established is as follows * * * If the chronicity provision is not applicable, a claim may still be well grounded or reopened on the basis of § 3.303(b) if the condition is observed during service or any applicable presumption period, continuity of symptomatology is demonstrated thereafter, and competent evidence relates the present condition to that symptomatology.

Id.

In initially proposed § 5.243(d)(1) we incorporated the requirement, as stated by the *Savage* court, ''that the condition [was] observed during service or any applicable presumption period'' with the phrase ''signs or symptoms of an injury or disease during active military service or during an applicable presumptive period.'' In initially proposed paragraph (d)(2) we incorporated the requirement, as stated by the court, that ''continuity of symptomatology [was] demonstrated thereafter'' with the phrase ''The signs or symptoms continued from the time of discharge . . . until the present.'' In initially proposed paragraph (d)(3) we incorporated the requirement, as stated by the court, ''that competent evidence relates the present condition to that symptomatology'' with the phrase ''The signs or symptoms currently demonstrated are signs or symptoms of an injury or disease, or the residuals of an injury or disease, to which paragraph (d)(1) of this section refers.''

We believe that the language of initially proposed § 5.243(d) accurately restates the intent of current § 3.303(b) as summarized by the *Savage* court. As the court stated, the keys to the continuity doctrine are that ''the condition is observed [through signs or symptoms] during service or any applicable presumption period, continuity of symptomatology [*i.e.* signs or symptoms] is demonstrated thereafter, and competent evidence relates the present condition to that symptomatology.'' *Savage,* 10 Vet. App. at 498. Following the commenter's suggestion of inserting ''injury or disease'' would introduce a new element to the doctrine which is not found in § 3.303(b) nor the court cases interpreting that paragraph. Moreover, it would risk confusing readers by blurring the line between the chronicity doctrine and the continuity doctrine. For these reasons, we propose to make no change based on this comment.

Since we published AM07, ''Service-Connected and Other Disability Compensation'' 75 FR 53744 (Sept. 1, 2010), VA has determined that initially proposed § 5.243 did not accurately restate current § 3.303(b) in the following respect. Section 5.243 would have made ''continuity of symptomatology'' a separate method of showing service connection distinct from the ''chronicity'' method set forth in § 3.303(b). In *Walker* v. *Shinseki,* 708 F.3d 1331 (Fed. Cir. 2013), the U.S. Court of Appeals for the Federal Circuit explained the correct interpretation of these § 3.303(b) provisions. The Court held that continuity of symptomatology

is actually a means of proving the existence of a chronic disease during military service or an applicable presumptive period. We now propose to correct the error contained in the NPRM by revising the provisions of initially proposed § 5.243(d), which we are moving into paragraph (c).

In addition to misstating the role of continuity of symptomatology, we erroneously stated in initially proposed § 5.243 that the term ''chronic disease'' included other diseases besides those listed in current § 3.309(a). The Walker court clarified that the term ''chronic disease'', as used in § 3.303(b), means only a disease listed in § 3.309(a) and no others. *Id.* at 1338. We propose to clarify this point in § 5.243(c)(2).

Lastly, we note that initially proposed paragraph (d)(2), which stated, ''The signs or symptoms continued from the time of discharge or release from active military service until the present'', omitted a presumptive period. To correct this omission, we propose to insert ''or from the end of an applicable presumptive period for a disease'' in § 5.243.

In AM07, we stated:

> VA's long-standing practice is to apply the principles of chronicity and continuity to residuals of injury. This practice provides a fair and efficient means to determine service connection in certain cases, and it is logical to apply these principles to injuries as well as to diseases. Therefore, proposed § 5.243(c)(1) would also apply to an injury incurred or aggravated in service where the current disability is due to ''the chronic residuals of the same injury.''

The court rejected the argument that § 3.303(b) applies to injuries as well as to chronic diseases, stating, ''We thus reject Walker's broader argument that continuity of symptomatology in § 3.303(b) has any role other than to afford an alternative route to service connection for specific chronic diseases.'' *Id.* The court also noted that, ''The Secretary is free to amend § 3.309(a) if he determines that chronic diseases beyond those currently listed should benefit from the application of § 3.303(b),'' and noted that, ''the Secretary is currently considering a substantial revision of his regulations concerning service connection for disability compensation'', referring to VA's Regulation Rewrite Project. *Id.*

As stated above in this preamble, our Veterans Benefits Administration's Transformation Plan will use improved technology and work methods to process disability claims more efficiently. VA has determined that significantly revising the substantive content of our service connection regulations at this time might interfere with this transformation. Moreover, further study is needed to determine the potential impact of such changes, after which VA may conduct a separate rulemaking for this purpose. We therefore propose not to include injuries in § 5.243(c).

§ 5.244 Presumption of Sound Condition on Entry Into Military Service

Initially proposed § 5.244(c)(2) stated, ''The presumption of sound condition is rebuttable even if an entry medical examination shows that the examiner tested specifically for a certain injury or disease and did not find that injury or disease, if other evidence of record is sufficient to overcome the presumption.''

One commenter urged that VA clarify paragraph (c)(2) by revising it to read, ''The presumption of sound condition is rebuttable, in accordance with subsection (d)(1), below, even if an entry medical examination shows that the examiner tested specifically for a certain injury or disease and did not find that injury or disease, provided other evidence of record is sufficient to overcome the presumption.'' The commenter asserted that this revision is needed to ensure the paragraph complies with *Kent* v. *Principi,* 389 F.3d 1380, 1383 (Fed. Cir. 2004).

As we stated in the preamble to AM07, we added paragraph (c)(2), which has no part 3 counterpart, to incorporate the *Kent* holding into VA regulations. The commenter offers no explanation of how initially proposed paragraph (c)(2) is inconsistent with *Kent* nor how it is unclear in any way. Furthermore, the clear and unmistakable evidence standard of paragraph already applies to rebuttal of the presumption of service connection. We therefore make no change based on this comment.

We propose to exclude initially proposed § 5.244(b) because it is contrary to judicial interpretation of 38 U.S.C. 1111. *Smith* v. *Shinseki,* 24 Vet. App. 40 (2010); *Crowe* v. *Brown,* 7 Vet. App. 238 (1994). Proposed § 5.244, the part 5 counterpart of 38 CFR 3.304(b), would implement 38 U.S.C. 1111, the presumption of sound condition. We initially proposed paragraph (b), which has no part 3 counterpart, to ''clarify that the presumption of sound condition attaches even if the military service department did not conduct an entry medical examination, or if there is no record of an entry examination.'' 75 FR 53744, 53750 (Sep. 1, 2010). We explained that ''if there was no entry medical examination, then there could be no 'defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment' that would serve to prevent the presumption from arising.'' *Id.*

Initially proposed at 75 FR 53764, paragraph (b) described a report of entry examination not a condition for application of the presumption as a presumption of sound condition applies even if:

- The veteran did not have a medical examination for entry into active military service; or
- There is no record of the examination.

In drafting paragraph (b), we overlooked precedent decisions of the U.S. Court of Appeals for Veterans Claims (CAVC) that held that 38 U.S.C. 1111 requires an entry examination for the presumption to apply. In *Smith,* the court stated that section 1111 ''provides that the presumption applies when a veteran has been 'examined, accepted, and enrolled for service.'" 24 Vet. App. at 45. The court said, ''Plainly, the statute requires that there be an examination prior to entry into the period of service on which the claim is based.'' *Id.* Although Ms. Smith ''attained veteran status because she served the required period of active duty service,'' *id.* at 44, the presumption could not apply in her case because there was no evidence of ''an examination made contemporaneous with [her] entry'' into the periods of active duty for training with the National Guard on which she based her claim. *Id.* at 46.

The court explained that ''[i]n the absence of such an examination, there is no basis from which to determine whether the claimant was in sound condition upon entry into that period of service on which the claim is based.'' *Id.* at 45. The court's reason why the statute precludes applying the presumption when there was no contemporaneous entry examination, or no evidence of one, was essentially the opposite of our reason why the presumption could apply in those situations.

In *Crowe,* 7 Vet. App. at 245 (1994), the court stated that the presumption of sound condition ''attaches only where there has been an induction examination in which the later-complained-of disability was not detected.'' Though the court focused on the term ''noted'' in section 1111, as VA interpreted the term in 38 CFR 3.304(b), the statement is direct and unequivocal.

Neither *Smith* nor *Crowe* was a case of a claimant for disability compensation who sought to apply the presumption of sound condition to a period of active duty even though he or she had no entry examination. Neither *Smith* nor *Crowe* was a case of a veteran

of active duty who claimed to have had an entry examination, but there is no record of it. Nonetheless, both decisions made unequivocal statements that mean, in essence, if there was no entry examination, the presumption cannot apply. VA must give deference to the court's interpretation of the plain meaning of a statute. *See Cypert* v. *Peake,* 22 Vet. App. 307, 311 (2008) (Deference to department's regulation not warranted when its interpretation of a statute is contrary to the plain meaning of the statutory language). We conclude that the court's interpretation of § 1111 in both cases precludes initially proposed § 5.244(b). Consequently, we have removed it from proposed part 5. We also propose to redesignate paragraphs (c) and (d) as (b) and (c), respectively.

In proposed rule AM07, ''Service-Connected and Other Disability Compensation,'' 75 FR 53744 (Sept. 1, 2010), we in advertently omitted the first five sentences of current § 3.303(c). We now propose to insert these sentences, with only minor stylistic changes to improve readability, as § 5.244(d).

§ 5.245 Service Connection Based on Aggravation of Preservice Injury or Disease

Initially proposed § 5.245(b)(3) stated the usual effects of medical or surgical treatment in service that ameliorates a preexisting injury or disease, such as postoperative scars, or absent or poorly functioning parts or organs, are not an increase in the severity of the underlying condition and they will not be service connected unless the preexisting injury or disease was otherwise aggravated by service.

One commenter urged that VA clarify paragraph (b)(3) by revising it to read:

(3) *Effects of medical or surgical treatment. Where medical evidence establishes by clear and convincing evidence that* the usual effects of medical or surgical treatment provided to a veteran in service to ameliorate a preexisting injury or disease, such as postoperative scars, or absent or poorly functioning parts or organs, do not constitute an increase in the severity of the underlying condition, they will not be service connected unless the preexisting injury or disease was otherwise aggravated by service (emphasis added).

The commenter asserted that this revision is needed to ensure the paragraph complies with *Hines* v. *Principi,* 18 Vet. App. 227, 241–42 (2004).

As a preliminary matter, we note that the Hines case does not impose any requirement that there be ''clear and convincing'' evidence that the usual effects of treatment provided during service do not constitute an increase in the severity of the underlying condition. Likewise, there is no such requirement in current § 3.306(b)(1), the regulation on which initially proposed § 5.245(b)(3) was based. The commenter offers no explanation of how initially proposed paragraph (b)(3) is inconsistent with *Hines* or § 3.306(b)(1) nor how it is unclear in any way. We therefore propose to make no change based on this comment.

§ 5.249 Special Service Connection Rules for Combat-Related Injury or Disease

One commenter urged VA to establish a new policy by revising initally proposed § 5.249 to create a presumption based on H.R. 6732, 110th Congress, 2nd session. The commenter suggested that VA include the following language in § 5.249: ''(iii) Deployment during service to a theatre of combat operations or hostilities during a period of war.''

The purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.250 Service Cnnection for Posttraumatic Stress Disorder

One commenter expressed concern that proposed § 5.250 modifies the provision in 38 CFR 3.304(f) that states, ''[i]f the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat . . . the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.'' The commenter believed that proposed § 5.250 ''shifts the burden to the veteran by requiring 'credible evidence from any source, other than the claimant's statement, that corroborates the occurrence of the in-service stressor.' '' Another commenter also expressed the same concerns.

Proposed § 5.250 does not increase the burden of proof on veterans claiming service connection for posttraumatic stress disorder (PTSD). The provision quoted by the commenter is merely a restatement of the language in the introductory paragraph of § 3.304(f). The special provision for combat veterans that the commenter referred to is discussed in proposed § 5.250(d). That paragraph refers the reader to the rule for combat veterans contained in § 5.249. As we stated in the NPRM preamble, because § 5.249 applies to all claims, there is no need to repeat it in § 5.250. We therefore propose to make no change based on this comment.

One commenter urged that VA revise initially proposed § 5.250 to eliminate the ''credible supporting evidence'' requirement for PTSD stressors which would permit a VA fact-finding hearing official to consider a veteran's sworn, personal hearing testimony—if believed by the VA hearing official—as evidence that can establish that the veteran was exposed to an adequate stressor. The commenter asserted, among other things, that this requirement, which is based on an identical, long-standing provision in 38 CFR 3.304(f), is contrary to 38 U.S.C. 5107(b), which states, ''The Secretary shall consider all information and lay and medical evidence of record in a case . . .''

We respectfully note that the legal arguments raised by the commenter were addressed and rejected by the U.S. Court of Appeals for the Federal Circuit in *Nat'l Org. of Veterans Advocates* v. *Sec'y of Veterans Affairs,* 330 F. 3d 1345 (Fed. Cir. 2003). In *NOVA,* the court expressly held that § 3.304(f) does not permit VA to deny service connection for PTSD in non-combat veterans without considering all the information and evidence of record in cluding lay evidence. 330 F.3d at 1352. It went on to hold that § 3.304(f) was consistent with 38 U.S.C. 5107. *Id.* Because the court has upheld this provision, and because we continue to believe that the rationale for the requirement is valid, we propose to make no changes based on this comment.

Initially proposed § 5.250(a)(1), required that in claims for service connection for PTSD, there must be ''[m]edical evidence diagnosing PTSD in accordance with § 4.125(a) of this chapter.'' 75 FR at 53765. *See* 38 CFR 4.125(a) (2010). Under § 4.125, all mental disorder diagnoses must conform to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1994) (''DSM–IV'). *Id.* One commenter asserted that initially proposed § 5.250(e)(2)(ii) is inconsistent with the DSM–IV's first diagnostic criterion to support a diagnosis of PTSD because the proposed paragraph uses terms that the DSM–IV does not use. Specifically, the commenter noted that under the DSM–IV's first diagnostic criterion, a person who has been exposed to a psychologically traumatic event, like those events described in initially proposed § 5.250(e)(2)(i), VA omitted the term ''intense'' and instead stated that must have experienced a response to the traumatic event that

''involved intense fear, helplessness, or horror.'' However, under initially proposed § 5.250(e)(2)(ii), a veteran's response to a traumatic event must ''involve [ ] a psychological or psycho-physiological state of fear, helplessness, or horror.'' 75 FR at 53766. The commenter noted that the terms ''psychological'' and ''psycho-physiological'' do not appear in the DSM–IV.

We note that § 5.250(e)(2)(ii) was based on a provision in § 3.304(f)(3), which VA added by a separate rulemaking published July 13, 2010 (75 FR 39843) and which has been challenged in the case *Paralyzed Veterans of America* v. *Sec'y of Veterans Affairs,* 412 F. App'x 286 (Fed. Cir. 2011). We believe that it would be premature to revise proposed § 5.250(e)(1) until the U.S. Court of Appeals for the Federal Circuit has rendered a decision in the above captioned case, and we therefore propose to make no change based on these comments.

Several commenters suggested that proposed § 5.250(e)(1) be changed to allow the stressor to be confirmed by any examining or treating psychiatrist or psychologist, not just a VA psychiatrist or psychologist. We note this provision is based on a provision in § 3.304(f)(3), which VA added by a separate rulemaking published July 13, 2010 (75 FR 39843) and which has been challenged in the case *Paralyzed Veterans of America* v. *Sec'y of Veterans Affairs,* 412 F. App'x 286 (Fed. Cir. 2011). We believe that it would be premature to revise proposed § 5.250(e)(1) until the U.S. Court of Appeals for the Federal Circuit has rendered a decision in the above captioned case, and we therefore propose to make no change based on these comments.

Another commenter urged VA to revise proposed § 5.250 (f) ''Special rules for establishing a stressor based on personal assault'', to allow veterans diagnosed with PTSD resulting from Military Sexual Trauma (MST) six months to respond to a VA request for more information about their stressor, rather than the 30 days under current VA practice pursuant to the Veterans Claims Assistance Act (VCAA). The commenter asserted that, ''Without more time veterans with PTSD secondary to MST are unlikely to comply.'' In support of this assertion, the commenter stated:

> Veterans with PTSD as a result of MST often feel guilt or shame. Many of these veterans have not shared with family and friends that they were sexually assaulted in the military. If a veteran receives a VCAA notice asking for additional evidence, such as statements regarding changes in behavior from friends and family, the guilt and shame that they are suffering make it unlikely that the veteran will respond to the 30 day deadline of the VCAA notice. Many of ICLC's clients are in mental health treatment facilities because of the impact of their PTSD secondary to MST. These clients cannot handle day to day functions. Responding within 30 days to a VCAA notice is unrealistic. This is especially true considering that the information the Regional Office requires can be difficult to obtain. Records from rape crisis centers are destroyed after a period of time and it can take as long as nine months to obtain service treatment records from the National Personnel Records Center. We have found that our clients need significant help and time to respond to the VCAA notice.

The commenter also expressed concern that proposed § 5.250(f) does not provide enough detail as to how a veteran will be ''advised that evidence from sources other than the veterans service records may constitute credible supporting evidence.'' The commenter noted that although the purpose of VA's Regulation Rewrite Project is to make VA regulations more logical, claimant-focused, and user-friendly, simply adopting 38 CFR 3.304(f)(5) ''wastes an opportunity to provide more concrete explanation of the type of notice that will be provided to a veteran with PTSD secondary to MST.''

As a preliminary matter, we note that the procedures VA follows for requesting evidence from claimants is explained in proposed § 5.90 (based on current 38 CFR 3.159). These procedures apply to all claims, so it would be redundant to restate them in § 5.250. Regarding the commenter's suggestion that, for military sexual trauma claims, VA expand the time permitted to respond to VA requests for evidence, we note that the commenter is correct that the purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.251 Current Disabilities for Which VA Cannot Grant Service Connection.

When we initially proposed § 5.251 (see 75 FR 53744, Sept. 1, 2010), we failed to state in the preamble that proposed 5.251(c) would be new. It would incorporate and expand upon 38 CFR 4.127, which states, ''Mental retardation and personality disorders are not diseases or injuries for compensation purposes, and, except as provided in § 3.310(a) of this chapter, disability resulting from them may not be service-connected. However, disability resulting from a mental disorder that is superimposed upon mental retardation or a personality disorder may be service-connected.'' Proposed § 5.251(c) expands the principle to recognize that the preexistence or coexistence of disabilities for which VA cannot grant service connection does not preclude granting service connection for ''superimposed'' disabilities that independently meet the criteria for service connection.

B. Presumptions of Service Connection for Certain Disabilities, and Related Matters

In a document published in the **Federal Register** on July 27, 2004, we proposed to revise VA regulations governing presumptions of service connection for certain disabilities and related matters, to be published in new 38 CFR part 5. *See* 69 FR 44614. We provided a 60-day comment period that ended September 27, 2004. We received submissions from seven commenters: Disabled American Veterans, Paralyzed Veterans of America, Vietnam Veterans of America, and four members of the general public.

Undesignated Center Heading Before § 5.260

One commenter suggested that the proposed undesignated center heading before § 5.260 is inaccurate. As proposed, it read, ''Presumptions of Service Connection for Certain Disabilities, and Related Matters.'' The commenter suggested that the word ''disabilities'' should be replaced by the word ''diseases'' because the presumption of service connection attaches to the disease rather than the disability and because it conflicts with subsequent regulatory language using the word ''disease''.

We agree with the commenter that it is appropriate to add ''diseases'' to the undesignated center heading; however, we would do so by inserting the word before the word ''disabilities'', rather than by replacing that word. The proposed undesignated center heading was imprecise because it was under-inclusive; however, to change the undesignated center heading by replacing ''disabilities'' with ''diseases'' would also be under-inclusive because to simply refer in our regulations to ''diseases'' may not adequately identify to readers all of the medical conditions identified by the authorizing statutes. *See,* for example, 38 U.S.C. 1112 (titled ''Presumptions relating to certain diseases and disabilities''); 38 U.S.C.

1112(b)(10) and (14) (providing benefits for a ''disorder'' and a ''syndrome''); 38 U.S.C. 1117 (authorizing compensation for ''qualifying chronic disabilit[ies]''); and 38 CFR 3.309(c) (including as presumptively service connectable ''diseases'', psychosis, anxiety states, dysthymic disorder, and organic residuals of frostbite, which may not be generally understood by the public as ''diseases''). It is important that our regulations clearly explain the various conditions to which a presumption applies, irrespective of whether current medical authorities classify a particular condition as a ''disease'', Referring to ''diseases, disabilities, and related matters'' in our undesignated subheading will provide the most useful information to VA personnel and the public.

Thus, we propose to revise both the undesignated center heading and the regulations herein in accordance with the above discussion. For example, in § 5.261, we refer to ''chronic diseases'' because that is the term the statute uses and because the list comprises conditions that are commonly understood to be diseases. The sole exception might be a ''brain hemorrhage'', but we do not believe that including that condition on the long list of ''chronic diseases'' will create confusion. On the other hand, in § 5.267(b), we provide a ''list [of] diseases or injuries that VA will consider associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite'' because that list contains several items that are more commonly understood to be injuries, such as corneal opacities and scar formation.

§ 5.260 General Rules Governing Presumptions of Service Connection

We propose to revise the heading of § 5.260 from ''General rules and definitions'' to ''General rules governing presumptions of service connection.'' This title is more precise and more descriptive.

We received two comments regarding § 5.260(a), a new provision that describes the purpose of presumptions of service connection. Both commenters agreed that the description of presumptions and how they operate in § 5.260(a) is accurate. However, both commenters suggested that VA add language to § 5.260(a) to clearly define the term ''presumption''.

One commenter suggested supplementing the explanation of how a presumption operates with a legal definition of the term ''presumption'', in order to make clear that presumptions are a rule of law that must be followed unless the presumption is sufficiently rebutted. The commenter suggested two definitions. The first is from *Manning* v. *John Hancock Mut. Life Ins. Co.,* 100 U.S. 693, 697–98 (1879), which held that the existence of a fact may be presumed from the existence of other proven facts, so long as the presumed fact has an immediate connection or relation with the proven facts. The second definition suggested by the commenter is from ''Black's Law Dictionary'', 1067 (5th ed. 1979), stating that a presumption is ''a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted.''

After review, we propose not to define the term ''presumption'' in § 5.260(a). While both legal definitions of the term ''presumption'' suggested by the commenter are correct, we do not believe that regulation readers will be best served by a legal definition of the term ''presumption'' in § 5.260(a). Since the legal definition of a presumption is a clear concept in the law, it is not necessary to include such a definition to aid the courts in interpreting the term ''presumption''. In addition, a legal definition of ''presumption'' in proposed § 5.260(a) would not well serve readers who may not be familiar with legal jargon in such a definition. With respect to the commenter's suggestion that VA must clarify that a presumption is a rule of law, we note that the mere existence of presumptions in both the statutes and in these regulations makes clear that these presumptions are in fact laws. With respect to the legal effect of a presumption, we have adequately explained the effect of the presumptions of service connection in proposed § 5.260(a).

Another commenter suggested that VA adopt the final sentence of § 3.303(d) as the first sentence of § 5.260(a), as it is a clear and succinct statement of the purpose of presumptions. The final sentence of § 3.303(d) reads: ''The presumptive provisions of the statute and [VA] regulations implementing them are intended as liberalizations applicable when the evidence would not warrant service connection without their aid.''

We agree in part, and propose to add the following as the first sentence of § 5.260(a): ''Presumptions of service connection apply when the evidence would not warrant service connection without their aid.'' We do not mean to include the characterization of the presumptions as liberalizations because such a characterization is not helpful. Although it is true that presumptions of service connection allow veterans who might not be able to establish direct service connection to have their disease service connected, it is misleading to refer to them as liberalizations. The effect of a liberalizing law is provided for in § 5.152, and we do not want § 5.260(a) to confuse that section with the general law governing presumptions of service connection.

In addition, we determined that in initially proposed § 5.260, we failed to include the second sentence of 38 CFR 3.303(d), which states, ''Presumptive periods are not intended to limit service connection to diseases so diagnosed when the evidence warrants direct service connection.'' We propose to restate this provision more clearly by adding this sentence at the end of § 5.260(a), ''VA will not use the existence of a presumptive period to deny service connection for a presumptive disease diagnosed after the presumptive period if direct evidence shows it was incurred or aggravated during service.''

After reviewing initially proposed § 5.260(b)(1), we propose to remove the parentheses from around the last sentence of the paragraph because they are unnecessary.

Initially proposed § 5.260(b)(2) discussed ''competent lay evidence'', ''lay evidence'', and ''medical evidence''. In § 5.1 we have defined ''competent lay evidence'' and ''competent expert evidence'' (which includes medical evidence). Our intent in initially proposed paragraph (b)(2) was to refer to competent evidence. We therefore propose to insert the word competent before lay and medical throughout this paragraph. To ensure consistency we propose to make these same changes throughout part 5.

We propose to make a minor technical change to the language of § 5.260(c). The introductory text to § 5.260(c), as initially proposed, stated: ''VA cannot grant service connection under this section when the presumption has been rebutted by the evidence of record.'' 69 FR 44624, July 27, 2004. We propose to change the words ''this section'' in this sentence to ''§§ 5.261, 5.262, 5.264 through 5.268, 5.270 and 5.271''.

In addition, we propose to change initially proposed § 5.260(c) based on comments objecting to our decision not to use the term ''affirmative evidence'' in the description of what kind of evidence may be used to rebut a presumption of service connection for a disease. Specifically, in § 5.260(c)(2) we stated that ''[a]ny evidence competent to indicate the time a disease existed or started may rebut a presumption of service connection that would otherwise

apply.'' 69 FR 44614, July 27, 2004. Because 38 U.S.C. 1113(a) specifically requires ''affirmative evidence'' to rebut the ''disease presumptions'' set forth in chapter 11, title 38, United States Code, we propose to revise initially proposed § 5.260(c) to require affirmative evidence. In addition, we agree with several commenters who defined affirmative evidence as evidence that declares a fact positively and establishes that a particular disease does not warrant the award of presumptive service-connection. We propose to revise paragraph (c)(2) to define ''affirmative evidence'' as ''evidence that supports the existence of a particular fact,'' and to further state that affirmative evidence ''does not mean the mere absence of evidence.''

However, some commenters asserted that under no circumstances may VA rebut a presumption based on the absence of evidence. A commenter stated that a medical opinion founded on the absence of symptoms is not ''affirmative evidence''. Similarly, another commenter stated that a medical opinion used to rebut the presumption of service connection for a chronic disease may not be based on the length of time between service and clinical manifestation of the disease, because Congress chose a specific period for the presumption of service connection to apply for each disease. The commenter noted that in 38 U.S.C. 1112(a)(2), Congress provided for a presumptive period of ''one year from the date of separation from such service, or at a time when standard or accepted treatises indicate that the incubation period thereof commenced during such service.'' According to the commenter, because Congress did not provide this alternative for chronic diseases, pure medical judgments cannot override the presumptive period allotted by Congress.

We disagree with these comments in the following respect: To rebut a presumption that a presumptive disease was incurred during service or during the post-service presumptive period, affirmative evidence would have to show that the disease did not exist at such time. A medical opinion that establishes the date of onset of the disease determined by the use of fact-based medical evidence may serve as ''affirmative evidence'' regarding the onset or existence of that disease, even if the mere absence of symptoms or other evidence of disease is not. In other words, it is the medical professional's qualified opinion that serves as evidence to be considered by VA's adjudicator, not the lack of evidence in the claims file. Hence, we propose to revise § 5.260(c)(2) to state that ''the absence of evidence may be a basis for affirmative evidence. For example, a medical professional may conclude that a disease or disability existed or started at a particular time based on an absence of evidence of signs or symptoms of the condition before that time.''

One commenter objected to the statement in proposed § 5.260(c) which states that once a presumption has been rebutted, VA can no longer grant presumptive service connection. The commenter believes the statement is not true in all cases, and suggests that if the veteran provides medical or lay evidence, it would be possible for the veteran to establish service connection on a presumptive basis. As an example, the commenter proposes a situation where VA reviews available medical records and finds the evidence rebuts the presumption of service connection because the veteran has not received a credible diagnosis of the disease for which he or she is claiming presumptive service connection. The commenter proposes that if the veteran later obtains a credible medical opinion diagnosing the veteran with the presumptive disease, the veteran should be entitled to presumptive service connection.

We propose not to make any changes based on this comment. In the hypothetical situation posed by the commenter, the absence of a credible diagnosis of the claimed disease does not serve to rebut the presumption of service connection. In that situation, the presumption never arose because the existence of the claimed condition is one of the underlying facts necessary to give rise to the presumption. If the veteran subsequently presents evidence sufficient to prove that he or she did in fact suffer from a disease for which VA may grant presumptive service connection, then the presumption will apply.

In any event, no scenario allows VA to grant presumptive service connection after the evidence rebuts the presumption. The commenter is correct that if VA rebuts the presumption of service connection for a disease, the veteran is entitled to bring forth evidence supporting service connection. However, service connection established in this manner is granted under 38 U.S.C. 1110 (generally referred to as ''direct'' service connection) and is not presumptive service connection. If the presumption of service connection is rebutted, a veteran may still establish service connection by filing evidence showing the onset of the disease in service, or by any other method provided by these regulations.

In NPRM AM07, we changed ''symptomatology'' to ''signs or symptoms'' consistent with current medical terminology. For consistency, we propose to do the same in § 5.260 and throughout part 5. In paragraph (b)(1), we propose to change ''symptomatology'' to ''signs or symptoms''. In (b)(2), we propose to replace the phrase ''physical findings and symptomatology'' with ''signs or symptoms''. The term ''signs'' is equivalent to ''physical findings''. Moreover, we intend this rule to include mental as well as physical signs.

In initially proposed paragraph (c)(2), we stated, ''For example, a medical professional may conclude that a disease or disability existed or started at a particular time based on an absence of evidence of symptoms of the condition.'' We now propose to insert ''signs or'' before ''symptoms''. We also propose to insert ''before that time'' at the end of the sentence to clarify when an absence of signs or symptoms is relevant.

In initially proposed § 5.260(a) and (c) we omitted reference to § 5.263, ''Presumption of Service Connection for Non-Hodgkin's Lymphoma Based on Service in Vietnam''. In reviewing the presumption regulations to respond to comments, we have noted that there is no reason to exclude § 5.263 from these provisions. We recognize that 38 CFR 3.313 contains no rebuttal provision but we do not believe that an irrebuttable presumption would be consistent with title 38 to the extent it would authorize benefits for a disease shown by clear evidence to be unrelated to service or to be attributable to the veteran's willful misconduct. We therefore propose to include § 5.263 in paragraphs (a) and (c).

§ 5.261 Certain Chronic Diseases VA Presumes Are Service Connected

In reviewing the initially proposed regulation, we noted that we included the phrase, ''from a qualifying period of service'', in § 5.261(a)(1), but not in § 5.261(a)(2). To ensure that readers are aware that the presumptions apply only after a period of qualifying service, we propose to revise § 5.261(a)(2) to include the phrase, ''after a qualifying period of service''. In § 5.261(a)(1), we propose to change the term, ''a year'' to ''1 year'' to ensure consistency throughout our regulations.

In initially proposed § 5.261(c), based on current §§ 3.307(a)(2) and 3.308(a), we stated, ''In claims based on service ending before December 7, 1941, for purpose of determining whether a chronic disease manifested within a presumptive period under this section,

the date of separation from wartime service will be the date of discharge or release during a war period, or if service continued after the war, the end of the war period.'' We have determined that this paragraph is erroneous because veterans whose service ended before that date get no presumption of service connection for chronic disease. Therefore, there can be no ''date of separation from wartime service'' for a pre-December 7, 1941 veteran ''for the purpose of determining whether a chronic disease manifested within a presumptive period.'' We therefore propose to remove paragraph (c) and redesignate the remaining paragraphs of § 5.261 accordingly.

One commenter suggested that VA include a statement clarifying that the chronic diseases listed in initially proposed § 5.261(d) (now (c)) are the only conditions that will be considered chronic. Currently, § 3.307(a) states that no condition other than one listed in § 3.309(a) will be considered chronic. In addition, 38 U.S.C. 1101(3) contains a list of chronic diseases and includes ''such other chronic diseases as the Secretary may add to this list'', which strongly implies that the list should be considered exclusive absent action by the Secretary. The commenter believes that stating that the list of chronic diseases in § 5.261(d) is exclusive will prevent any misconception that VA has the ability to establish presumptive service connection for any disease which appears no later than 1 year after leaving service. The commenter concluded that nothing prevents VA from stating the list of chronic conditions in § 5.261(d) is exclusive.

We agree and propose to include the sentence, ''Only conditions listed in this section are chronic for purposes of this section.'' The commenter is correct that only the conditions listed in § 5.261(d) will be considered chronic for purposes of presumptive service connection under § 5.261.

One commenter suggested that for clarity, § 5.261(d) should use the words ''acute and transitory'' instead of simply using ''acute''. The commenter states that the ''acute and transitory'' language is ''consistent with long-standing VA parlance regarding how it adjudicates claims based on chronic conditions.'' Although VA has previously used the term ''acute and transitory'' in decisions, it is not consistent with current VA terminology used in adjudicating claims based on chronic conditions. The word ''transitory'' is not found in any regulation in either part 3 or part 4 of title 38 CFR. Nor is it found in ''Dorland's Illustrated Med. Dictionary'' (31st ed. 2007). Moreover, ''acute'' and ''transitory'' both suggest brief duration, so that ''transitory'' does not add to the meaning of the rule. For these reasons, we propose to make no changes based on this comment.

Initially proposed § 5.261(d) is based on § 3.307(b) and contains an exclusive list of the diseases VA considers chronic for purpose of presumptive service connection. One commenter stated that this section would ''authorize adjudicators to determine that a chronic disease which has manifested to a compensable degree and which is under consideration for service connection is not chronic.'' The commenter stated that VA has no lawful authority to make an independent factual determination contrary to the command of 38 U.S.C. 1101(3), which lists chronic diseases for purposes of disability compensation.

However, 38 U.S.C. 1101(3) only defines what are considered to be chronic diseases; it does not contain any requirement that service connection be granted for the listed diseases. The requirement to grant presumptive service connection for chronic diseases is found in 38 U.S.C. 1112(a), which states that a chronic disease will be considered to have been incurred in or aggravated by such service. The authority to rebut a presumption of service connection is found at 38 U.S.C. 1113(a), which states that ''where there is affirmative evidence to the contrary, or evidence to establish that intercurrent injury or disease . . . has been suffered . . . service-connection . . . will not be in order.'' The wording in initially proposed § 5.261(c) is a restatement of the previous wording used in § 3.307(b), which states, ''Unless the clinical picture is clear otherwise, consideration will be given as to whether an acute condition is an exacerbation of a chronic disease.'' As initially proposed, § 5.261(d) restated this principle as, ''Unless the clinical picture clearly shows the condition was only acute, VA will consider whether an acute condition was an exacerbation of a chronic disease.'' Based on the comment, we understand that the proposed rule could be misunderstood to authorize VA to treat a chronic condition as if it were acute. Neither the statute nor the current regulation authorize such treatment, and we did not propose to create such authorization in § 5.261(d). Hence, we propose to revise the sentence so that it more closely follows the language of the current regulation.

We received four comments stating that our proposed rule regarding the presumption of service connection for aggravation of certain chronic diseases and diseases associated with exposure to certain herbicide agents in proposed §§ 5.261(d) and 5.262(e) is contrary to the holding of the U.S. Court of Appeals for the Federal Circuit in *Splane* v. *West,* 216 F.3d 1058 (Fed. Cir. 2000), and otherwise not in accordance with 38 U.S.C. 1112(a) and 1116(a). The comments asserted that the statutes do not limit the degree to which a pre-existing condition must be disabling prior to entry in order for the presumption of aggravation to apply; that the statute does not provide that a disease must ''first'' become manifest during the presumptive period; and that 38 U.S.C. 1112(a) and 1116(a) should be interpreted to provide a presumption of aggravation of the listed diseases if the degree of disability increases by any degree during the applicable presumptive period (for example, from 20 percent disabling to 30 percent disabling).

Additionally, a commenter suggested that the treatment of preexisting conditions under 38 U.S.C. 1112(a) and 1116(a) conflicts with the treatment of preexisting conditions under 38 U.S.C. 1153, the general presumption of aggravation. Commenters asserted that VA could not arbitrarily apply different rules to veterans who had preexisting disabilities that were aggravated by service than to veterans who had no preexisting disabilities. One commenter suggested that the only difference is the ''formality'' that the underlying pathology had its inception prior to service rather than during service.

By way of background, 38 U.S.C. 1153 provides a presumption that ''[a] preexisting injury or disease will be considered to have been aggravated by active military . . . service, where there is an increase in disability during such service.'' The presumptions at issue in proposed §§ 5.261 and 5.262, however, are based on 38 U.S.C. 1112(a) and 1116(a), which provide a presumption for conditions that manifest to a degree of disability of 10 percent or more during a specified period of time after service.

In the *Splane* case, the Federal Circuit examined whether the post-service presumptive period in 38 U.S.C. 1112(a) could cover a preexisting condition. The Federal Circuit held that the words ''or aggravated by'' in paragraph (a) required application of the presumption of aggravation of a chronic disease to a veteran whose chronic disease existed but was not compensable prior to service, regardless of VA's ''not altogether unpersuasive'' argument that those words were a vestige of an earlier provision that was long ago rendered obsolete. *Splane,* 216 F.3d at 1069. The court found it ''unreasonable to assume

that Congress did not anticipate the possibility that a veteran, who had nonsymptomatic M[ultiple] S[clerosis] before service, might be exposed to such aggravating conditions during service that he would become disabled to a compensable degree after service.'' Id.

Our proposed part 5 regulations specifically accounted for this possibility by presuming that a chronic disease or a disease associated with herbicide exposure is presumed to have been aggravated during service if the disease manifests to a compensable degree within the applicable presumptive period. Proposed § 5.261(d) stated that VA cannot presume service connection when the evidence shows that the disease existed prior to military service to a degree of 10 percent or more disabling.

Section 5.262(e) used nearly identical language. We explained our rationale in the NPRM, as follows:

> The Federal Circuit held that the words ''or aggravated by'' indicate that Congress meant section 1112(a) to apply to those situations where multiple sclerosis predated entry into the service and became disabling to a compensable degree within the presumptive period following service. The ''or aggravated by'' language also appears in 38 U.S.C. 1116(a)(1)(B), which provides the authority for the presumptions based on herbicide exposure. Therefore, we propose to add language to clarify that presumptions may apply to a listed disease that preexisted service but first became manifest to a degree of 10 percent or more within the presumptive period following service.

69 FR 44620, July 27, 2004.

Limiting §§ 5.261 and 5.262 presumptions to situations where the condition was not manifest to a degree of 10 percent or more disabling before service is not arbitrary, unfair, or beyond VA's statutory authority. Under 38 U.S.C. 1112(a)(1), VA must presume service connected ''a chronic disease becoming manifest to a degree of 10 percent or more disabling within one year from the date of separation from . . . service,'' and 38 U.S.C. 1116(a) similarly creates a presumption based on manifestation of a disease to a degree of 10 percent or more disabling within the presumptive period. Use of a 10 percent threshold would not make sense if a preexisting disease manifest to a degree of 10 percent or more disabling prior to service could trigger the presumption because the disease would already have reached the threshold before service. If Congress had intended to also presume aggravation for a veteran who already had a disease manifest to a compensable degree prior to service, the law could have been written to presume service connection for a disease that ''worsens by 10 percent or more,'' rather than one that ''becom[es] manifest'' to such a degree. Finally, we note that most of the diseases that are considered chronic are diseases that, had they been symptomatic prior to service, would have likely rendered the person ineligible for service. In fact, several of the conditions are so disabling that their symptoms cannot even be rated as merely 10 percent disabling. For example, the first signs of multiple sclerosis are rated at 30 percent under 38 CFR 4.124a, Diagnostic Code 8018. It is unlikely that VA will receive claims from persons who were compensably disabled before service, and our experience has not shown this to be a problem under the current regulations.

Lastly, we note that the *Splane* court did not address the type of case described by the commenters: where a disability was already manifest to a degree of disability of 10 percent or more prior to service. The commenters urge VA to adopt an interpretation of 38 U.S.C. 1112 far beyond that which the *Splane* court provided. For the reasons stated above, we propose to make no changes based on these comments.

One commenter also had a comment related to the following sentence in the NPRM:

> We note that if the condition preexisted service to a degree of 10 percent, for example, and after service the condition was 20 percent disabling, the veteran may be able to establish service connection using the presumption of aggravation in 38 U.S.C. 1153.

69 FR 44620, July 27, 2004.

The commenter noted that 38 U.S.C. 1153 only applies to increases in disability during service. Therefore, this statement would not be correct with respect to increases in disability within the presumptive period. The commenter is correct that 38 U.S.C. 1153 only applies to aggravation during service. We clarify this statement by noting that when we said ''after service'', we meant immediately after service.

The commenter stated that in some cases, VA would presume that a disease in a state of remission or inactivity was disabling to a degree of 10 percent at entry, while a draft rule for service connection indicates that VA would deny service connection for lack of current disability if a disease was in remission. The commenter objects to this dual standard for cases when diseases are in remission.

We propose to make no changes based on this comment. The provision the commenter discussed from the draft rule for service connection does not address this situation since that concerns direct service connection and not establishment of service connection through the use of the presumptions. Additionally, if there is no current disability, service connection cannot be established. Also, Congress in 38 U.S.C. 1112, mandated that the disease must manifest to a degree of 10 percent or more disabling before VA may presume service connection. A disease that is in remission and is not manifest to a degree of 10 percent or more disabling may not be service connected under the presumptions of service connection provisions.

§ 5.262 Presumption of Service Connection for Diseases Associated With Exposure to Certain Herbicide Agents

In our initially proposed regulations on presumptions of service connection, we changed the wording found in §§ 3.307(a) and 3.317(c)(3), ''. . . [certain diseases] will be considered to have been incurred in or aggravated by service . . .'' to ''VA will presume service connection [for certain diseases] . . .'' We proposed this language in several part 5 regulations: §§ 5.262(a)(2), 5.264(b) and (c), 5.265(a) and (d), 5.267(a), and 5.268(b). This attempt to use simpler language resulted in a technical error because under its authorizing statutes, VA service connects disability or death, not injury or disease *per se*. We therefore propose to correct these sections to reflect that the diseases listed will be considered to have been incurred in or aggravated by service.

We received four comments regarding the proposed definition of ''Service in the Republic of Vietnam'' in § 5.262(a)(1) for purposes of the presumption of service connection for diseases associated with exposure to certain herbicide agents. As proposed, § 5.262(a)(1) stated:

> For purposes of this section, ''Service in the Republic of Vietnam'' does not include active military service in the waters offshore and service in other locations, but does include any such service in which the veteran had duty in or visited in the Republic of Vietnam, which includes service on the inland waterways.

69 FR 44626, July 27, 2004.

Three commenters objected to the exclusion of service in the waters offshore Vietnam in the definition of ''Service in the Republic of Vietnam'' for purposes of § 5.262. One commenter stated that when Congress refers to a country by its name in a statute, it is referring to the entire country, including the entire area over which a country has

sovereignty. This would, under the 1982 United Nations Convention on the Law of the Sea, 21 I.L.M. 1261, include the territorial sea which extends up to twelve miles beyond the land territory of Vietnam. All three commenters support this proposition with an example of the service required to receive the Vietnam Service Medal. Executive Order 11231, July 8, 1965, provides that the ''Vietnam Service Medal shall be awarded to members of the armed forces who serve in Vietnam or contiguous waters or air space''. The commenters believe that the definition of ''Service in the Republic of Vietnam'' provided in § 5.262(a)(1) is contrary to the ordinary and common meaning of the phrase. Therefore, the commenters believe there is no reason to believe that Congress intended to exclude the territorial sea when it drafted 38 U.S.C. 1116.

We propose to make no changes based on these comments. These comments are adequately addressed by *Haas* v. *Peake,* 425 F.3d 1168 (Fed. Cir. 2008); the notice proposing to rescind, and the notice actually rescinding, the VA manual provision cited in *Haas,* 72 FR 66218, Nov. 27, 2007 and 73 FR 20363–65, Apr. 15, 2008; and the proposed revision to 38 CFR 3.307(a)(6)(iii), 73 FR 20566–71, Apr. 16, 2008 (withdrawn by 74 FR 48689, Sept. 24, 2009). We incorporate by reference the rationales set forth therein, and do not reiterate them here.

However, we do propose to revise initially proposed § 5.262(a)(1) so that it more clearly conveys the requirement that the veteran have served ''on land, or on an inland waterway, in the Republic of Vietnam.''

On May 7, 2009, VA published Final Rule RIN 2900–AN01, ''Presumptive Service Connection for Disease Associated With Exposure to Certain Herbicide Agents: AL Amyloidosis'', which stated the Secretary's determination of ''a positive association between exposure to herbicide agents and the occurrence of AL amyloidosis'' and added that disease to 38 CFR 3.309(e). 74 FR 21258. Therefore, we now propose to include AL amyloidosis in § 5.262(e) in accordance with the Secretary's finding.

On August 31, 2010, VA published RIN 2900–AN54, ''Diseases Associated With Exposure to Certain Herbicide Agents (Hairy Cell Leukemia and Other Chronic B-Cell Leukemias, Parkinson's Disease and Ischemic Heart Disease)'' which stated the Secretary's determination of ''a positive association between exposure to herbicide agents and the occurrence of those diseases'' and added those diseases to 38 CFR 3.309(e). 75 FR 53202. Therefore, we now propose to include them in § 5.262(e) in accordance with the Secretary's finding.

We propose to change the term ''acute and subacute peripheral neuropathy'' in § 5.262 and instead use the term ''early-onset peripheral neuropathy''. Additionally, we have removed note \1\ which provided that peripheral neuropathy must resolve within 2 years of onset. This conforms to changes made in part 3. 78 FR 54763, Sept. 6, 2013.

§ 5.263 Presumption of Service Connection for Non-Hodgkin's Lymphoma Based on Service in Vietnam

One commenter believed that proposed § 5.263, which was based on § 3.313 with minor changes, was unnecessary. Proposed § 5.263 provides for presumptive service connection for non-Hodgkin's lymphoma based on service in Vietnam. The commenter asserted that anyone eligible for presumptive service connection under § 5.263 would also be eligible for presumptive service connection under § 5.262 and it is therefore unnecessary to have § 5.263.

We propose to make no changes based on this comment. We agree with the commenter that many of the veterans entitled to presumptive service connection under § 5.263 may also be entitled to presumptive service connection under § 5.262. However, there are differences between §§ 5.262 and 5.263 that require two separate rules. Therefore, we propose to retain § 5.263 in our final rule. One difference is in the definition of what constitutes ''service in Vietnam''. *See* VA General Counsel's Opinion, VAOPGCPREC 27–97, 62 FR 63604 (Dec. 1, 1997). Specifically, the definition of ''service in Vietnam'' in § 5.263 includes service in the waters offshore Vietnam, whereas the definition in § 5.262 specifically excludes such service from the definition of ''service in the Republic of Vietnam''. Another difference is that § 5.262 provides for determining presumptive exposure to herbicides due to service in the Republic of Vietnam while § 5.263 provides for service connection for non-Hodgkin's lymphoma without regard to possible exposure to herbicides in the Republic of Vietnam.

§ 5.264 Diseases VA Presumes Are Service Connected in a Former Prisoner of War

On June 30, 2006, VA published in the **Federal Register** an addition to § 5.264, ''Diseases VA presumes are service connected in former prisoners of war'', adding atherosclerotic heart disease or hypertensive vascular disease (including hypertensive heart disease) and their complications (including myocardial infarction, congestive heart failure, and arrhythmia) and stroke and its complications to the diseases VA presumes are service connected in former prisoners of war. 71 FR 37793, June 30, 2006. No comments were received concerning this addition. Proposed § 5.264 is revised from the version published in the NPRM, by adding these conditions to the list of diseases. 69 FR 44614, July 27, 2004.

Section 106 of Public Law 110–389, 122 Stat. 4145, 4149 (2008), amended 38 U.S.C. 1112(b)(2) by adding a new subparagraph (F) that creates a presumption of service connection for osteoporosis that becomes manifest to a degree of 10 percent for prisoners of war (POWs) if the Secretary determines that the veteran has posttraumatic stress disorder (PTSD). On August 28, 2009, VA published an amendment in the **Federal Register** to § 3.309(c), applying Public Law 110–389. 74 FR 44288. This amendment also implements a decision by the Secretary to establish a presumption of service connection for osteoporosis that becomes manifest to a degree of 10 percent for POWs if the veteran was interned for more than 30 days. This presumption is based on scientific studies. These changes have been incorporated into proposed § 5.264(b) and (c).

§ 5.265 Tropical Diseases VA Presumes Are Service Connected

In initially proposed § 5.265(d), we stated, ''For any disease service connected under this section, VA will also service connect the resultant disorders or diseases originating because of therapy administered in connection with such a disease or as a preventative measure against such a disease.'' We have determined that this sentence is redundant of the basic rule on secondary service connection contained in § 5.246, ''Secondary service connection—disabilities that are due to or the result of service-connected injury or disease.'' Therefore, we propose to remove this sentence from § 5.265(d).

One commenter suggested a minor clarifying change to § 5.265(e). The commenter suggested revising the sentence stating that ''Residence during the applicable presumptive period where the particular disease is endemic may also be considered evidence to rebut the presumption'', to refer to ''post-service'' residence. The commenter recognized that this addition would be redundant (because the presumptive period is post-service), but

opined that it would nevertheless make the rule clearer for the average lay person. We agree that, while redundant, this minor change could be beneficial to readers. Therefore, we propose to change § 5.265(e) to refer to ''[p]ost-service residence''.

One commenter objected to the requirement in § 5.265(f) that would require a tropical disease to manifest to a degree of 10 percent or more disabling within the presumptive period in order for the disease to be presumptively service connected. The commenter noted that the statutory authorization for this presumption, 38 U.S.C. 1133, provides no minimum degree of manifestation for the presumption of service connection to apply for veterans with peacetime service before January 1, 1947. The commenter is correct. We propose to revise § 5.265(f) so that it no longer contains the 10 percent requirement.

Moreover, we discovered that we mistakenly used the term ''existed'', rather than ''manifested'', in initially proposed § 5.265(f). This language was taken from 38 CFR 3.308(b), but it does not appear in any other presumption regulation in part 5. Therefore, in order to ensure consistency with the other presumption regulations in part 5, we propose to replace ''existed'' with ''manifested''.

We also propose to change the term ''accepted medical treatises'' to ''accepted medical literature'' throughout this section because ''treatise'' is a specific type of scholarly literature, specifically ''a systematic exposition or argument in writing including methodical discussion of the facts and principles involved and conclusions reached.'' ''Merriam-Webster's Collegiate Dictionary'' 1258 (10th ed. 1998). ''Accepted medical literature'' is a broader class of literature, sufficiently authoritative and more accessible to claimants than are ''treatises''. We propose to make the same change in § 5.266, Disability compensation for certain qualifying chronic disabilities.

§ 5.266 Disability Compensation for Certain Qualifying Chronic Disabilities

We propose to reorganize and make technical corrections to initially proposed § 5.266. We would reorganize this section as follows. Initially proposed paragraph (a) stated that VA will compensate veterans for a qualifying chronic disability and defined that term. Initially proposed paragraphs (b) and (c) defined undiagnosed illness and medically unexplained chronic multisymptom illness, respectively. Paragraph (f) would contain the general definitions that apply to all types of qualifying chronic disabilities.

We propose to move initially proposed paragraph (a)(1)(ii), which stated, ''By history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis.'' This paragraph would apply only to undiagnosed illnesses, not to other qualifying chronic disabilities, so we propose to move it into new paragraph (b), which would describe undiagnosed illnesses.

For purposes of accuracy, we propose to change the title of the regulation from ''Compensation for certain disabilities due to undiagnosed illnesses'' to ''Disability compensation for certain qualifying chronic disabilities''.

Since publication of the AL70 NPRM, VA published a Final Rule VA that made technical revisions to 38 CFR 3.317 to clarify that adjudicators have the authority to determine whether diseases in addition to the three listed in 38 U.S.C. 1117 qualify as medically unexplained chronic multisymptom illnesses in addition to the three that are listed in 38 U.S.C. 1117. 75 FR 61995, Oct. 7, 2010. VA subsequently published a final rule that replaced ''irritable bowel syndrome'' with ''functional gastrointestinal disorders''. 76 FR 41696, Jul. 15, 2011. We propose to incorporate these regulatory amendments into § 5.266.

Current 38 CFR 3.317(c) describes situations in which the presumptions in that section will be considered rebutted. We note that § 3.307(d) (the basis for initially proposed § 5.260(c)) already contains this same rebuttal information as it applies to the various presumptions listed in § 3.309, but not to § 3.317. We now propose to expand the scope of § 5.260(c) to include § 5.266 and 5.271. To avoid duplication, we propose to exclude the duplicate provisions from § 5.266 and 5.271.

§ 5.267 Presumption of Service Connection for Conditions Associated With Full-Body Exposure to Nitrogen Mustard, Sulfur Mustard, or Lewisite

One commenter asserted that the proposed rule would have changed the current rule, § 3.316, which the commenter said requires direct service connection for exposure to mustard gas and Lewisite, to a rule that would establish presumptive service connection based on such exposure. The commenter questioned whether VA has the authority to create a new class of presumptive conditions. The commenter stated that the wording of proposed § 5.267(a) should be amended to provide for direct service connection, rather than presumptive service connection.

The commenter is incorrect that VA grants direct service connection under § 3.316. Although the regulation text does not explicitly state so, § 3.316 grants presumptive service connection and not direct service connection. The regulation presumes a medical nexus between full-body exposure to mustard gas or Lewisite and the listed diseases, thereby establishing a presumption as described in § 5.260(a).

We also note that our authority to create presumptions is explicitly set forth in 38 U.S.C. 501(a)(1), under which the Secretary may prescribe ''regulations with respect to the nature and extent of proof and evidence . . . in order to establish the right to benefits''. As we noted in the preamble to the NPRM, the Secretary exercised this authority when he first promulgated § 3.316. 69 FR 44614, July 27, 2004.

We propose to revise the sentence preceding the table in § 5.267(b) so it is a complete sentence instead of a phrase and so it is consistent with other table introductions used in this regulation. We also propose to change ''condition'' in paragraph (a)(2) to ''injury or disease'' to be consistent with paragraph (b). In the table, we propose to change ''disease or disability'' to ''injury or disease'' for the same reason.

§ 5.268 Presumption of Service Connection for Diseases Associated With Exposure to Ionizing Radiation

In initially proposed § 5.268 we inadvertently failed to include the provisions of current 38 CFR 3.309(d)(3)(ii)(E). We propose to correct this omission by inserting § 5.268(c)(6), which is virtually identical to current § 3.309(d)(3)(ii)(E).

§ 5.269 Direct Service Connection for Diseases Associated With Exposure to Ionizing Radiation

In reviewing the comment received regarding this section, we have determined that both 38 CFR 3.311 and initially proposed § 5.269 use several different terms interchangeably or inconsistently. For example they refer to dose estimates as ''dose assessments,'' ''dose information,'' and ''dose data''. We propose to remedy this problem by using the phrase ''dose assessment'' throughout § 5.269.

In initially proposed § 5.269(c)(3), we stated, ''Neither the veteran nor the veteran's survivors may be required to produce evidence substantiating exposure if the information in the veteran's service records or other records maintained by the Department of Defense is consistent with the claim

that the veteran was present where and when the claimed exposure occurred.'' Current § 3.311(a)(4) actually limits the scope of this provision to only ''cases described in paragraph (a)(2)(i) and (ii) of this section'' (those involving atmospheric nuclear weapons test participation and Hiroshima and Nagasaki occupation). We inadvertently omitted this scope limitation in the initially proposed rule and we not propose to insert it in § 5.269(c)(3).

In initially proposed § 5.269(b), we omitted, without explanation, a number of cancers listed in current 38 CFR 3.311(b)(2): thyroid cancer; breast cancer; lung cancer; liver cancer; skin cancer; esophageal cancer; stomach cancer; colon cancer; pancreatic cancer; kidney cancer; urinary bladder cancer; salivary gland cancer; multiple myeloma; ovarian cancer; cancer of the rectum; and prostate cancer. We omitted these because they are subsumed within the meaning of the phrase, ''Cancer (any other not listed)'' in initially proposed paragraph (b)(2) (based on the phrase, ''Any other cancer'' in current § 3.311(b)(2)(xxiv)). We provide this explanation now, to assure the public that the fact that these cancers are not specifically referenced in the part 5 rule does not represent VA's intent to alter the applicability of the presumption that the diseases in some cases were caused by exposure to ionizing radiation.

In initially proposed paragraph (c)(5)(iii) (now redesignated as (d)(2)(iii)) we referred to an estimated dose of ''zero rem gamma''. The word ''gamma'' is not in § 3.311 and we propose to remove it because it would improperly narrow the scope of this paragraph.

In initially proposed paragraph (d)(1) (now redesignated as paragraph (c)(1)(iii)), we stated, ''If neither the Department of Defense nor any other source provides VA with records adequate to permit the Under Secretary to prepare a dose estimate, then VA will ask the Department of Defense to provide a dose estimate.'' We stated in the preamble that this provision would reflect the fact that it is impossible to estimate the likelihood that ionizing radiation exposure caused a claimed condition in the absence of a numerical ionizing radiation dose estimate and that VA would be unable to prepare a dose estimate if it has not received any records on which to base such an estimate.

Upon review of this provision, we have determined that it does not accurately reflect VA's procedures in such cases. Moreover, it would be impracticable to request dose assessments from the Department of Defense (DoD) in these cases. This is because if DoD lacked records adequate to permit the Under Secretary for Health to prepare a dose assessment, then presumably DoD would likewise be unable to do so. For this reason, we propose to remove this provision.

In initially proposed paragraph (f), now redesignated as paragraph (g), we stated, ''With regard to any issue material to consideration of a claim, the provisions of § 3.102 of this title apply (any reasonable doubt on any issue will be resolved in favor of the claimant).'' In proposed § 5.3, we state, ''When the evidence is in equipoise regarding a particular fact or issue, VA will give the benefit of the doubt to the claimant and the fact or issue will be resolved in the claimant's favor.'' Since this provision applies to all VA claims, there is no need to repeat it in this paragraph and so we propose to remove it.

We received one comment stating that part of initially proposed § 5.269(g), now redesignated as paragraph (h), is unnecessary. The commenter believes that there is no danger of service connection being established for a disease due to radiation exposure if the disease is due to the abuse of alcohol or drugs. The commenter believes that since § 5.269 requires competent evidence and a decision by the Under Secretary of Benefits that it is at least as likely as not that the veteran's disease resulted from ionizing radiation in service, a disease due to the abuse of alcohol or drugs could not possibly be service connected under § 5.269.

We agree that the language regarding abuse of alcohol or drugs is unnecessary in § 5.269(h) and propose to remove it. Section 5.662, ''Alcohol and drug abuse'', already bars an award of service connection for disabilities resulting from such abuse. For the same reason, we propose to remove such language from § 5.266(c)(3).

In initially proposed § 5.269(g), now redesignated as paragraph (h), we referred to ''a supervening, nonservice-related condition or event [that] is more likely the cause of the disease'' but failed to say more likely than what. We propose to clarify this by adding ''than was exposure to ionizing radiation in service'' so that the sentence will read: ''In no case will service connection be established if evidence establishes that a supervening condition or event unrelated to service is more likely the cause of the disease than was exposure to ionizing radiation in service.''

In addition to the changes described above, we also propose to make minor changes in format and wording for clarity and readability.

§ 5.270 Presumption of Service Connection for Amyotrophic Lateral Sclerosis

Since publication of the AL70 NPRM, VA published a Final Rule creating a presumption of service connection for amyotrophic lateral sclerosis, which was codified as 38 CFR 3.318. 73 FR 54693, Sept. 23, 2008. We propose to add the text of § 3.318 as new § 5.270, with one revision: rather than restate the rebuttal standards already contained in § 5.260(c), we simply referenced that paragraph.

§ 5.271 Presumption of Service Connection for Infectious Diseases

Since publication of the AL70 NPRM, VA published a final rule creating presumptions of service connection for nine infectious diseases, which was codified as 38 CFR 3.317.75 FR 59968, Sept. 29, 2010. Infectious diseases are not actually within the definition of ''qualifying chronic disability,'' which is the purported subject of the regulation. Removing those provisions to a separate section will make the rules easier to comprehend and follow. We propose to incorporate these regulatory amendments into § 5.271.

Omission of § 3.379, Anterior Poliomyelitis, From Part 5

We received two comments relating to the initial proposal in the NPRM not to repeat § 3.379 in part 5. This section concerned service connection of the disease anterior poliomyelitis. One commenter agreed with the proposal. Another commenter disagreed with both the proposal and VA's rationale for removing it.

We proposed not to include § 3.379 because it is unnecessary in light of the operation of proposed § 5.261 regarding the presumption of service connection for chronic diseases. 69 FR 44623, July 27, 2004. Congress specified myelitis as a chronic disease under 38 U.S.C. 1101(3), and anterior poliomyelitis is a subcategory of myelitis. The general rules of presumptive service connection for chronic diseases under § 5.261 would apply to anterior poliomyelitis and any veteran who would be service connected under § 3.379 would also be service connected under § 5.261. Therefore, we concluded that § 3.379 was unnecessary and we proposed not to include it in part 5. We propose to make no changes based on these comments.

One commenter stated that it is not proper to apply the general presumption of service connection to poliomyelitis without taking into account the known medical facts, specifically, that

poliomyelitis is a disease for which the exact cause and date of onset can be ascertained.

The commenter also detailed the three possible outcomes of a poliomyelitis infection. First, there is nonparalytic poliomyelitis, which is an acute illness, which resolves with no chronic or permanently disabling residuals. Nonparalytic poliomyelitis may properly be denied service connection on that basis. Second, there is paralytic poliomyelitis. The commenter notes that the date of the antecedent illness for paralytic poliomyelitis is crucial. If it occurs no later than 35 days after separation from service, it must have occurred in service, but if it occurs more than 35 days after separation from service, it must have occurred after service (therefore rebutting the presumption of service connection). Finally, there is paralytic poliomyelitis without apparent antecedent illness. In this case, it is a matter for medical determination and opinion as to the most probable date of exposure. If the medical evidence is inconclusive, then the presumption of service connection for myelitis should apply.

We propose to make no changes based on this comment. The general rule for presumption of service connection for chronic diseases in § 5.261 would provide accurate results for all the situations the commenter described, including rebuttal by medical evidence of the type the commenter described.

First, regarding nonparalytic poliomyelitis, because this disease cannot possibly be 10 percent or more disabling, the presumption of service connection under § 5.261 cannot apply in these cases.

Second, regarding paralytic poliomyelitis, direct service connection may be established in the majority of cases based on medical knowledge that the illness occurs no later than 35 days after exposure. Where direct service connection is denied based on the fact that the illness occurred more than 35 days after separation from service, the presumption of § 5.261 will be considered. However, the presumption of service connection will be rebutted under the provisions of § 5.260(c)(1)(iii) because there will be a preponderance of evidence (based on fact-based medical evidence and the date symptoms first occurred) establishing that the disease was not incurred in service.

Finally, with respect to paralytic poliomyelitis without apparent antecedent illness as described by the commenter, where direct service connection is not in order, VA will consider the presumption of service connection for myelitis as a chronic disease. However, the Centers for Disease Control and Prevention reports that all forms of poliomyelitis have an incubation period of 3 to 35 days, so a fact-based medical opinion would be needed to establish the approximate date of onset. Poliomyelitis, Centers for Disease Control and Prevention 232, Poliomyelitis, *http://www.cdc.gov/vaccines/pubs/pinkbook/downloads/polio.pdf*, last viewed Sept. 15, 2009.

Technical Corrections

One commenter noted that in one part of the NPRM preamble, we ''reserved'' § 5.263, but elsewhere in the NPRM we proposed to repeat § 3.313 as § 5.263. The commenter felt that this was confusing. This was an error that we now propose to correct. We propose to create a new § 5.263 that has the same wording as § 3.313, except for the changes discussed in the preamble of the NPRM. We have corrected this in this proposed rule.

C. Rating Service-Connected Disabilities

§ 5.280 General Rating Principles

Initially proposed § 5.280(b)(1), based on 38 CFR 3.321, stated that for *extra*-schedular ratings in unusual cases that to accord justice to the exceptional case where the Veterans Service Center (VSC) finds the schedular ratings to be inadequate, the Under Secretary for Benefits or the Director of the Compensation and Pension Service, upon VSC submission, is authorized to approve an extraschedular rating commensurate with the average impairment of earning capacity due exclusively to the service-connected disability or disabilities. Paragraph (b)(1) also stated that the governing norm in these exceptional cases is a finding that the application of the regular schedular standards is impractical because the case presents an exceptional or unusual disability picture with such related factors as marked interference with employment, or frequent periods of hospitalization.

One commenter suggested that to avoid injustice in a case where the VSC improperly fails to find that the schedular rating is inadequate, VA should revise § 5.280(b)(1) to read:

> To accord justice to the exceptional case, the Under Secretary for Benefits or the Director of the Compensation and Pension Service, is authorized to approve on the basis of the criteria set forth in this paragraph, an extra-schedular rating commensurate with the average impairment of earning capacity due exclusively to the service-connected disability or disabilities.

The commenter asserted that this suggested language is consistent with *Colayong* v. *West,* 12 Vet. App. 524, 536–37 (1999) and *Young* v. *Shinseki,* 22 Vet. App. 461, 470 (2009), which state that whether or not the VSC has, in the first instance, found the schedular rating to be inadequate, if it is inadequate it must be referred for an extra-schedular rating.

We note that the language of initially proposed 5.280(b)(1) was not substantively different from current § 3.321(b)(1), the regulation which was the basis for the courts' rulings in *Colayong* and *Young.* Those cases left undisturbed the requirement in § 3.321(b)(1) that extra-schedular review may be undertaken by the Under Secretary for Benefits or the Director, Compensation and Pension Service, only ''upon field station submission''. Rather, those cases held that the Board of Veterans' Appeals (Board) must adjudicate the issue of entitlement to an extraschedular evaluation, if the issue is raised by the evidence of record or by the appellant.

We do not believe it is necessary to incorporate this line of cases into part 5. Since the *Colayong* case was decided in 1999, the Board has been under the duty set out by the court and the Board's Veterans Law Judges are now well aware of this duty. Moreover, it would be outside the scope of part 5 to impose a duty on the Board via a part 5 regulation. We therefore propose to make no change based on this comment.

In reviewing proposed § 5.280 to respond to this comment, we have noted that it contains language (substantively the same as § 3.321(b)) that might confuse a reader. Specifically, proposed § 5.280(b)(1) stated, ''To accord justice to the exceptional case where the [VA] finds the schedular ratings to be inadequate, the [VA] is authorized to approve on the basis of the criteria set forth in this paragraph (b) an extra-schedular rating commensurate with the average impairment of earning capacity due exclusively to the service-connected disability or disabilities.'' The use of the plural ''disabilities'' might be misconstrued as allowing VA to approve an extra-schedular rating based partly on a disability for which the schedular rating is inadequate and partly on a disability for which the schedular rating is adequate, or to suggest that under § 5.280 VA must consider the combined effect of multiple disabilities in determining whether an extra-schedular award is appropriate.

VA never intended that § 3.321, nor initially proposed § 5.280, apply in either of those ways but rather that they be applied individually to each specific disability being evaluated. Therefore, we propose to use only the singular

form of ''disability'', and to replace the word ''case'' with ''disability'' in the second sentence of § 5.280(b)(1), to clarify this point. We also propose several other, non-substantive changes to improve readability of paragraph (b)(1).

§ 5.281 Multiple 0 Percent Service-Connected Disabilities

Initially proposed § 5.281 stated:

VA may assign a 10 percent combined rating to a veteran with two or more permanent service-connected disabilities that are each rated as 0 percent disabling under the Schedule for Rating Disabilities in part 4 of this chapter, if the combined effect of such disabilities interferes with normal employability. VA cannot assign this 10 percent rating if the veteran has any other compensable rating.

One commenter suggested that for clarity, the second word in this section should be changed from ''may'' to ''shall'' to emphasize the mandatory nature of assigning the combined rating. We agree with this suggestion but we use ''will'' instead of ''shall'' throughout part 5 because the former is easier for the public to understand. We therefore propose to change ''may'' to ''will'' in § 5.281.

§ 5.282 Special Consideration for Paired Organs and Extremities

Initially proposed § 5.282(c) stated that, ''If a veteran receives money or property of value in a judgment, settlement, or compromise from a cause of action for a qualifying nonservice-connected disability involving an organ or extremity described in paragraph (b) of this section, VA will offset the value of such judgment, settlement, or compromise against the increased disability compensation payable under this section.''

One commenter suggested that because the VA Schedule for Rating Disabilities does not provide compensation for non-economic loss, such as pain and suffering and loss of enjoyment of life, initially proposed § 5.282(c)(2) should calculate the offset of damages by first reducing the total amount recovered as damages by the amount received for pain and suffering and loss of enjoyment of life. The commenter also suggested that the amount paid for attorney fees and expenses for that recovery should be subtracted from the total amount recovered as damages.

The relevant statute, 38 U.S.C. 1151 does not allow VA to reduce the offset for any reason. Moreover, the purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.283 Total and Permanent Total Ratings and Unemployability

Initially proposed § 5.283(b) stated that, ''VA will consider a total disability to be permanent when an impairment of mind or body, that makes it impossible for the average person to follow a substantially gainful occupation, is reasonably certain to continue throughout the life of the disabled person.''

One commenter asserted that it is inconsistent for VA to provide that total disability is permanent only if it is reasonably certain to continue throughout the lifetime of the veteran when the Social Security Administration considers a total disability to be permanent if it is likely to continue for 1 year or lead to death. The commenter asserted that veterans should not have a higher threshold for permanency than Social Security Disability recipients.

The purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.300 Establishing Dependency of a Parent

In initially proposed § 5.300(b)(2)(ii), we stated, ''Net worth of a minor family member will be considered income of the parent only if it is actually available to the veteran's parent for the minor's support.'' This statement was erroneous and inconsistent with § 3.250(b)(2). In fact, a minor's net worth is not considered income. Rather it is considered as a separate matter from income. We therefore propose to revise paragraph (b)(2)(ii) to read, ''Net worth of a minor family member will be considered in determining dependency of a parent only if it is actually available to the veteran's parent for the minor's support.''

In initially proposed § 5.300 we also failed to address a minor's income. We therefore propose to add a new paragraph (b)(1)(iii) which states, ''Income of a minor family member from business or property will be considered income of the parent only if it is actually available to the veteran's parent for the minor's support.'' This is merely a plain language restatement of the § 3.250(b)(2) provision quoted above.

5.304 Exclusions From Income—Parent's Dependency

Following publication of proposed § 5.304 in AM07, VA published a rulemaking to implement the ''Caregivers'' provisions of Public Law 111–163. 76 FR 26148 (May 5, 2011). As we stated in the preamble, ''The stipend payments to Primary Family Caregivers under 38 U.S.C. 1720G(a)(3)(A)(ii)(V) constitute 'payments [of benefits] made to, or on account of, a beneficiary' that are exempt from taxation under 38 U.S.C. 5301(a)(1). VA does not intend that the stipend replace career earnings.'' Consistent with that interpretation, we believe that this stipend should not be counted as income when determining parental dependency. We therefore propose to add this exclusion as § 5.304(l) and redesignate previous paragraph (l) as paragraph (m).

C. Special Ratings AL88

In a document published in the **Federal Register** on October 17, 2008, we proposed to revise Department of Veterans Affairs (VA) regulations governing special ratings, to be published in new 38 CFR part 5. 73 FR 62004. We provided a 60-day comment period, which ended December 16, 2008. We received a submission from one commenter.

§ 5.320 Determining Need for Regular Aid and Attendance

Current 38 CFR 3.352(c) states, ''The performance of the necessary aid and attendance service by a relative of the beneficiary or other member of his or her household will not prevent the granting of the additional allowance.'' Initially proposed § 5.320(a) inadvertently omitted this paragraph. We therefore propose to insert this provision, phrased in a clearer way, into § 5.320(a).

The commenter noted that initially proposed § 5.320(b) differs from current § 3.352(a), from which it derives. The current rule defines ''bedridden'' as ''that condition which, through its essential character, actually requires that the claimant remain in bed.'' The initially proposed rule defined bedridden as requiring that the claimant ''must remain in bed due to his or her disability or disabilities based on medical necessity and not based on a prescription of bed rest for purposes of convalescence or cure.'' The commenter asserted that the change of language ''may eliminate the possibility of using proof by lay testimony that remaining in bed is required.''

The need for aid and assistance or confinement to bed may be shown by

medical treatment records, medical opinions, and competent non-medical evidence based on personal observations. However, the relationship between service-connected disability and need for aid and attendance or confinement to bed as a result of a service-connected disability must be shown by medical treatment records and medical opinions.

VA will always accept and consider lay evidence, even if such evidence cannot be dispositive of a particular factual issue. The consideration of lay evidence in the context of a determination on whether a person is bedridden is no different that the consideration of lay evidence on the context of any other factual determination. Therefore, we propose not to include an instruction regarding lay evidence.

However, the comment revealed that the initially proposed rule was unclear about the meaning of the term ''bedridden''. Current § 3.352(a) states, ''The fact that . . . a physician has prescribed rest in bed for the greater or lesser part of the day to promote convalescence or cure will not suffice'' to establish bedridden status. The gist of this qualification is to distinguish the need to stay in bed unremittingly from a need to be in bed intermittently. It is the intermittency that distinguishes being in bed ''for the greater or lesser part of the day'' from being bedridden, not that convalescence or cure is the reason. If a doctor forbids a person to leave bed because of the person's medical condition, the person would be bedridden, whether the prescribed confinement was for convalescence, cure, or other reason. We propose to revise § 5.320(b) to preserve this point, consistent with § 3.352(a), by stating that the person who is bedridden ''must remain in bed due to his or her disability or disabilities based on medical necessity and not based on a prescription of periods of intermittent bed rest.'' Because the reason for the prescribed confinement is irrelevant, we propose to remove the phrase ''for purposes of convalescence or cure''.

The initially proposed rule required that, ''The individual is temporarily or permanently bedridden. . . .'' A person who is permanently bedridden logically meets the requirement that he or she is temporarily bedridden. Because being either temporarily or permanently bedridden satisfies the requirement of § 5.320(b), there is no need to qualify ''bedridden'' as either temporarily or permanently. We therefore propose to remove the phrase ''temporarily or permanently'' before ''bedridden''. However, a finding that a veteran is permanently bedridden is significant because such a veteran's special monthly compensation (SMC) will not be reduced based on hospitalization, as we explained in the preamble to the initially proposed rule. *See* 73 FR 62011, Oct. 17, 2008; *see* also proposed § 5.724, ''Payments and Adjustments to Payments'', 73 FR 65212, Oct. 31, 2008. The only statute that requires payment of SMC based on the ''permanently bedridden'' criterion is 38 U.S.C. 1114(*l*). Therefore, we have added a cross reference to § 5.324, the regulation that implements section 1114(*l*). This change will not affect entitlement, because even a person who is temporarily bedridden will qualify for SMC under section 1114(*l*) (because such a person needs regular aid and attendance). The change is intended to improve clarity in terms of the potential for a reduction based on hospitalization.

Initially proposed § 5.320(b) omitted the sentence from current § 3.352(a) that states, ''It is not required that all of the disabling conditions enumerated in this paragraph be found to exist before a favorable rating may be made.'' However, we failed to explain that omission in our preamble. We note that initially proposed 5.320(a) already provided for aid and attendance if the claimant meets ''any or all'' of the listed criteria. Therefore this sentence was unnecessary and we propose not to include it in § 5.320.

§ 5.321 Additional Disability Compensation for a Veteran Whose Spouse Needs Regular Aid and Attendance

At the end of initially proposed paragraph (a), we propose to add a notation that the term ''aid and attendance'' used in that paragraph is ''defined in paragraphs (b) and (c) of this section.'' The notation is needed to ensure that a reader does not think that the term means only the generally applicable definition set forth in proposed § 5.320.

The commenter addressed the visual impairment criteria of automatic eligibility for regular aid and attendance. Initially proposed § 5.321(b) provided that the spouse of a veteran who is 30 percent disabled is automatically considered in need of regular aid and attendance if the spouse's visual impairment meets one of two criteria: ''(1) The spouse has corrected visual acuity of 5/200 or less in both eyes; [or] (2) The spouse has concentric contraction of the visual field to 5 degrees or less in both eyes''. Section 3.351(c)(1), from which proposed § 5.321(b)(2) derives, states, ''. . . or concentric contraction of the visual field to 5 degrees or less.'' The proposed rule specified the bilateral requirement, which VA has long implemented, as we explained in the notice of proposed rulemaking (NPRM). We explained that VA had long used these objective vision criteria to satisfy the regulatory criteria of ''blind or so nearly blind''. *See* 38 U.S.C. 1115(1)(E). Noting that the VA Schedule for Rating Disabilities provides only a 30 percent disability rating for unilateral concentric contraction of the visual field to 5 degrees and a rating of 100 percent for bilateral concentric contraction to that degree, we explained that unilateral contraction could not be considered ''so nearly blind as to support a need for aid and attendance''. We further noted that, although the rating schedule applies to ratings for veterans, there is no rational basis not to apply the same criteria for veterans' spouses in considering the proper standards for determining the need for aid and attendance.

The commenter asserts that there is a rational basis to construe the visual impairment criteria of the need for regular aid and attendance differently for the spouse of a 30 percent disabled veteran than for a veteran seeking disability compensation for visual impairment. The commenter stated:

> To the contrary, the criterion for granting a veteran, who already has a 30% disability, additional benefits because of having a spouse with a serious visual impairment should be more relaxed than the standard for rating the veteran's own visual impairment. It follows that even a spouse with a unilateral concentric contraction of the visual field to 5 degrees or less would necessarily require regular aid and attendance which would be an additional financial burden on a veteran who is 30% disabled.

We disagree with the commenter for two reasons. First, the aid and attendance criterion of ''blind, or so nearly blind'' is established by statute. 38 U.S.C. 1115(1)(E)(ii). VA would exceed its authority to ''relax'' the statutory standard for finding the veteran's spouse in need of regular aid and attendance. As we explained in the initial NPRM, by reference to the VA Schedule for Rating Disabilities, a person with unilateral concentric contraction of the visual field to 5 degrees or less ''cannot rationally be considered 'so nearly blind' as to need regular aid and attendance.'' Section 5.321(b) states an objective measure of vision that VA considers ''so nearly blind'' as to need regular aid and attendance without further inquiry. It confers the benefit of automatic eligibility without burdening the veteran to prove some other way that his or her spouse is ''blind, or so nearly

blind'' as to need regular aid and attendance. Section 5.321(b) does not deprive the veteran of the ability to establish need for aid and attendance by other means. This is because § 5.321(c) provides for proof of entitlement with any evidence that shows the veteran's spouse in fact needs regular aid and attendance, even, possibly, with evidence of visual impairment that is much less than the impairment that automatically establishes a need for regular aid and attendance.

Second, we disagree that because a veteran is 30 percent disabled the veteran's spouse would necessarily require regular aid and attendance with unilateral concentric contraction of the visual field to 5 degrees or less, or, by implication, with less impairment than prescribed by proposed § 5.321(b). The need for regular aid and attendance is a function of a person's ability to care for himself or herself, not of another's ability to provide financial or other support. Although the veteran's ability to provide for the spouse financially or otherwise could vary in relation to the veteran's disability, it does not logically follow that the spouse's need for regular aid and attendance varies in relation to the veteran's disability. In light of the discussion above, we propose to make no changes based on this comment.

§ 5.322 Special Monthly Compensation: General Information and Definitions of Disabilities

In initially proposed § 5.322(a)(1), we stated that multiple regulations allow special monthly compensation (SMC) to veterans who have certain service-connected disabilities. In initially proposed paragraph (a)(2), we stated that certain nonservice-connected disabilities will be considered in determining entitlement to SMC, and we listed the relevant sections. To emphasize that service-connected disability is a prerequisite for SMC, we propose to add this sentence to paragraph (a)(1): ''Except as specified in paragraph (a)(2) of this section, the disabilities referred to in §§ 5.323–5.333 must be service connected.''

Section 601 of Public Law 111–275, 124 Stat. 2864, 2884 (2010) amended 38 U.S.C. 1114(m) to replace the phrases ''at a level, or with complications,'' and ''at levels, or with complications,'' with the phrase ''with factors''. The public law also amended section 1114(n) to replace ''at levels, or with complications,'' with the phrase ''with factors'' and to replace ''so near the shoulder and hip as to'' with ''factors that''. It also amended section 1114(o) to replace ''so near the shoulder as to'' with ''with factors that''. We propose to revise initially proposed §§ 5.322, 5.325–5.330, and 5.334 to conform to this new statutory language.

In the NPRM, we identified many disabilities in those sections as ''service connected''. Given that service-connected disability is a requirement for all SMC benefits (except as specifically provided in certain sections), we have determined that it is unnecessary to specify each disability as service connected throughout those sections. We have therefore removed the modifier ''service-connected'' throughout §§ 5.321 and 5.323–5.333, except where necessary to distinguish the service-connected disability from a nonservice-connected disability.

§ 5.323 Special Monthly Compensation Under 38 U.S.C. 1114(k)

We have reorganized initially proposed § 5.323(b) and moved one sentence from paragraph (b) into a closely related part 5 section. Initially proposed § 5.323(b) stated limitations on SMC under 38 U.S.C. 1114(k). Paragraph (b)(1) stated limitations on combining SMC under 38 U.S.C. 1114(k) with disability compensation under section 1114(a) through (j). Paragraph (b)(2) stated limitations on combining SMC under section 1114(k) with SMC under 1114(*l*) through (n). On review, we see that paragraph (b)(1)(ii) stated a limitation germane to paragraph (b)(2). We therefore propose to move it to paragraph (b)(2), and redesignate it as paragraph (b)(2)(i). We propose to redesignate initially proposed paragraph (b)(2) as paragraph (b)(2)(ii).

One provision of initially proposed paragraph (b)(1)(iii) stated that the additional compensation for dependents under 38 U.S.C. 1115 is not subject to the ''above limitations'', meaning the limitations in initially proposed paragraph § 5.323(b)(1). We propose to move this provision to § 5.240, ''Disability compensation'', because it pertains to all disability compensation, not just to SMC.

The remainder of initially proposed paragraph (b)(1)(iii) stated that ''the additional allowance for regular aid and attendance or a higher level of care provided by 38 U.S.C. 1114(r) [is] not subject to the above limitations regarding maximum monthly compensation payable under this paragraph.'' To improve clarity, we therefore propose to redesignate this provision of initially proposed paragraph (b)(1)(iii) as paragraph (b)(3) and have clearly identified the excluded limitations as those of § 5.323(b). For consistency throughout part 5, we propose to revise ''compensation'' to read ''disability compensation''. As revised, the sentence will read: ''The additional allowance for regular aid and attendance or a higher level of care provided by 38 U.S.C. 1114(r) is not subject to the limitations of paragraph (b) of this section regarding maximum monthly disability compensation payable under 38 U.S.C. 1114(k) in combination with other rates.''

§ 5.324 Special Monthly Compensation Under 38 U.S.C. 1114(l)

The commenter asserted that as initially proposed, § 5.324(d) violated the ''benefit of the doubt'' rule of 38 U.S.C. 5107(b) by defining ''permanently bedridden'' as ''reasonably certain that the confinement to bed will continue throughout his or her lifetime.'' The commenter noted that the benefit of the doubt rule is ''[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.'' The commenter argued that to comply with the benefit of the doubt rule, § 5.324(d) should substitute ''at least as likely as not'' for ''reasonably certain''. That is, it should read, ''It is at least as likely as not that the confinement to bed will continue throughout his or her lifetime.''

The statute that § 5.324(d) implements authorizes VA to pay special monthly compensation to a veteran who is ''permanently bedridden.'' 38 U.S.C. 1114(*l*). We agree that use of the term ''reasonably certain'' could be misconstrued to require a higher standard of proof than ''at least as likely as not''. Therefore, we propose to remove ''reasonably certain''. As revised, the standard of proof would be the default standard, which is the ''benefit of the doubt'' rule. The ''benefit of the doubt rule'', found in § 5.3, incorporates the concept of ''at least as likely as not.''

§ 5.325 Special Monthly Compensation at the Intermediate Rate Between 38 U.S.C. 1114(l) and (m)

We propose to amend the language in § 5.325 for clarity.

§ 5.326 Special Monthly Compensation Under 38 U.S.C. 1114(m)

In initially proposed § 5.326(i), we provided an award of SMC under 38 U.S.C. 1114(m) based on the facts found ''[i]f the veteran has . . . concentric contraction of the visual field to 5 degrees or less in both eyes''. This paragraph was derived from § 3.350(c)(3), which does not include the ''or less'' criterion. *See* 38 CFR

3.350(c)(3) (''[w]ith . . . the vision field reduced to 5 degrees concentric contraction in both eyes''). We did not explain our reason for the addition of the ''or less'' criterion. Although we did not receive any comments on this issue, we note that in the NPRM for proposed § 5.325(d) we explained our rationale for treating visual acuity of 5/200 or less and concentric contraction of the visual field to 5 degrees or less as equally disabling. *See* 73 FR 62012, Oct. 17, 2008. In that notice, we also stated our intent to apply the principle of equivalence of visual acuity of 5/200 or less with concentric contraction of the visual to 5 degrees or less ''wherever it is applicable''. It applies to § 5.326(i).

5.330 Special Monthly Compensation Under 38 U.S.C. 1114(o).

In initially proposed § 5.330(c), we stated one combination of disabilities that qualify a veteran for an award under 38 U.S.C. 1114(o) as follows: ''Total deafness in one ear, or bilateral deafness rated at 40 percent or more disabling, even if the hearing impairment in one ear is nonservice connected, in combination with service-connected blindness of both eyes having only light perception or less.'' We believe the phrase ''only light perception or less'', which is also contained in current 38 CFR 3.350(e)(1)(iv), may confuse readers because it fails to explain what ''less'' refers to. The intent of § 3.350(e)(1)(iv) is to include veterans with only light perception or less vision, so we propose to add the word vision at the end of § 5.330(c).

The preamble to initially proposed 5.330 stated, ''We will not repeat § 3.350(e)(4) and the third and fourth sentences of § 3.350(e)(3). These sentences are redundant of § 3.350(e)(1)(ii) . . .'' In fact, we actually omitted the second through fourth sentences, for the same reason.

5.332 Additional Allowance for Regular Aid and Attendance Under 38 U.S.C. 1114(r)(1) or for a Higher Level of Care Under 38 U.S.C. 1114(r)(2)

Section 601 of Public Law 111–275, 124 Stat. 2864, 2884 (2010) amended 38 U.S.C. 1114 by adding a new paragraph (t) which provides:

> Subject to section 5503(c) of this title, if any veteran, as the result of service-connected disability, is in need of regular aid and attendance for the residuals of traumatic brain injury, is not eligible for compensation under subsection (r)(2), and in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other residential institutional care, the veteran shall be paid, in addition to any other compensation under this section, a monthly aid and attendance allowance equal to the rate described in subsection (r)(2), which for purposes of section 1134 of this title shall be considered as additional compensation payable for disability. An allowance authorized under this subsection shall be paid in lieu of any allowance authorized by subsection (r)(1).

We propose to add a new paragraph (c)(7) to initially proposed § 5.332 to implement this statutory change.

§ 5.333 Special Monthly Compensation Under 38 U.S.C. 1114(s)

In *Bradley* v. *Peake,* issued after § 5.333 was initially proposed, the U.S. Court of Appeals for Veterans Claims held that under VA's existing regulation (38 CFR 3.350(i)) entitlement to SMC under section 1114(s) may be provided to a claimant who was assigned ''a TDIU [total disability based on individual unemployability] rating based on a single disability to satisfy the statutory requirement of a total rating.'' *Bradley,* 22 Vet. App. 280, 293 (2008). To clearly implement the court's holding, we propose to revise the first paragraph of initially proposed § 5.333 to state:

> Special monthly compensation under 38 U.S.C. 1114(s) is payable to a veteran who has a single disability rated 100 percent disabling under subpart B of the Schedule for Rating Disabilities in part 4 of this chapter, or a disability that is the sole basis for a rating of total disability based on individual unemployability (TDIU) under § 4.16 of this chapter, and [additional disabilities as described in either paragraph (a) or (b) of § 5.333].

We propose to revise paragraphs (a) and (b) so that they will be clear when read in connection with these revisions.

§ 5.336 Effective Dates: Additional Compensation for Regular Aid and Attendance Payable for a Veteran's Spouse Under § 5.321

We propose to revise *§ 5.336*(a)(2) to be in the active voice and to improve clarity. In initially proposed paragraph (a)(2), we stated, ''[retroactive] regular aid and attendance for the spouse will also be awarded''. We now propose to clarify that the benefit paid is properly called ''additional compensation'' for regular aid and attendance. Also, initially proposed paragraph (a)(2) referred to a spouse's ''entitlement to regular aid and attendance''. However, it is the spouse's need for, not entitlement to, regular aid and attendance that is the basis for the additional compensation. We therefore propose to change the reference to ''entitlement'' to a reference to ''need''. The whole sentence will read, ''When VA awards disability compensation based on an original or reopened claim retroactive to an effective date that is earlier than the date of receipt of the claim,VA will also award additional compensation for any part of the retroactive period during which the spouse needed regular aid and attendance.''

Title 38 CFR 3.501(b)(3) states that the effective date for discontinuance of additional compensation paid based on a spouse's need for regular aid and attendance is the, ''[e]nd of month in which award action is taken if need for aid and attendance has ceased.'' Initially proposed paragraph (b) stated, ''The effective date for the discontinuance of regular aid and attendance will be the end of the month in which VA stops paying the aid and attendance.'' The proposed regulation incorrectly stated that VA will stop paying the benefit when we discontinue the benefit. It also failed to identify the reason for the discontinuance: the spouse no longer needs regular aid and attendance. We propose to remedy these two defects by revising the sentence to read, ''If the veteran's spouse no longer needs regular aid and attendance, VA will discontinue additional compensation effective the end of the month in which VA takes the award action to discontinue.''

5.337 Award of Special Monthly Compensation Based on the Need for Regular Aid and Attendance During Period of Hospitalization

We have determined that initially proposed § 5.337 is redundant of § 5.720(f). We therefore propose to delete § 5.337 from part 5.

§ 5.350 Benefits Under 38 U.S.C. 1151(a) for Additional Disability or Death Due to Hospital Care, Medical or Surgical Treatment, Examination, Training and Rehabilitation Services, or Compensated Work Therapy Program

Initially proposed § 5.350 erroneously included applicability date rules derived from current § 3.361(a)(1) and (2). Those rules pertain, respectively, to the applicability date of § 3.361 to claims for benefits under 38 U.S.C. 1151(a) generally, and to claims for benefits related to compensated work therapy specifically. No regulation in part 5 will apply before the applicability date of part 5 as a whole, which will be on a date prescribed in the final rule. Consequently, we erred in restating in initially proposed § 5.350 the applicability dates prescribed in § 3.361. We now propose not to include them in § 5.350. We also propose to similarly revise initially proposed §§ 5.351 and 5.353, which also involve benefits under section 1151.

Section 3.800(a), ''Disability or death due to hospitalization, etc.'', provides that:

Where disease, injury, death or the aggravation of an existing disease or injury occurs as a result of having submitted to an examination, medical or surgical treatment, hospitalization or the pursuit of a course of vocational rehabilitation under any law administered by the Department of Veterans Affairs and not the result of his (or her) own willful misconduct, disability or death compensation, or dependency and indemnity compensation will be awarded for such disease, injury, aggravation, or death as if such condition were service connected.

In initially proposed § 5.350, we failed to include a similar basic explanation of the benefits payable under 38 U.S.C. 1151. To correct this omission, we propose to insert similar language as new paragraph (a).

In initially proposed § 5.350(g), we stated, ''The benefit payable under 38 U.S.C. 1151(a) to an eligible survivor for a veteran's death occurring after December 31, 1956, is dependency and indemnity compensation.'' This paragraph is unnecessary because we use the term ''dependency and indemnity compensation'' in new paragraph (a), and part 5 will not govern any claims filed on or before December 31, 1956. We therefore propose to delete paragraph (g).

§ 5.352 Effect of Federal Tort Claims Act Compromises, Settlements, and Judgments Entered After November 30, 1962, on Benefits Awarded Under 38 U.S.C. 1151(a) for Additional Disability or Death Due to Hospital Care, Medical or Surgical Treatment, Examination, Training and Rehabilitation Services, or Compensated Work Therapy Program

For the same reasons explained above as to § 3.350, we propose to delete initially proposed paragraph (a), which had stated that this rule applied to claims received after September 30, 1997. Accordingly, we propose to redesignate initially proposed paragraph (b) as paragraph (a), proposed paragraph (c) as paragraph (b), and proposed paragraph (d) as paragraph (c). We propose to remove unnecessary language from these paragraphs for clarity.

We propose to add paragraph (d), ''Offset of award of benefits under 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39'', to initially proposed § 5.352. Section 304(c) of the Veterans Benefits Improvement Act of 2004 amended 38 U.S.C. 1151(b) by adding section 1151(b)(2) relating to offset of chapter 21 and 39 benefits. VA amended current § 3.362 in August 2006 by adding paragraph (e) to that section to implement the part of 38 U.S.C. 1152(b) pertaining to 38 U.S.C. chapter 39. On September 23, 2010, VA amended § 3.362(e) to implement 38 U.S.C. 1151(b) pertaining to 38 U.S.C. chapter 21. *See* 75 FR 57859. Initially proposed § 5.352 omitted a counterpart to § 3.362(e). We now propose to add the language of § 3.362(e), reorganized for clarity.

§ 5.360 Service Connection of Dental Conditions for Treatment Purposes

Initially proposed § 5.360 was based on 38 CFR 3.381 as it existed at the time (2008). *See* 73 FR 62004. VA revised § 3.381 on January 30, 2012 (77 FR 4469). This amendment was intended to clarify the language of § 3.381 by adding a new introductory paragraph (a) explaining the types of issues that VBA adjudicates in a dental claim. VA also added a sentence to § 3.381(b) explaining that, ''These conditions and other dental conditions or disabilities that are noncompensably rated under § 4.150 of this chapter may be service connected for purposes of Class II or Class II (a) dental treatment under § 17.161 of this chapter.''

We propose to revise initially proposed § 5.360(a), ''General Principles'', to incorporate the new introductory paragraph (a) of § 3.381 and to add a statement explaining what service connection for treatment purposes means. We likewise propose to include the second sentence of § 3.381(b) in § 5.360(c)(3). We also propose to revise initially proposed § 5.360 to simplify the provisions, to state the provisions in the active voice, to specify which Administration within VA must make which determinations, and to reorder the provisions in a more logical sequence.

We propose to change the sequence of the paragraphs, designating paragraph (b) as (c), paragraph (c) as (e), paragraph (d) as (b), and paragraph (e) as (d). It is more logical to include the paragraphs concerning what VA will service connect for treatment purposes together and in sequence and before the paragraph that provides for the conditions VA will not service connect for treatment purposes.

In proposed paragraph (c) (initially proposed paragraph (b)), we propose to rephrase the first sentence to state it in the active voice. We propose to remove the modifier, ''chronic'' from periodontal disease in paragraph (iv) because VA will treat any periodontal disease in a veteran who is eligible for treatment in accordance with the provisions of § 17.161 of this chapter. Periodontal disease, whether labeled acute or chronic, is classified based on the severity of the disease. Gingivitis, which is acute and treatable, is a milder form of periodontal disease. Periodontitis, which is chronic, is the condition that develops if gingivitis is untreated. Since these are essentially different stages of the same disease, VA will treat both stages.

We propose to remove the phrase, ''outpatient dental'' from the first sentence of paragraph (e) (initially proposed paragraph (c)) because it is redundant and unnecessary. This entire section concerns service connection of dental conditions for treatment purposes. It is immaterial whether VA treats the veteran as an outpatient or while hospitalized. We also propose to remove ''acute periodontal disease'' from the list of conditions that VA will not service connect for treatment purposes for the reasons stated earlier. We propose to redesignate the subsequent paragraphs accordingly.

§ 5.365 Claims Based on the Effects of Tobacco Products

Initially proposed § 5.365 restated § 3.300 essentially without change. Initially proposed § 5.365(b)(1) stated: ''The disability or death resulted from injury or disease that is otherwise shown to have been incurred or aggravated during service, which means that the disability or death can be service connected on some basis other than the veteran's use of tobacco products during service.'' The phrase ''otherwise shown to have been incurred or aggravated'' quotes paragraph (b) of the authorizing statute, 38 U.S.C. 1103. However, we have determined that the phrase ''the disability or death can be service connected on some basis other than the veteran's use of tobacco products during service'' is the premise of the paragraph. The other language in the initially proposed paragraph is superfluous. We therefore propose to remove this other language.

We also determined that the phrase, ''the disability became manifest or death occurred during service'', which appeared in initially proposed (b)(1), is a separate exception to paragraph (a). We therefore propose to designate it paragraph (b)(2). Consequently, we propose to redesignate initially proposed paragraph (b)(2) as (b)(3) and initially proposed paragraph (b)(3) as (b)(4).

We further propose to change the word ''appeared'' in initially proposed paragraph (b)(2), redesignated paragraph (b)(3), to ''manifested'' because the cited sections, §§ 5.260 through 5.268, use the word ''manifested''. Likewise, 38 U.S.C. 1103(b) uses the word ''manifest''.

In the preamble to the initially proposed rule, we explained that we were not repeating the first clause of § 3.300, ''For claims received by VA after June 9, 1998,'' because all claims under part 5 will be received after 1998. We have noted that one of the authority citations listed in initially proposed § 5.365 was 38 U.S.C. 1103 note. Because this note only concerns this effective date provision, we propose to omit it from § 5.35.

§ 5.367 Civil Service Preference Ratings for Employment in the U.S. Government

Initially proposed § 5.367 was not explicit as to the purpose of the civil service preference ratings. We now propose to clarify that these ratings are for ''employment by the U.S. government''. This clarification is consistent with current practice.

The second sentence stated, ''Any directly or presumptively service-connected injury or disease that exhibits some extent of actual impairment may be held to exist at the level of less than 10 percent.'' This implied a two-step process in which VA found ''actual impairment'' and then assigned a rating of less than 10 percent. In fact, there is only one step: if a veteran has any actually disabling directly or presumptively service-connected disability he or she will qualify for the civil service preference. We propose to revise the sentence to say this explicitly.

§ 5.368 Basic Eligibility Determinations: Home Loan and Education Benefits

In initially proposed *§ 5.368*(a)(1), we stated that claims based on service after January 31, 1955, and before August 5, 1964; or after May 7, 1975, would be governed by the presumption of aggravation in current § 3.306(a) and (c). This was derived from current § 3.315(b). However, the current rule is incorrect, and should refer to § 3.306(b), which applies to all claims based on service after December 7, 1941. We will state the rule correctly in part 5. We propose to make the same correction to paragraph (b)(4).

XI. Subpart F: Nonservice-Connected Disability Pensions and Death Pensions Improved Pension

A. Improved Pension

In a document published in the **Federal Register** on September 26, 2007, we proposed to revise VA's regulations governing Improved Pension benefits, to be published in a new 38 CFR part 5. 72 FR 54776. We provided a 60-day comment period that ended November 26, 2007. We received no comments.

Although we received no comments regarding our publication on September 26, 2007, an internal review of initially proposed Subpart F revealed several drafting errors that needed to be corrected, and we propose to do so. We also propose to make organizational and technical changes to improve the clarity of the regulations, and to maintain consistency throughout part 5.

§ 5.370 Definitions for Improved Pension

We propose to add a general definition of ''Improved Pension'', as *§ 5.370*(d), to be consistent with our practice of providing general definitions for the benefits provided by VA. *See,* for example, §§ 5.240(a) (defining disability compensation) and 5.460 (defining certain VA pension programs). The text of the definition is based on the text of what was initially proposed as § 5.371, with minor revisions to improve clarity.

We also propose to add a definition of ''Improved Pension payment amount'' as paragraph (e), which is ''the monthly payment calculated under § 5.421(a)''.

In the definition of ''Maximum annual pension rate'', proposed paragraph (f), we changed the reference to § 5.400 from ''The various types of maximum annual pension rates are set forth at § 5.400'' to ''Maximum annual pension rates are described in § 5.400''. Section 5.400 does not ''set forth'' any rates; it merely refers the reader to title 38, United States Code.

In this revised version of § 5.370, we would add a definition of ''net worth in proposed paragraph (g)'' as ''the value of real and personal property, as calculated under § 5.414''. This is a general definition, and is consistent with common usage of the term; however, it will be useful to provide a definition in this central location of § 5.370, where it will guide readers to the relevant (and more detailed) substantive rules in § 5.414.

In § 5.370, we initially proposed to define ''special monthly pension'' as:

> [A] type of Improved Pension with higher maximum annual pension rates than the basic rates listed in § 5.400(a)(1) and (5). Special monthly pension is based on a veteran's or surviving spouse's disability or disabilities ratable at 60 percent or more, their housebound status, or their need of the aid and attendance of another person in performing their daily living habits.

We propose to revise the definition in proposed paragraph (i) to make it more general; specific entitlement criteria are more appropriately discussed in the substantive rules at §§ 5.390 and 5.391. There is no need to restate those criteria here. We will explicitly note in the definition that claimants for special monthly pension must meet the eligibility criteria for Improved Pension, notwithstanding that this is implied by the definition of special monthly pension as a ''type of Improved Pension''.

We propose to delete the initially proposed definition of ''surviving child'' as unnecessary and redundant of other material in part 5.

§ 5.371 Eligibility and Entitlement Requirements for Improved Pension

We propose to revise § 5.371(a) so that it is in the active voice and so that it specifically refers to special monthly pension, where, in the initially proposed version, it applied only implicitly to special monthly pension. In addition, we propose to delete from paragraph (a) the material that was moved to the definition in § 5.370.

Initially proposed paragraph § 5.371(c) states the general rules for the eligibility requirements to Improved Death Pension for a surviving spouse or surviving child. We propose to add cross-references in § 5.371(c)(1) and (2) to the part 5 regulations relating to status as a surviving spouse, and surviving child.

We propose to clarify paragraph § 5.371(c) by moving the material in initially proposed § 5.371(c)(3) to the beginning of the paragraph. The purpose of the language is to explain that in determining eligibility for Improved Death Pension, it does not matter whether the veteran's death is service-connected.

§ 5.372 Wartime Service Requirements for Improved Pension

We propose to add the word ''nonconsecutive'' to *§ 5.372*(b)(2), to illustrate that, unlike the period described in paragraph (b)(1), the days need not be consecutive to meet this requirement. Indeed, if the days were consecutive, the service described in paragraph (b)(2) would meet the requirements of paragraph (b)(1). We do not need to add the word ''nonconsecutive'' to paragraph (b)(3) because that paragraph explicitly requires two separate periods of service.

Initially proposed § 5.372(b)(4)(ii) provided wartime service if the veteran served for any period of time during a period of war and had a disability ''at the time of discharge that in medical judgment would have justified a discharge for disability''. This requirement appears in current § 3.3(a)(3)(ii). In part 5, we will remove the ''medical judgment'' requirement. Instead, we will require that the veteran

have ''had such a service-connected disability at the time of discharge that would have justified discharge.'' This change will recognize that in some cases lay evidence may be sufficient to establish the existence of a disability that could have served as a basis for discharge.

In addition, we propose to improve the clarity of the paragraph by specifying that the disability that existed at discharge must be one for which service connection is granted without relying on a presumption. This is consistent with current § 3.3(a)(3)(ii).

§ 5.373 Evidence of Age in Improved Pension Claims

In initially proposed § 5.373, we stated that the regulation applies when age ''is material to the decision of an Improved Pension claim''. It is possible to misread this language as a narrowing of the current rule, such that the new rule would apply only when age is outcome determinative. We therefore propose to remove the phrase ''the decision of''. As revised, the part 5 rule will be substantively identical to the current rule.

§§ 5.380 Disability Requirements for Improved Disability Pension; 5.381 Permanent and Total Disability Ratings for Improved Disability Pension Purposes; and 5.382 Improved Disability Pension—Combining Disability Ratings

We propose to significantly revise §§ 5.380, 5.381, and 5.382 by combining the initially proposed regulations, removing redundant material, correcting errors, and otherwise improving clarity. In addition, we propose to reserve §§ 5.381 and 5.382, and several other changes as discussed below.

In § 5.380(a), we propose to add guidance on how VA combines disability ratings to determine whether a veteran is permanently and totally disabled for Improved Pension purposes. This guidance was initially contained in proposed § 5.382(b). We now propose to move § 5.382(b) to § 5.380(a) because it is more logical to state that provision in § 5.380(a) along with the other disability requirements. We also propose to eliminate § 5.382(a) because in the case, as here, where a veteran has multiple disabilities, all disabilities are combined in the same manner, regardless of whether the disability is service or non-service connected. We now propose to mark § 5.382 as reserved.

In initially proposed § 5.380, we failed to explain our omission of current 38 CFR 3.342(b)(5). We consider that paragraph to be a comingled authority citation and cross reference and we therefore believe it is unnecessary in part 5.

Initially proposed § 5.381(b)(2), which is now § 5.380(c)(2), consisted of seven sentences that were not logically organized and were not stated clearly. We propose to reorganize the material. In sentence one, we propose to replace ''consistent with the evidence in the case'' with ''that is shown by the evidence'', because that phrase has the same meaning as ''consistent with the evidence'' and is easier for the public to understand. For the same reason, we propose to use the phrase ''that is shown by the evidence'' in paragraphs (c)(2)(i) through (iii). The remaining material will be divided into three separate paragraphs, § 5.380(c)(2)(i) through (iii), to distinguish between generally applicable rules, rules that apply to cases involving disabilities that require hospitalization for indefinite periods, and special rules that apply only in tuberculosis cases.

In what was initially proposed as § 5.381(b)(3), which is now proposed § 5.380(c)(3), we propose to remove language requiring VA to give ''special consideration'' to veterans under 40 years of age. As revised, the regulation will describe how VA determines the permanence of total disability in such veterans, without suggesting that VA treats these veterans in a ''special'' way, that is, without suggesting that these veterans are not entitled to the same treatment as any other veteran.

In initially proposed § 5.381(b)(4), which is now § 5.380(c)(4), we propose to change ''presumed'' to ''considered'' to be consistent with the current regulation, § 3.342(b)(4), and the statute, 38 U.S.C. 1718(g). ''Considered'' is more favorable to veterans because it establishes a rule rather than a rebuttable presumption.

In initially proposed § 5.381(b)(4)(i), which is now § 5.380(c)(4)(i), we repeated a typographical error from § 3.342(b)(3)(i) by using ''member-employer''. The correct term is ''member-employee''. *Compare* 50 FR 36632, Sept. 9, 1985 (proposed amendment of § 3.342(b)(4) using ''member-employee'') with 50 FR 52775, Dec. 26, 1985 (final rule amending § 3.342(b)(4) using ''member-employer'').

In initially proposed § 5.381(b)(5), which is now § 5.380(c)(5), we had cross-referenced a part 5 regulation that would be based on current 38 CFR 3.321(b)(2) (concerning extra-schedular ratings for pension). We have since decided against establishing a separate regulation based on that current rule. Thus, in the revised § 5.380(c)(5), we propose to include a rule equivalent to current 38 CFR 3.321(b)(2).

§ 5.383 Effective Dates of Awards of Improved Disability Pension

We have determined that initially proposed § 5.383(a)(2) is an exception to the general effective date rule for Improved Disability Pension. It deals with previously denied claims, and we propose to name it as addressing such claims and redesignate it as paragraph (b). What was previously proposed paragraph (b) will now be proposed paragraph (c).

We propose to revise § 5.383(b)(3), eliminating the description of an incapacitating disability, which was circular and confusing. The revised language will also affirmatively state that a disability that requires extensive hospitalization is an incapacitating disability for Improved Disability Pension purposes, whereas the initially proposed language appeared to establish a rebuttable presumption to the same effect. Compared to current § 3.400(b)(1)(ii)(B) and to the initially proposed rule, the revised rule is easier to understand and apply. Consequently, this will be a change from both part 3 and the initially proposed rule, but it will result in a clearer regulation and will not lead to later effective dates of awards to disabled veterans.

§ 5.390 Special Monthly Pension for a Veteran or Surviving Spouse Based on the Need for Regular Aid and Attendance

Initially proposed § 5.390 was titled, ''Special monthly pension for veterans and surviving spouses at the aid and attendance rate.'' We propose to revise the title to read, ''Special monthly pension for a veteran or surviving spouse based on the need for regular aid and attendance.'' The revision is in part to help clarify that special monthly pension is essentially Improved Pension paid at a higher maximum annual pension rate. The revision also makes the reference to regular aid and attendance consistent with our terminology in the rest of part 5.

We propose to make significant clarifications, eliminate redundancy, and otherwise simplify the introductory paragraph, proposed as § 5.390(a).

In initially proposed § 5.390(b)(4), which is now § 5.390(d), we had cross-referenced § 5.333 for the rules to govern factual need for aid and attendance. We propose to change this citation to § 5.320 because we propose to renumber the regulation.

§ 5.391 Special Monthly Pension for a Veteran or Surviving Spouse At the housebound rate

In initially proposed part 5, there are several regulations that define ''permanently housebound'' as it applies to the veteran and the surviving spouse. To ensure consistency throughout part 5, we propose to change the definition in § 5.391(a)(2), to the language used in proposed § 5.511(c). Proposed paragraph (a)(2) will now define the term to mean that the veteran is substantially confined to his or her residence (ward or clinical areas, if institutionalized) and immediate premises because of a disability or disabilities, and that it is reasonably certain that such disability or disabilities will not improve during the veteran's lifetime.

Initially proposed § 5.391(b) was a new provision intended to reconcile current VA regulations, which have not been altered since being promulgated in 1979, with *Hartness* v. *Nicholson,* 20 Vet. App. 216 (2006). In that case, the United States Court of Appeals for Veterans Claims (CAVC) stated that current § 3.351(d) does not consider the interpretive effects of 38 U. S.C. 1513(a), first enacted in 2001, on 38 U.S.C. 1521(e). *See Hartness,* 20 Vet. App. at 221. The CAVC held that, according to these statutes, a veteran who is otherwise eligible for Improved Pension based on being age 65 or older, and who is not in need of regular aid and attendance, is entitled to special monthly pension at the housebound rate if he or she has a disability ratable at 60 percent or more or is considered permanently housebound. See *Hartness,* 20 Vet. App. at 221–22. The court held that such a veteran, unlike a veteran who is under 65 years old, need not have a disability that is permanent and total. See *id.*

However, in 2012, the U.S. Court of Appeals for the Federal Circuit overturned *Hartness.* In *Chandler* v. *Shinseki,* 676 F.3d 1045 (Fed. Cir. 2012), the court stated:

> This court concludes § 1513(a) only eliminates the permanent and total disability requirement in § 1521(a), which applies to all § 1521 subsections. The language of section 1521 is structured so that subsection (a) is a threshold requirement and the other subsections recite additional requirements for a veteran to qualify for different pension rates. As such, § 1521's language and structure, when viewed in light of the statute's purpose and meaning, suggest that the parenthetical exclusion in section 1513(a) refers only to the threshold requirement found in section 1521(a) for pension benefits under § 1521 and not to the additional [housebound] requirements imposed by § 1521(e). *slip op* at 11.

We therefore propose to delete § 5.391(b) and reorder the section paragraphs accordingly.

§ 5.392 Effective Dates of Awards of Special Monthly Pension

Although it was technically accurate, initially proposed § 5.392, ''Effective dates of awards of special monthly pension'', was unnecessarily complex. In paragraph (a), we had stated the general rule that the effective date of an award of special monthly pension was the date VA received the claim for special monthly pension or the date entitlement arose, whichever date is later. This is essentially the same as the effective date of an award of Improved Pension under §§ 5.383 and 5.431, except that it does not address the eligibility or entitlement criteria for Improved Pension. It is unnecessary for the special monthly pension effective date regulation to address such criteria, because the claimant must have met those criteria as a prerequisite for the award. Moreover, in cases where a claimant who was not already receiving Improved Pension is awarded special monthly pension, the claim for Improved Pension constitutes the claim for special monthly pension, because special monthly pension is a form of Improved Pension paid at a higher maximum annual pension rate. Thus, the award of special monthly pension is predicated upon the same rules that govern the award of Improved Pension, and the award of special monthly pension will be effective on the same date as the award of Improved Pension in every situation except where entitlement to special monthly pension arose after the date of entitlement to Improved Pension. This could occur in a case where an Improved Pension beneficiary files a new claim for special monthly pension, or where a claimant seeking Improved Pension incurs, after filing the Improved Pension claim, additional disability that makes him or her eligible for special monthly pension. Hence, we propose to revise the rule to simply state that the effective date of an award of special monthly pension will be the later of either the effective date of the award of Improved Pension under § 5.383 or the award of Improved Death Pension under § 5.431, or the date entitlement to special monthly pension arose.

In initially proposed § 5.392 we failed to include the provisions of 38 CFR 3.402(c)(1), concerning aid and attendance, and housebound benefits payable to a surviving spouse. We propose to correct this omission by adding a reference to proposed § 5.431, ''Effective dates of Improved Death Pension''. We also omitted the provisions of § 3.402(c)(2), concerning concurrent receipt of Improved Pension and Improved Death Pension. We propose to correct this omission by adding a new paragraph (b).

In initially proposed § 5.392(b), we stated an exception applicable ''when an award of Improved Pension is effective retroactively''. This refers to the retroactive provisions in § 5.383(b). By referencing § 5.383 in its entirety in § 5.392(a), the simplified version of paragraph (a) will eliminate the need for this exception.

§ 5.400 Maximum Annual Pension Rates for a Veteran, Surviving Spouse, or Surviving Child

After reviewing initially proposed § 5.400, we propose to make several changes, including redesignating due to the removal and revision of certain paragraphs, described below.

We determined that it would be helpful for readers to know that the rates of pension are listed on the Internet. We therefore propose to add the following sentence to what is now the introductory paragraph (which, as initially proposed, was designated as paragraph (a)): ''Current and historical maximum annual rates can be found on the Internet at *http://www.va.gov* or are available from any Veterans Service Center or Pension Management Center.'' We propose to include ''Pension Management Center'' because most pension cases are processed in these three centers. We propose to remove from that paragraph language related to 38 U.S.C. 5312 because it was redundant of § 5.401. For similar reasons, we propose to add ''Pension Management Center'' to initially proposed § 5.471(a).

Also in reviewing this section, we found that what is now designated as paragraph (e) could be simplified to refer only to a surviving spouse. The authorizing statute for that paragraph addresses the different rates based on whether or not the spouse has custody of a child of the deceased veteran.

We propose to delete initially proposed § 5.400(b), pertaining to World War I veterans, because VA does not have any Improved Pensioners on its rolls who served in World War I and does not expect to receive any new claims from such veterans. If any claims are received, they may be adjudicated in accordance with 38 U.S.C. 1521(g), which provides the higher rate for such veterans.

Finally, we propose to move the information that had been contained in initially proposed § 5.400(c), concerning higher maximum annual pension rates

based on the number of dependents, to the second sentence of what is now the introductory paragraph. We were concerned that the separate paragraph would lead a reader to think that paragraph (c) was an exception to the information in the introductory paragraph when, in fact, the statutes referred to in the introductory paragraph provide the higher rates.

§ 5.401 Automatic Adjustment of Maximum Annual Pension Rates

We propose to omit a counterpart to § 3.23(c) from § 5.401. The preamble to initially proposed § 5.401(b), 72 FR 54776, 54782–54783 (Sept. 26, 2007), stated that it derives, in part, from § 3.23(c), which provides for publication of increases in the rate of pension paid to Mexican border period and World War I veterans. As explained in the initial, 72 FR 54776, 54782, and current preambles for § 5.400, part 5 will not repeat 3.23(c) because it is obsolete. Consequently, though proposed 5.401(b) restates the requirement to publish increases in the rate of certain benefits, VA will not publish increased in the rate for veterans of the Mexican border period or World War I, and § 5.401(b) does not partly derive from § 3.23(c).

§ 5.410 Countable Annual Income

We propose to clarify § 5.410(a)(1) and make its phrasing parallel in structure to paragraph (a)(2) for consistency.

In initially proposed § 5.410(b)(3), we stated that: ''The income of a surviving child includes the income of that child's custodial parent and the income of other surviving children as described in § 5.435, 'Calculating annual Improved Pension amounts for surviving children.' '' The preamble to the initially proposed rule explained that the rule regarding whose income must be included in a surviving child's income was ''too complex to be included in this regulation, so we propose to include a cross-reference to proposed § 5.435''. However, § 5.435 requires including the income of the surviving child's custodian, irrespective of whether the custodian is a ''custodial parent''. Thus, the reference in § 5.410(b)(3) to ''custodial parent'' was improperly narrow. We therefore propose to change the term ''custodial parent'' to ''custodian''. This change corrects the erroneous reference to a ''custodial parent'' in the proposed rule. We also propose to clarify in paragraph (b)(3) that the income of a surviving child includes that child's income, to make the provision consistent with paragraphs (b)(1) and (2).

We propose to add paragraphs (c)(3)(i) and (ii) to address overlapping irregular income. This type of income was not previously addressed. This change follows current VA practice.

§ 5.411 Counting a Child's Income for Improved Pension Payable to a Child's Parent

In reviewing initially proposed § 5.411, we determined that this section could be much clearer, and we also identified several problems with the initially proposed regulation.

In paragraph (a), we propose to now state the general rule, which is that ''VA counts as income to the parent-beneficiary (that is, the veteran or surviving spouse receiving Improved Pension) the annual income of every child of the veteran who is in the parent-beneficiary's custody''. In current § 3.23(d)(4) and (5), this rule is phrased as a presumption: ''There is a rebuttable presumption that all of such a child's income is available to or for the [parent-beneficiary].'' Using a presumption makes this rule far more complicated than it needs to be. Moreover, neither the current regulation nor the initially proposed part 5 regulation clearly stated that the parent-beneficiary must specifically seek to rebut the presumption. Thus, in § 5.411(a), we propose to state that the child's income is counted as income to the parent-beneficiary unless the parent-beneficiary files a claim to exclude all or part of the child's income.

We also, in paragraph (a), propose to establish a duty on the part of VA to provide the proper VA form to describe the bases for the exclusions that follow. VA uses VA Form 21–0571, ''Application For Exclusion Of Children's Income'', to gather the information needed to calculate whether a parent-beneficiary qualifies for an exclusion. Much of the specificity that we have added to § 5.411 in this rulemaking is derived from that form, and using that form simplifies the process and greatly reduces the burden of seeking an exclusion under this rule.

In initially proposed § 5.411(b), we set forth the first basis for an exclusion of the child's income, which is that the income is not considered available for expenses necessary for reasonable family maintenance. We propose to change the term ''reasonably available'' to ''considered available'' for clarity. This rule is similar to the current and initially proposed rules, except that in paragraph (b)(2) we provide specific examples of common ways to establish that income is not considered available. These examples are derived from current VA practice and VA Form 21–0571.

In § 5.411(c), we describe the hardship exclusion. The calculation required under paragraphs (c)(1) through (5) was included in the initially proposed rule and is set forth in current § 3.272(m), but it is not clearly described as a mathematical formula. This subsequently proposed rule more clearly shows how VA calculates the amount of the hardship exclusion.

In paragraph (b)(1), we propose to add that annual expenses cannot include ''expenses for items such as luxuries, gambling, and investments''. This guidance is based on long-standing VA practice and will clarify for VA employees what types of expenditures are, or are not, necessary to support a reasonable quality of life.

Finally, we propose to move what was initially proposed as § 5.411(c), ''Child's earned income'', to § 5.412(a). This provision was mistakenly included in § 5.411, but it applied, by its terms, to calculating a child's income in all situations. Hence, we have moved it to § 5.412(a), where it is more appropriately located. We propose to redesignate the paragraphs of initially proposed § 5.412 to accommodate the new paragraph (a).

§ 5.412 Income Exclusions for Calculating Countable Annual Income

In *Osborne* v. *Nicholson,* 21 Vet. App. 223 (2007), the court held that ''pursuant to § 3.272(e), the receipt of accrued interest on the redemption of a savings bond is 'profit realized from the disposition of . . . personal property' and is therefore excluded from income for VA pension purposes.'' A GC Opinion was issued based on this ruling, VAOPGCPREC 2–2010 (May 10, 2010). The GC Opinion stated that the holding of *Osborne* v. *Nicholson* depended not on the political entity that issued the bond, but rather on the terms of the bond. The Opinion further stated that ''If a bond requires redemption for the payment of accrued interest . . . then the statutory exclusion for profit realized from the disposition of real or personal property applies. If accrued interest is payable on the bond without redemption, then it does not qualify for the exclusion.'' This income exclusion also applies to interest received from the surrender of a life insurance policy. However, if a bond pays interest semiannually without the redemption of such bond, VA will consider the interest received as income. The GC Opinion also held that the exclusion of interest received from the redemption of a bond applies to income calculations in parents' dependency and indemnity

compensation (DIC), Improved Pension, and Section 306 Pension. Section 3.262(k) excludes from income the accrued interest received from the redemption of a savings bond for purposes of Section 306 Pension and parents' DIC to the extent that § 3.272(e) excludes such income in Improved Pension. Conversely, there is no profit exclusion for Old-Law Pension in § 3.262(k)(3). VA will therefore consider as income the interest received from the surrender of a bond or life insurance in Old-Law Pension. Although not specifically stated in the Opinion, we believe that this exclusion also applies in the income calculation for the dependency of a parent for purposes of disability compensation. This interpretation is considered to be just and consistent with the intent of the statute.

We therefore propose to incorporate the holding of the GC Opinion in proposed § 5.412(e). We also propose to include similar changes in §§ 5.302(d), ''General income rules—parent's dependency'', 5.472, ''Evaluation of income for Old-Law Pension and Section 306 Pension'', and 5.533, ''Income not counted for parent's dependency and indemnity compensation.''

In initially proposing this subpart, we inadvertently omitted § 3.272(x) (listing ''lump-sum proceeds of any life insurance policy on a veteran'' as an item VA will not count when calculating countable income for Improved Pension), so we propose to insert § 5.412(*l*)(8) as its part 5 equivalent.

We propose to move the broad provision proposed as § 5.412(k)(8) to § 5.412(m).

Section 604 of Public Law 111–275, 124 Stat. 2864, 2885 (2010) amended 38 U.S.C. 1503(a) to exclude payment of a monetary amount of up to $5,000 to a veteran from a State or municipality that is paid as a veterans benefit due to injury or disease from countable income for purposes of Improved Pension. We propose to add this exclusion as § 5.412(n).

§ 5.413 Income Deductions for Calculating Adjusted Annual Income

In reviewing initially proposed § 5.413, we determined that this section could be clarified. We propose to revise the language, particularly in paragraph (b), to more accurately reflect current policy. These changes will not alter the legal effect of this section. In paragraph (b), we propose to add a cross-reference to § 5.707, ''Deductible Medical Expenses,'' to be consistent with § 5.474, ''Deductible Expenses for Section 306 Pension Only'', and § 5.532, ''Deductions from income for parent's dependency and indemnity compensation.''

We propose to revise paragraphs (b)(2)(i) and (ii). As initially proposed, the provision could be interpreted to permit deductions for a member of the household ''for whom there is a moral or legal obligation of support'' on the part of the beneficiary, irrespective of whether that person was a relative of the beneficiary. The part 3 rule, located in § 3.272(g)(1) and (2), requires that the person be both a relative and a member of the household. We propose to revise § 5.413(b)(2) so that it accords with the current rule. We also propose to correct an error in initially proposed paragraph (b)(2)(i). The initially proposed provision and the current rule, § 3.272(g)(1)(i) and (ii), refer incorrectly to the veteran's ''spouse'' instead of referring to the veteran's ''dependent spouse''.

In paragraphs (c)(2)(ii) and (iii), we propose to remove a reference to ''just debts'' because ''just debts'' are included in the definition of final expenses set forth in paragraph (c)(1).

We propose to remove the reference to chapter 51 and § 5.551(e) in § 5.413(c)(3)(i). The current rule, § 3.272(h)(1)(ii), and the authorizing statute, 38 U.S.C. 1503(a)(3), only reference ''expenses not reimbursed under chapter 23 of this title''. We propose to revise § 5.413(c)(3)(i) so that it accords with them.

We also propose to clarify § 5.413(c)(3)(ii) to state that if ''The expenses of a veteran's last illness were allowed as a medical expense deduction on the veteran's pension or parents' dependency and indemnity compensation (DIC) account during the veteran's lifetime'', then said expenses will not be deducted from a surviving spouse's award. This change will follow current VA practice.

Subsequent to the publication of proposed § 5.413, section 509 of Public Law 112–154 (2012) amended 38 U.S.C. 1503(a) by adding new provisions which set forth in detail what casualty loss reimbursements are excludable from countable income for purposes of VA Improved Pension. We propose to include these new provisions in § 5.413(d).

We propose to move § 5.413(e), concerning the treatment of gambling losses, to § 5.410(g), because it primarily concerns counting income from gambling. Initially proposed paragraph (f) of this section is redesignated paragraph (e), accordingly. Initially proposed § 5.413(g), which is now § 5.413(f), used the term ''profession''. The regulation meant a professional practice. We are now clarifying this term.

§ 5.414 Net Worth Determinations for Improved Pension

In reviewing initially proposed § 5.414, we determined that this section could be clarified by the reorganization and removal of unnecessary verbiage. We also propose to provide more detailed explanations of when a dependent's net worth is considered and how net worth can bar Improved Pension.

In what is now paragraph (b)(1) (initially proposed paragraph (a)), we propose to add the word ''primary'' before residence to clarify that VA excludes from net worth only the value of the residence where the claimant or beneficiary usually lives, not the value of other properties where they may occasionally reside. A claimant or beneficiary can only have one primary residence at any given time. The term is well understood because a primary residence is considered as a legal residence for purpose of income tax and/or acquiring a mortgage. We also propose to clarify that the primary residence will not be counted as net worth simply because the veteran has moved into a nursing home.

In what is now paragraph (b)(3) (initially proposed paragraph (c)(3)), we propose to clarify that the ''child educational exclusion'' applies whether the child is a dependent or a claimant in his or her own right.

In § 5.414(d)(2)(i), we propose to clarify that a claimant's adjusted annual income includes the adjusted annual income of any person whose net worth is considered part of the claimant's net worth. These rules were not explicit in the initially proposed rule, but they comport with current VA practice and policy and are not inconsistent with the initially proposed rule.

In initially proposed § 5.414(d), we determined that there was a lack of criteria for determining whether net worth is a bar for benefits. To eliminate ambiguity, we propose to establish an $80,000 guideline and determined that ''it is reasonable to expect that part of the claimant's net worth should be used for the claimant's living expenses'' when the net worth is $80,000 or more. Having a specific dollar amount ensures uniformity and fairness of VA decision-making throughout the country. This change is consistent with current practice.

We also propose to revise § 5.414(e) for clarity.

§ 5.415 Effective Dates of Changes in Improved Pension Benefits Based on Changes in Net Worth

We had stated in § 5.415(a) that an increase in a child's net worth requires VA to reduce the payment amount of Improved Pension. However, if the child's net worth is increased, the removal of his dependency from the beneficiary's award may cause an increase in payment. Such a situation may occur when the dependent child has income and the removal of the child's dependency and his or her income causes an increase in the beneficiary's award. We propose to clarify that regardless of whether or not the removal of such child's dependency results in a higher pension rate, the effective date based on the change in net worth is the first day of the year after the year that net worth increased. This change is consistent with current practice.

§ 5.416 Persons Considered as Dependents for Improved Pension

We propose to remove the sentence, ''The child need not be living with the veteran or surviving spouse to be in custody'', from initially proposed § 5.416(b)(1) because the same information is provided in what was initially proposed § 5.417(d), now the definition of ''custody of a child'' in proposed § 5.1. The rule is appropriately located in that definition. It is not necessary to § 5.416, which pertains to persons considered as dependents.

We also propose to change ''reasonably contributes'' to ''provides reasonable contributions'' in both paragraphs (a)(3) and (b)(2), because it is the amount of the contributions that must be reasonable, not the way that the person provides those contributions.

§ 5.417 Child Custody for Purposes of Determining Dependency for Improved Pension

We propose to move the definitions of ''custody'' and ''legal responsibility'' to proposed § 5.1, defining ''custody of a child''. The remainder of this regulation contains four presumptions for determining dependency. We propose to simplify the regulation to eliminate redundancy without altering its meaning.

§ 5.420 Reporting Periods for Improved Pension

In initially proposed § 5.420, we stated, ''When calculating adjusted annual income, VA counts income that is anticipated or received during a specific period, called a 'reporting period.' '' We have determined that it would be helpful for readers to have a simple definition of ''reporting period'' so we propose to insert the following definition (based on § 3.661, the current rule regarding income reporting): ''A reporting period is a time period established by VA during which a claimant or beneficiary must report to VA all income, net worth, and adjustments to income.''

We propose to revise § 5.420(a) to include that a claimant or beneficiary may report a change in income or net worth when the change occurs. The claimant or beneficiary does not have to wait until the beginning of the next reporting period to report the change. This change is consistent with current VA practice.

§ 5.422 Effective Dates of Changes to Annual Improved Pension Payment Amounts Due to a Change in Income

In paragraphs (b)(2) and (3) of initially proposed § 5.422, we used the term ''required evidence'' without explaining what the evidence should prove. To resolve this potential ambiguity, we propose to revise paragraph (b)(2) by replacing ''required evidence'' with ''evidence showing the dependency''. Likewise, we propose to revise (b)(3) by replacing ''required evidence'' with ''evidence showing the loss of a dependent''.

§ 5.423 Improved Pension Determinations When Expected Annual Income Is Uncertain

We propose to provide a definition for ''expected annual income'' in the first sentence of § 5.423(a). We propose to define the term as ''the annual income a claimant or beneficiary anticipates receiving during a given reporting period.''

We propose to remove all references in this subpart to the term ''anticipated income'' and propose to replace it with ''expected income''. This proposed change will be for consistency purposes.

§ 5.424 Time Limits To Establish Entitlement to Improved Pension or To Increase the Annual Improved Pension Amount Based on Income

In reviewing initially proposed § 5.424, we determined that this section can be clarified and shortened by minor reorganization and the removal of unnecessary verbiage. We propose to make these changes.

§ 5.430 Marriage Date Requirements for Improved Death Pension

Initially proposed § 5.430(a)(2)(i) referred to veterans of the Mexican Border period and World War I. We propose to remove these references because there are no longer any surviving veterans of these war periods and VA does not anticipate receiving any more Improved Death Pension claims from the surviving spouses of these deceased veterans. Moreover, if VA does receive such a claim, it could process the claim under the controlling statutes, 38 U.S.C. 103(b) and 1541(f).

We also propose to remove initially proposed § 5.430(b), which had concerned the marriage-date requirements of a surviving spouse. That paragraph was based on 38 U.S.C. 103(b), which is not limited to Improved Pension. We propose to move the rule to § 5.200, ''Surviving spouse: requirement of valid marriage to veteran.''

§ 5.432 Deemed Valid Marriages and Contested Claims for Improved Death Pension

In §§ 5.432 and 5.433, we propose to delete the term ''legal'' as it was used in the initially proposed rule to describe a surviving spouse. Although there is no explicit definition of ''legal surviving spouse'' in current part 3, the term is used to denote a spouse who was legally married to the veteran at the time of the veteran's death as contrasted with a deemed valid spouse. This distinction has no legal significance in § 5.432 or § 5.433. For the same reason, we propose to delete the term ''lawful'' before ''surviving spouse'' in § 5.539.

§ 5.434 Award or Discontinuance of Award of Improved Death Pension to a Surviving Spouse Where Improved Death Pension Payments to a Child Are Involved

In initially proposed § 5.434(a)(3) we stated:

> When a surviving spouse establishes eligibility for Improved Death Pension but is not entitled because his or her adjusted annual income is greater than the maximum annual pension rate or because his or her net worth bars entitlement, VA will discontinue the child's pension award effective the first day of the month after the month for which VA last paid benefits to the surviving spouse.

Consistent with current §§ 3.503(a)(9) and 3.657(b)(1), the reference to the surviving spouse at the end of § 5.434(a)(3) should refer instead to the child. We now propose to correct this error.

In addition, we propose to reorganize § 5.434(b) to improve clarity.

§ 5.435 Calculating Annual Improved Pension Amounts for a Surviving Child

In initially proposed § 5.435(a) we parenthetically defined the term ''personal custodian'' as ''a person legally responsible for the child's support''. We propose to add a

definition of ''custody of a child'' as § 5.1. Therefore, the definition initially proposed in this section is superfluous and we propose to remove it.

B. Elections of Improved Pension; Old-Law and Section 306 Pension AL83

In a document published in the **Federal Register** on December 27, 2004, we proposed to publish in a new 38 CFR part 5 VA regulations governing Old-Law Pension, Section 306 Pension, and elections of Improved Pension. 69 FR 77578. The title of this proposed rulemaking was ''Elections of Improved Pension: Old-Law and Section 306 Pension'' (RIN: AL83). The proposed regulations were based on current regulations in 38 CFR part 3, but were revised to reflect plain English and updated to reflect current practice. We provided a 60 day comment period that ended on February 25, 2005. We received submissions from two commenters.

Terminology

We mean to add the word ''Pension'' after ''Old-Law'' and ''Section 306'' whenever these two pension programs are mentioned together in a single sentence. For example, ''Old-Law and Section 306 Pension'' will be rewritten as ''Old-Law Pension and Section 306 Pension.'' This will help readers understand that these two pension benefits are separate and distinct programs.

For consistency purposes in describing whether particular potential sources of revenue are considered by VA in calculating a beneficiary's income or net worth, we propose to replace the word ''include'' with ''count'' (or with a commensurate substitute) and ''exclude'' with ''does not count'' (or with a commensurate substitute).

Comment Relating to a Different Portion of This Rulemaking

One commenter suggested that a rating decision that reduces a rating during a period of hospitalization should be considered void if notice of a prior rating decision had not been sent to a veteran at the veteran's latest address of record. The commenter used her husband's case as an example, stating that his 1990 reduction should be void because she alleges that VA did not provide her husband with notice of a 1971 rating decision. This comment deals with defective notice and the effect it has on the finality of decisions. Accordingly, this comment will be discussed with other comments received for RIN 2900–AL87, ''General Provisions'', in subpart A of this part, which contains VA's definition of a ''Final decision'' in proposed § 5.1.

§ 5.461 Electing Improved Pension Instead of Old-Law Pension or Section 306 Pension

In the initially proposed rule, we proposed to include § 5.461, ''Electing Improved Pension instead of Old-Law or Section 306 Pension'', in subpart F of part 5. However, upon further consideration, it would be more appropriate to place this regulation in subpart L, ''Payments and Adjustments to Payments'', along with other rules on elections of veterans benefits as § 5.758. Hence, we propose to include § 5.461 in our proposed subpart L, initially published in the **Federal Register** on December 27, 2004. 69 FR 77578.

§ 5.472 Rating of Income for Old-Law Pension and Section 306 Pension

Initially proposed § 5.472(b)(2) defined ''payments'' as ''cash and cash equivalents (such as goods and other negotiable instruments) . . . '' We propose to revise our definition by replacing the term ''goods'' with ''checks''. This change is made in order to be consistent with our definition of ''payments'' in § 5.370(h) and § 5.531(b).

§ 5.475 Gaining or Losing a Dependent for Old-Law Pension and Section 306 Pension

For consistency purposes, we propose to revise the heading and the regulatory text in § 5.475(b)(2) by replacing ''on or before December 31, 1978'' with ''before January 1, 1979''. This change will improve clarity in the application of effective dates and is consistent with the rest of part 5.

§ 5.477 Effective Dates of Reductions and Discontinuances of Old-Law Pension and Section 306 Pension

In § 5.477(b), we propose to delete the reference to ''§§ 3.500 through 3.503'' from the regulatory text and replace it with a reference to § 5.705, the part 5 regulation that lists all of the part 5 regulations governing the effective dates of reductions and discontinuances. We propose to revise the regulatory text by inserting the words ''appropriate'' and ''as specified'' in order to notify readers that the provisions in § 5.705 will indicate which effective dates, other than those stated in paragraph (a), are applicable to a particular case.

§ 5.478 Time Limit To Establish Continuing Entitlement to Old-Law Pension or Section 306 Pension

We propose to revise the regulatory text in § 5.478(a), Expected income appears to exceed income limit, by inserting the phrase ''for that calendar year'' after ''annual income limit'' and inserting the word ''calendar'' before ''year effective January 1''. These revisions will remove ambiguity and clarify that VA measures income in calendar-year units.

Deletion of Withholding Provision, Formerly Under 38 CFR 3.260(b), Computation of Income

In addition, we note that under 38 CFR 3.260(b) (the current rule upon which § 5.478(a) is based), VA has the authority to withhold payments if that income will exceed the statutory limit. However, this withholding provision only applied to new claims for Old-Law Pension and Section 306 Pension. Since such claims have been barred by statute since 1979 (*see* Public Law 95–588, sec. 306(a), 92 Stat. 2508 (1978)), there is no need to include the provision in part 5.

XII. Subpart G: Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary

A. Dependency and Indemnity Compensation Benefits AL89

In a document published in the **Federal Register** on October 21, 2005, we proposed to revise Department of Veterans Affairs (VA) regulations governing dependency and indemnity compensation (DIC) benefits, to be published in a new 38 CFR part 5. 70 FR 61326. We provided a 60-day comment period that ended December 21, 2005. We received submissions from four commenters: Disabled American Veterans, Vietnam Veterans of America, National Organization of Veterans' Advocates, and one from a member of the general public.

§ 5.500 Proof of Death

Initially proposed § 5.500 described the types of evidence VA will accept as proof of death. We propose to revise this provision to explain that, where the rule lists more than one type of evidence that VA will accept as proof of death, VA requires the first-listed type of evidence, if obtainable. If the first-listed document is not obtainable, VA will accept the next-listed type of evidence that is obtainable. This clarification reflects VA's established practice. With respect to matters that are ordinarily documented by official public records, such as death, VA's long-standing practice is to require the official records that VA considers most reliable to establish those facts, if such records are available. We believe that it is helpful to state this principle in proposed

§ 5.500 and we propose to revise it accordingly. In accordance with its duty to assist, VA will assist claimants as necessary in seeking to obtain the types of evidence needed to establish the fact of death.

§ 5.504 Service-Connected Cause of Death

All four of the comments received concerned the provisions of initially proposed § 5.504. This proposed section defined a service-connected disability for purposes of determining entitlement to VA death benefits, and provided the rules for determining if a veteran's death is service connected. The AL89 NPRM, omitted the following sentence from 38 CFR 3.312(a), ''[t]he issue involved will be determined by exercise of sound judgment, without recourse to speculation, after a careful analysis has been made of all the facts and circumstances surrounding the death of the veteran, including, particularly, autopsy reports.'' This language is unnecessary in proposed § 5.504 because it mainly restates the generally applicable principle that VA decisions will be based on a review of the entire record. *See* 38 U.S.C. 5107(b) and 38 CFR 3.102. We have stated this in proposed § 5.4(b), ''Claims adjudication polices''. Regarding avoiding ''speculation'', we have stated this concept in proposed § 5.3(b)(6). Regarding the ''exercise of sound judgment'', and conducting a ''careful analysis'', these duties are inherent in any adjudication process and where a claimant disagrees with the judgment or analysis of a VA adjudicator, he or she may appeal the decision. We therefore believe it is unnecessary to include this language in our regulations.

One commenter was concerned with the provision in initially proposed § 5.504(b)(1)(ii) that states, ''[f]or purposes of this section, VA will deem a sudden death in service from trauma to have been preceded by disability from the trauma.'' This commenter stated that the sentence we initially proposed ''is unnecessarily logically convoluted and restrictive, is legally insufficient, and is in fact altogether unnecessary.'' He suggests as alternative language, ''[f]or purposes of this section, a death in service is service-connected [sic], provided the death was in line of duty and was not due to the servicemember's own willful misconduct.''

We agree in part with the commenter's concerns. Part of this sentence is somewhat convoluted and could be read as restrictive. We propose to revise the sentence for the reasons explained in the following paragraphs.

The purpose of this sentence in the proposed rule is to preclude the interpretation that a traumatic death in service is so sudden that it does not produce a disability before death. This provision is necessary because Title 38 of the United States Code requires that to be service-connected, a death in service must result from a disability incurred or aggravated in service. ''The term 'service-connected' means . . . that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service'', 38 U.S.C. 101(16). For a surviving spouse or dependent to be eligible for many VA benefits due to a servicemember's death in service, the person's death must be a result of a disability ''incurred or aggravated, in line of duty in the active military, naval, or air service''. 38 U.S.C. 101(16); *see* also 38 U.S.C. 1310, 2307, 3500, and 3701.

We agree with the commenter that the sentence may be construed to be restrictive if not read carefully. This is due primarily to use of the words ''trauma'' and ''sudden''. Accordingly, we propose to remove the phrases ''from trauma'' and ''from the trauma'' and the word ''sudden'' in the subject sentence in proposed § 5.504(b)(1)(ii).

The revised proposed sentence now reads, ''[f]or purposes of this section, VA will presume that a death that occurred in line of duty was preceded by disability.'' This will make clear VA's intent that the presumption applies to all deaths that occur in line of duty. We substituted ''line of duty'' for ''in service'' to reflect the requirement in 38 U.S.C. 105 and 1110 that disability must be incurred in the line of duty in order to be service connected.

Three commenters expressed concern with the provisions of initially proposed § 5.504(c), regarding service connection for the cause of death when the service-connected disability hastens death. The commenters stated that the proposed revisions in § 5.504 were more restrictive than the provisions in current 38 CFR 3.312. To avoid such a misinterpretation, we are retaining the provisions of § 3.312(c). Accordingly, we are inserting the exact wording of § 3.312(c) into proposed § 5.504(c)(2).

§ 5.510 Dependency and Indemnity Compensation—Basic Entitlement

Initially proposed § 5.510 stated that in order to be entitled to dependency and indemnity compensation a survivor of the veteran ''must be otherwise qualified'' for this benefit. We propose to delete the terms ''otherwise qualified'' and ''qualified'' from proposed § 5.510. To say that a survivor of a veteran must be qualified is redundant of other VA provisions that state the requirements that must be met in order to be considered a dependent of the deceased veteran.

In proposed § 5.510(b)(2), to be consistent with the **Federal Register** Document Drafting Handbook, page 1–19, we propose to change the order of the references to list the United States Code first. In addition, we propose to correct the authority citation at the end of proposed § 5.510.

§ 5.511 Special Monthly Dependency and Indemnity Compensation

We propose to revise initially proposed § 5.511(a) to clarify that entitlement to this benefit is determined based on whether the surviving spouse or parent needs regular aid and attendance. Determinations of the need for aid and attendance will be made under the criteria in proposed § 5.320.

§ 5.520 Dependency and Indemnity Compensation—Time of Marriage Requirements for Surviving Spouses

We propose to revise initially proposed § 5.520(b)(1)(iii) and (b)(2)(ii) by adding the words, ''was born to them'' between ''marriage or'' and ''before the marriage'' in both places it appears. These changes are made to ensure that readers understand that the child VA is referring to is a child of a veteran and spouse, not a veteran's stepchild. This is the same wording used in part 3.

In the NPRM to this rulemaking we stated that ''Proposed § 5.520 is based on portions of current § 3.54 and applicable statutory provisions. . .'' However, it is also based on § 3.22(d), which is substantially the same as § 3.54.

§§ 5.521 Dependency and Indemnity Compensation Benefits for Survivors of Certain Veterans Rated Totally Disabled at Time of Death, and 5.523 Dependency and Indemnity Compensation Rate for a Surviving Spouse

In the NPRM, we reserved §§ 5.521 and 5.523 as the eventual locations for rules concerning entitlement to DIC for survivors of certain veterans rated totally disabled at the time of death and concerning the rates of DIC payments to surviving spouses. We explained that, when the NPRM was issued, rulemaking was pending to amend the provisions in part 3, Code of Federal Regulations, involving those matters, and that we would incorporate those part 3 provisions in this final rule once the pending part 3 changes were made.

Because those part 3 changes have now been made, as explained below, we propose to add the corresponding provisions in part 5.

VA issued a final rule in December 2005 amending its part 3 regulations in response to the decision in *Nat'l Org. of Veterans' Advocates, Inc.* v. *Sec'y of Veterans Affairs,* 314 F.3d 1373 (Fed. Cir. 2003). This final rule (*see* 70 FR 72211, Dec. 2, 2005) revised § 3.22(b) to clarify the meaning of the phrase ''entitled to receive'' for purposes of determining whether a veteran's survivors are entitled to benefits under 38 U.S.C. 1318, ''Benefits for survivors of certain veterans rated totally disabled at time of death''. This final rule also revised provisions previously in § 3.5(e) relating to the rates of DIC payable to surviving spouses and moved those provisions into § 3.10.

VA completed another rulemaking in 2006, implementing section 301 of the Veterans Benefits Improvement Act of 2004. Section 301 amended 38 U.S.C. 1311, Dependency and indemnity compensation to a surviving spouse, by adding subsection (e) (amended to be subsection (f) by section 4 of Pub. L. 109–361, 120 Stat. 2062 (2006)), providing a $250 increase in the monthly rate of DIC to which a surviving spouse with one or more children below age 18 is entitled. The increased rate is payable for the 2-year period beginning on the date entitlement to DIC began and ends the first month after the month all children of the surviving spouse attain age 18. This statutory change was incorporated as § 3.10(e)(4). *See* 71 FR 44915, Aug. 8, 2006.

In anticipation of these regulatory changes, VA reserved §§ 5.521 and 5.523 in the NPRM for this regulation rewrite segment. We propose to incorporate the current versions of §§ 3.22 and 3.10 (as amended), as proposed §§ 5.521 and 5.523, respectively. In addition, we propose to remove the reference to, ''§ 5.521 (Reserved) and § 5.523 (Reserved)''. As noted in the NPRM and this proposed notice, the provisions of current § 3.22(d) are incorporated in proposed § 5.520 and the provisions of current § 3.22(e) and (f) are incorporated in proposed § 5.522(a), (b), and (c)(4).

Current 38 CFR 3.22(a)(2)(iii) implements 38 U.S.C. 1318(b)(3) which states that VA will pay death benefits to the surviving spouse or children in the same manner as if the veteran's death were service-connected if the veteran's death was not the result of his or her own willful misconduct and at the time of death, the veteran 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 not less than 1 year immediately preceding death, if the veteran was a former prisoner of war who died after September 30, 1999. Section 603 of Public Law 111–275, 124 Stat. 2864, 2885 (2010) amended section 1318(b)(3) by removing the requirement that the veteran have died after September 30, 1999, so we have omitted this requirement from § 5.521(a)(2)(iii).

§ 5.524 Awards of Dependency and Indemnity Compensation Benefits to Children When There Is a Retroactive Award to a Schoolchild

We propose to make changes to initially proposed § 5.524 to reduce wordiness and enhance clarity. For example, paragraph (a), as initially proposed, stated: ''The total amount payable to the children, which varies according to the number of children, is divided and paid to the children in equal shares.'' We propose to revise that sentence to state: ''The total amount VA pays to a child depends on the number of children, and the amount is paid to each child in equal shares.'' Further, we propose to add the term ''currently'' to paragraph (a)(1) to clarify that the exception stated in proposed § 5.524 only applies when, at the time DIC is reestablished for the additional child, other children are receiving running DIC awards.

We propose to delete the term ''eligible'' as it applies to child in proposed § 5.524. To state that dependency and indemnity compensation is payable to an eligible child is redundant of other VA regulations that state the requirements of a dependent. For this same reason, we propose to make similar changes in proposed § 5.536 to the term ''eligible parents''.

We additionally propose to reword paragraphs (a)(2) and (3) to enhance reader comprehension. The rewording of proposed § 5.524(a) will make this regulation more comprehensible to the average reader.

Proposed § 5.524(b) deals with retroactive payments and payment dates for additional children who successfully reestablish DIC entitlement. Upon further review, we determined that rewording the paragraph would make it easier to understand. We intend no change in the meaning of paragraph (b).

§ 5.525 Awards of Dependency and Indemnity Compensation When Not All Dependents Apply

In NPRM AM06, ''Payments and Adjustments to Payments''; 73 FR 65212, Oct. 31, 2008, we included proposed § 5.696, ''Awards of dependency and indemnity compensation when not all dependents apply''. In preparing this proposed rule, we have determined that because it concerns only dependency and indemnity compensation benefits, this section more logically belongs in part 5, subpart G, which is titled, ''Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary''. We therefore propose to move this section into subpart G, renumbering it as proposed § 5.525.

§ 5.530 Eligibility for, and Payment of, a Parent's Dependency and Indemnity Compensation

We propose to correct the authority citation at the end of initially proposed § 5.530 so that the United States Code sections are in chronological order.

5.533 Income Not Counted for Parent's Dependency and Indemnity Compensation

In the preamble for initially proposed § 5.302, 70 FR 61326, 61336, (Oct. 21, 2005), we explained our omission of the first sentence of § 3.262(j)(2) as an unnecessary specific instance of a broader general rule in 5.302(a) that encompasses the specific rule. The second sentence of § 3.262(e) is analogous to § 3.262(j)(2) and unnecessary for the same reason. The preamble to initially proposed explained our omission of the third sentence of § 3.262(e)(4). Without the third sentence, the fourth sentence is moot without the third sentence, because it provides a process to implement after implementing the third sentence.

§ 5.535 Adjustments to a Parent's Dependency and Indemnity Compensation When Income Changes

In reviewing the AL89 NPRM, we determined that we failed to incorporate § 3.660(b)(2) in initially proposed § 5.535. The concept of anticipated income is different from that of actual income. This is because a beneficiary's actual income may be less than his anticipated income. VA may learn of this in any of the following ways: (1) Actual income is reported by the parent on an eligibility verification report (EVR); (2) VA requests a statement from the parent of their actual income at anytime; or (3) The parent notifies VA of income changes on their own.

We therefore propose to insert the rules from § 3.660(b)(2) into proposed § 5.535.

§ 5.536 Parent's Dependency and Indemnity Compensation Rates

In initially proposed § 5.536(d) we intended only to restate current § 3.251(a)(4), but we inadvertently misstated that provision. Section 3.251(a)(4) does not purport to apply only if there is one eligible parent. Instead, it states that if a parent's remarriage ends, the parent will be paid at the rate for one parent alone or for two parents not living together, whichever is applicable. This means that the parent will be paid at the ''one parent'' rate if there is no other eligible parent, or at the ''two parents not living together rate'' if the other parent is alive. Initially proposed § 5.536(d) limited this rule to cases where there is only one parent and stated that VA will pay at the ''one parent'' rate if the remarriage ends or at the ''two parents not living together'' rate if the parent is separated from his or her spouse. We propose to revise initially proposed paragraph (d) so that it is now consistent with § 3.251(a)(4).

Note Regarding § 5.573 Through § 5.579.

In the NPRM for AL89, we included §§ 5.573 through 5.579. We received no comments on these sections. To cut down on the length of this rulemaking, we chose to include those sections in the rule segment to the companion rulemaking, RIN 2900–AL71, Accrued Benefits and Special Rules Applicable Upon Death of a Beneficiary, published as NPRM at 69 FR 59071, Oct. 1, 2004. Any technical corrections or changes in terminology made to these regulations are included there. Thus initially proposed §§ 5.573 and 5.574 have been removed from this proposed subpart, as well as the reference to reserving proposed §§ 5.575–5.579.

Technical Corrections and Changes in Terminology

The changes in terminology in this proposed rulemaking are made primarily for purpose of achieving consistency throughout our part 5 regulations. Except as otherwise provided in this preamble, no substantive changes are intended by these changes made in terminology.

According to paragraph 12.9 of the Government Printing Office Style Manual, numerals rather than words are used when referring to units of measurement and time. Therefore, we substituted the numeral ''7'' for the word ''seven'' in proposed § 5.503(b). Likewise, we substituted the numeral ''1'' for the word ''one'' in proposed § 5.520(b)(1)(ii) and (b)(2)(i).

To be consistent in style with the rest of part 5, we propose to change ''DIC'' to ''dependency and indemnity compensation'' if it was used in a heading to a regulation section in the NPRM. We also propose to change the headings in proposed §§ 5.521 and 5.535 accordingly. Similarly, ''dependency and indemnity compensation'' was changed to ''dependency and indemnity compensation (DIC)'' the first time it appears in each section, if we did not do so in the NPRM. We propose to make this change in proposed § 5.531(c) and the introductory paragraph to proposed § 5.533. Likewise, we propose to change ''dependency and indemnity compensation'' to ''DIC'' the second and subsequent times it appeared in each section, if we had not already done so in the NPRM. We propose to make such changes to proposed § 5.523(a) and (e)(4).

To clarify that only one parent is required to apply for DIC, not both, we propose to change the heading of the undesignated center heading entitled, ''Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for Parents,'' to, ''Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for a Parent''. Also, where appropriate to make this requirement more apparent, we propose to change references from ''parents'' to ''a parent,'' except where the context clearly encompasses both parents or all parents in receipt of DIC.

To be consistent with other regulations in part 5, we propose to change the phrases, ''[t]he amount to be offset includes'' and ''[t]he amount to be offset excludes'' to ''VA will count in the amount to be offset'' and ''VA will not count in the amount to be offset'' in each place they appeared in the NPRM in initially proposed § 5.522(c)(1) through (4). For the same reason, in (c)(1) we propose to change ''excluded'' to ''not counted'', in (c)(2) we changed ''[t]his includes'' to ''VA will also count'', and in (c)(3) we changed ''included'' to ''counted''. Similarly, in § 5.531(a) and (b), we propose to change the word ''included'' to the phrase or word, ''are counted'' or ''counted'', as appropriate. Finally, we propose to change the heading of initially proposed § 5.533 from ''Exclusions from income'' to ''Income not counted for parent's dependency and indemnity compensation,'' and in initially proposed § 5.533(i)(2), we propose to change the phrase, ''be excluded'' to ''not be counted.''

B. Accrued Benefits, Death Compensation, and Special Rules Applicable Upon Death of a Beneficiary AL71

In a document published in the **Federal Register** on October 1, 2004, we proposed to revise Department of Veterans Affairs (VA) regulations governing accrued benefits and special rules applicable upon death of a beneficiary, to be published in a new 38 CFR part 5. 69 FR 59072. We provided a 60-day comment period that ended November 30, 2004. We received submissions from two commenters: Vietnam Veterans of America and a member of the general public.

§ 5.538 Effective Date of Dependency and Indemnity Compensation Award

In initially proposed AL71, we placed all the dependency and indemnity compensation (DIC) effective date provisions at the end of subpart G, ''Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary''. We have determined that they will be easier to locate if they appear after the series of regulations on DIC, rather than after the series of regulations on accrued benefits. Therefore, we propose to renumber the sections initially proposed as §§ 5.567 through 5.574 as §§ 5.538 through 5.545.

We propose to revise initially proposed § 5.538 to identify dates as ''effective dates'' instead of ''payment dates'' to be consistent with other provisions in part 5.

In § 5.538(a)(1)(i), we propose to change the phrase, ''If VA receives a claim for [DIC] within one year from'' to ''If VA grants DIC based on a claim received no later than 1 year after''. In proposing this rule, we incorrectly omitted the relevant event of VA granting the benefit. In addition, because VA considers a claim for death pension to also be a claim for DIC, it could be misleading to imply that the claim must be for DIC. For the same reasons, we propose to make conforming changes to paragraphs (a)(2), (b)(1), (b)(2), (d)(1), and (d)(2) of § 5.538.

In § 5.538(a)(1)(ii), we propose to add the words, ''based on a report of actual death'' to be consistent with current § 3.400(c)(1), the part 3 equivalent to this section, and to correct an omission from the initially proposed rule. We also propose to add the words, ''any of the veteran's following military entitlements'' and reformat the sentence. This revision will ensure that there is no confusion between military

entitlements and other benefits titled allowances, allotments, or service pay.

In § 5.538(d)(2), we propose to change cross-references to §§ 5.230 and 5.696 to exceptions, in order to be as specific as possible and eliminate confusion. We begin the proposed rule by stating ''Except as otherwise provided in this part'' and end with the cross-references in an attempt to imply that the cross-references are the exceptions.

In § 5.538(e), we propose to add § 5.230 as an exception to correct an omission from the initially proposed rule.

§ 5.539 Discontinuance of Dependency and Indemnity Compensation to a Person No Longer Recognized as the Veteran's Surviving Spouse

In § 5.539 (initially proposed 5.568), we propose to revise paragraph (a) so that it clearly requires the discontinuance of DIC payments to a former payee when VA recognizes that a new payee is eligible for DIC based on the same veteran. In the initially proposed rule, we inadvertently addressed the effective date of such discontinuance without also directing that such discontinuance occur.

We propose to delete from paragraph (b) language referring to periods on or after December 1, 1962. Because part 5 will apply only prospectively, not retroactively, the language is unnecessary.

We also propose to revise the language in paragraph (b)(1) that had stated that ''the award to the former payee will be terminated the day preceding the effective date of the award to the new payee'' to state instead that ''the award to the former payee will be discontinued on the effective date of the new payee's DIC award''. We propose to revise the language to conform to our practice in part 5 of referring to the first date that a new rate or benefit is paid, instead of referring to the last date on which a prior rate or benefit is paid.

We propose to delete paragraph (b)(3), which had contained an exception to the effective-date provisions when the discontinuance of DIC payments is due to a change in, or in the interpretation of, the law or an administrative issue, from this regulation. That provision was redundant of § 5.152, which was published as proposed on May 22, 2007. *See* 72 FR 28769.

§ 5.540 Effective Date and Payment Adjustment Rules for Award or Discontinuance of Dependency and Indemnity Compensation to a Surviving Spouse Where Payments to a Child Are Involved

In § 5.540 (initially proposed 5.569), We propose to reorganize this section for clarity by incorporating much of the introductory material initially proposed in paragraph (a) into the paragraphs that follow. This revision simplifies the section without changing the meaning or intent.

§ 5.541 Effective Date of Reduction of a Surviving Spouse's Dependency and Indemnity Compensation Due to Recertification of Pay Grade

In § 5.541, (initially proposed 5.570), we propose to delete paragraphs (a) and (b) because those paragraphs were redundant of §§ 5.197, ''Effective date of reduction or discontinuance of Improved Pension, compensation, or dependency and indemnity compensation due to marriage or remarriage'', and 5.231, ''Effective date of reduction or discontinuance: child reaches age 18 or 23'', which were published as proposed on September 20, 2006. 71 FR 55052, 55067, 55073. We also propose to change the title of the regulation to accurately describe the revised content.

One commenter suggested that VA should add language to § 5.541 (initially proposed § 5.570(c)) to inform readers that the reduction of DIC based on recertification of a pay grade to a level lower than the one originally certified would not result in an overpayment of monthly DIC benefits paid to a veteran's survivors based on the pay grade previously in effect. We did not include such language in the initially proposed rule because a reduction under § 5.541 will always involve a future and not a retroactive adjustment in DIC benefit payments. No overpayment is created because of the prospective nature of the reduction. However, we propose to reword the provision to clarify that the reduction will be ''effective the first day of the month after the month for which VA last paid the greater benefit''.

§ 5.542 Effective Date of an Award or an Increased Rate Based on Decreased Income: Parents' Dependency and Indemnity Compensation

In initially proposed § 5.571(c), we referred to time limits contained in a ''regulation that [would] be published in a future Notice of Proposed Rulemaking'' based on current § 3.660(b)(1). That regulation, § 5.535, was published as proposed on October 21, 2005. *See* 70 FR 61326. To simplify the material and eliminate redundancy, we propose to combine proposed §§ 5.535 and 5.571 into a single section, § 5.542.

§ 5.543 Effective Date of Reduction or Discontinuance Based on Increased Income: Parents' Dependency and Indemnity Compensation

In proposed § 5.543 (initially proposed 5.572), we propose to reorganize the material into two paragraphs instead of four to simplify the structure of the regulation. Also, we propose to change the language in initially proposed paragraph (b) stating that a reduction or discontinuance would be effective at ''the end of the month in which income increased'' to refer instead to ''the first day of the month after the month in which the income increased or is expected to increase''. We propose to revise the language to conform with our practice in part 5 of referring to the first date a new rate is paid instead of referring to the last date on which a prior rate is paid.

§§ 5.544 Dependency and Indemnity Compensation Rate Adjustments When an Additional Survivor Files a Claim, and 5.545 Effective Dates of Awards and Discontinuances of Special Monthly Dependency and Indemnity Compensation

When these initially proposed rules were published in the **Federal Register** on October 1, 2004, we proposed to reserve §§ 5.573 and 5.574 for future regulations. 69 FR 59072. In the second package of proposed rules for this subpart G published on October 21, 2005, we designated § 5.573 as ''Effective date of dependency and indemnity compensation rate adjustments when an additional survivor files an application'', and § 5.574 as ''Effective dates of awards and discontinuances of special monthly dependency and indemnity compensation.'' 70 FR 61326, 61348. We received no comments regarding these two sections. As discussed above, we propose to renumber the sections, initially proposed as §§ 5.573 and 5.574, as §§ 5.544 and 5.545 respectively.

We propose to move the exception (stated in initially proposed § 5.573(e)) referring to § 5.524 to the introductory paragraph of § 5.544. This prominent position will more effectively alert readers to the exception.

Also in § 5.544, we propose to delete paragraph (a)(2) and reorganize the remainder of paragraph (a) into a single paragraph. The condition contained in initially proposed paragraph (a)(2)—that

payment to the additional survivor would reduce the benefit being paid to the other survivors—is always true when the benefit is DIC; therefore, stating it as a condition is unnecessary in proposed § 5.544. The language proposed in paragraph (a)(2) is derived from current § 3.650(a) and is necessary in that section because it applies to pension and compensation as well as DIC.

In § 5.545(a)(2), we propose to delete the word ''basic'' from before ''DIC''. Part 5 will not use the term ''basic DIC'' to distinguish DIC from special monthly DIC because use of the term ''basic DIC'', which is not used elsewhere in part 5, was likely to confuse a reader. Instead, we will distinguish the benefits by referring to ''DIC'' and ''special monthly DIC''. We also propose to simplify the paragraph by eliminating initially proposed paragraph (a)(2)(i). Initially proposed paragraph (a)(2) provided that the effective date would be ''the later of the following dates: (i) [t]he effective date of the . . . DIC award, or (ii) [t]he date entitlement to special monthly DIC arose.'' Unless the two dates are the same, the date entitlement to special monthly DIC arose will always be the later date, so it is unnecessary to refer to the effective date of the DIC award.

We propose to redesignate initially proposed § 5.574(a)(3), which was based on current § 3.402(c)(2) and the last sentence of § 3.404, as a new paragraph § 5.545(c). We have also reworded the paragraph in order to specify that special monthly dependency and indemnity compensation based on the need for aid and attendance will not be paid if the surviving parent or surviving spouse is receiving hospital care in his or her own right as a veteran. The rewording of this paragraph is made for clarity.

Changes From Proposed §§ 5.550 Through 5.559 Based Upon a Change in the Implementation of Part 5

When we began writing part 5, we planned to remove part 3 from title 38, CFR, such that all claims for benefits, and the administration of such benefits, would be governed by part 5. Accordingly, many of the part 5 regulations were written and proposed with that concept in mind. Since then, we determined that it would be better to retain the part 3 regulations for the adjudication of claims received before the applicability date of the part 5 regulations. Thus, we would apply the part 5 regulations only to claims received on or after the applicability date of the part 5 regulations.

Specifically, when we initially proposed the accrued-benefits regulations, we anticipated that they would apply to all claims, including those filed before December 16, 2003, and those in which death of the beneficiary occurred before December 16, 2003. The proposed rules distinguished claims for accrued benefits filed before December 16, 2003, from claims for accrued benefits filed on or after that date. The rules also contained effective dates relevant to the distinction between claims filed before versus after December 16, 2003. We received comments concerning the substance of these issues, but these comments are no longer relevant because we have removed the provisions.

Part 5 will not be in effect before 2013. A claim for accrued benefits must be filed no later than 1 year after the date of the beneficiary's death. Therefore, part 5 will not apply to claims for accrued benefits based on a death before 2004. We propose to revise the rules accordingly.

For the above reason, we propose to revise the definition of ''accrued benefits'' (initially proposed in § 5.550, now in proposed § 5.1) and delete initially proposed §§ 5.556, 5.558, and 5.559. As discussed further below, we also propose to delete initially proposed § 5.554. Because we are proposing to delete initially proposed §§ 5.554 and 5.556, we propose to renumber proposed § 5.555 as § 5.554, and proposed § 5.557 as § 5.555. We propose to reserve §§ 5.556, 5.557, 5.558, and 5.559.

One comment pertained to initially proposed § 5.556 and its 2-year limitation on the payment of accrued benefits on cases in which the beneficiary had died before December 16, 2003. The commenter explained that she was a surviving spouse receiving dependency and indemnity compensation under 38 U.S.C. 1151 because of a death caused by VA medical treatment and that the veteran had been receiving VA disability compensation during his lifetime. The commenter felt that where VA medical care had hastened a veteran's death so that the veteran did not live until December 16, 2003, VA should pay the full amount of accrued benefits without regard to the 2-year limitation. The Veterans Benefits Act of 2003, Public Law 108–183, sec. 104, 117 Stat. 2651, 2657, was signed into law on December 16, 2003, and removed the 2-year limitation on payment of accrued benefits with respect to deaths occurring on or after that date. *See* 38 U.S.C. 5121. VA has no authority to pay more than 2 years of accrued benefits for deaths occurring before December 16, 2003. We propose to make no changes based on this comment because we do not have the authority to change the regulations as the commenter wants. However, as discussed above, we propose to delete initially proposed § 5.556 because it was intended to apply only to claims based upon the death of a beneficiary occurring before December 16, 2003.

§ 5.550 [Reserved]

In § 5.550, we initially proposed several definitions. We have determined that the definitions are either unnecessary or more appropriately placed elsewhere in part 5. So we propose to delete the initially proposed text and reserve § 5.550.

We propose to move the definition of ''accrued benefits'' to § 5.1, the definition of ''claim for benefits pending on the date of death'' to § 5.1, and the definition of ''evidence in the file on the date of death'' to § 5.1 because these definitions apply to all of part 5.

We initially proposed a definition of ''deceased beneficiary'' to distinguish that person from the living beneficiary claiming survivor's benefits. *See* 69 FR 59076, Oct. 1, 2004. We have since concluded that the definition is superfluous because it adds nothing to the plain meaning of the term ''deceased beneficiary''. Where the regulations refer to a ''deceased beneficiary'', the term is clear in context.

The initially proposed definitions of ''child'' and ''dependent parent'' contained references to the general definitions of those terms (contained elsewhere in part 5) and rules limiting the application of the general definitions for purposes of accrued benefits. The references to the general definitions are unnecessary, and the rules limiting the definitions are more appropriately placed in § 5.551(a). We therefore propose to revise the rule limiting the definition of ''child'' to more accurately reflect the content of current § 3.1000(d)(2) upon which the rule is based.

Similarly, the initially proposed definition of ''surviving spouse'' contained a reference to the general definition contained elsewhere in part 5 and a rule limiting the application of the general definition for purposes of accrued benefits. The reference to the general definition is unnecessary, and the rule limiting the definition is more appropriately placed in §§ 5.551(b) and 5.566(d)(1). In relocating the rule, we propose to not repeat the language contained in initially proposed § 5.550(h)(2)(i) regarding date-of-marriage requirements for DIC and

death compensation. Although initially proposed § 5.550(h)(2)(i) was based on a reference to date-of-marriage requirements in § 3.1000(d)(1), a surviving spouse could never claim accrued benefits based on DIC, so the language was superfluous.

As stated in the preamble of the AL71 NPRM, the U.S. Court of Appeals for Veterans Claims in *Bonny* v. *Principi,* 16 Vet. App. 504 (2002) interpreted 38 U.S.C. 5121(a) as establishing a class of benefits known as ''benefits awarded, but unpaid at death''. 69 FR 59072, 59074, Oct. 1, 2004. Although we initially proposed to define ''benefits awarded, but unpaid at death'' in proposed § 5.550, we have determined that it is unnecessary to include rules on such benefits in part 5. As stated in the preamble to RIN 2900–AL71, ''These proposed rules also apply to claims for benefits awarded, but unpaid at death, if the deceased beneficiary died prior to December 16, 2003, and a claim for such benefits was pending on December 16, 2003.'' Any claim pending on that date would be processed under part 3, not part 5, so there is no need to include such provisions in part 5. We therefore propose to remove all references to ''benefits awarded, but unpaid at death'' from part 5.

§ 5.551 Persons Entitled to Accrued Benefits

In § 5.551(c)(2) and (d)(1), we propose to add the sentence, ''[i]f there is no eligible claimant, such accrued benefits are payable to the extent provided in paragraph (f) of this section.'' We propose to add this sentence for consistency with paragraphs § 5.551(e)(1) and (f) and to ensure proper disposition of the accrued benefits.

We propose to clarify initially proposed § 5.551(e), now redesignated as paragraph (f). Title 38 CFR 3.1000(a)(5) uses the phrase ''last sickness or burial'' instead of ''last sickness and burial''. However, in initially proposed § 5.551(e), we used the phrase ''last illness and/or burial'' without providing an explanation for this change. Title 38 U.S.C. 5121(a)(6) states, ''accrued benefits may be paid . . . to reimburse the person who bore the expense of last sickness and burial.'' VA interprets the word ''and'' as used in the statute to mean ''or''. We do not believe that Congress intended to require that a person have paid expenses of both the last illness and burial in order to qualify for some reimbursement. For example, if a person expended their savings paying for health care bills resulting from the veteran's last illness and therefore could not pay for the burial, it would be unfair not to reimburse them for the health care bills. We are changing the initially proposed language from ''and/or'' to simply ''or'' because this term includes ''and''. For this same reason, we are making similar changes in proposed §§ 5.566(d)(4), and 5.567(a)(4).

We propose to clarify § 5.551(g) to reflect VA's long-standing policy that if a preferred potential claimant fails to file a claim, VA will not pay his or her share of accrued benefits to a person having an equal or lower preference. Similarly, if a preferred potential claimant waives rights to accrued benefits, VA will not pay his or her share of accrued benefits to a person having an equal or lower preference. VA will only pay the accrued benefits to someone else if, within the 1-year period to file a claim for accrued benefits, the preferred potential claimant dies, forfeits entitlement, or otherwise becomes disqualified. In such a case, the next-in-line (or equal) person must file a timely claim.

The statute, 38 U.S.C. 5121, authorizes VA to pay accrued benefits only to ''the living person first listed'' in the hierarchy set forth in section 5121(a)(2). VA has consistently interpreted ''the living person first listed'' as an instruction to pay only that person, so long as he or she is alive. Because a claim for accrued benefits may be filed up to 1 year after the veteran's death, however, we permit a claimant lower in the hierarchy to file a claim if the person above them dies during that 1 year. We also liberally interpret the statute to authorize payment of accrued benefits to a person lower in the hierarchy when the person(s) above them is involuntarily disqualified, not withstanding that the person is still alive because, as a legal matter, such person is treated as if he or she were dead for purposes of determining entitlement to benefits.

We propose to make similar revisions to § 5.566(e)(3) based on VA's consistent interpretation of ''the following persons living at the time of settlement, and in the order named'' as used in the authorizing statute, 38 U.S.C. 5502(d).

§ 5.552 Claims for Accrued Benefits

In initially proposed § 5.552(a), we noted that § 5.552 did not apply to claims for the proceeds of a benefit check that the deceased beneficiary did not negotiate before death or to awards under the *Nehmer* court orders for disability or death caused by a condition presumptively associated with herbicide exposure. These scope provisions are unnecessary because they are redundant of material contained in §§ 5.564, ''Cancellation of checks mailed to deceased payee; payment of such funds as accrued benefits'', and 5.592, ''Awards under *Nehmer* Court orders for disability or death caused by a condition presumptively associated with herbicide exposure.'' We therefore propose to delete § 5.552(a) and redesignate the other paragraphs accordingly.

We also propose to delete the cross reference to § 3.152(b) that was contained in initially proposed § 5.552(c)(3). Cross-referencing § 3.152, or its part 5 counterpart, § 5.52, would not be useful to the reader. The portions of those regulations pertinent to claims for accrued benefits are incorporated in § 5.552(b).

Deletion of Proposed § 5.554

We propose to delete initially proposed § 5.554. First, we propose to move the material from initially proposed § 5.554 concerning school vacation periods to § 5.551(a)(1)(ii). We propose to revise the provision to more clearly and simply state the rule.

We propose to eliminate the provision in the initially proposed rule which stated that ''school confirmation of evidence of school attendance is not required to support a claim''. This provision was intended to prevent VA employees from requiring proof of school attendance in claims for accrued benefits where such evidence was already of record. This might occur, for example, when the child was already listed as a dependent on the veteran's award or was receiving educational benefits under 38 U.S.C. chapter 35. There are no similar provisions regarding other types of proof in claims for accrued benefits, and it is unnecessary to have a regulation instructing VA employees to refrain from requesting duplicate evidence.

§ 5.554 VA Benefits Payable as Accrued Benefits

We propose to revise the heading of § 5.554 (initially proposed as § 5.555) so that it is no longer phrased as a question, and so that it more completely identifies the subject matter of the section.

In § 5.554(a)(10), we propose to correct the citation to 10 U.S.C. chapter 1606 (as initially proposed, it was ''10 U.S.C. 1606''), and we propose to add veterans' educational assistance under 10 U.S.C. chapter 1607 to the list of potentially qualifying benefits. Section 527 of Public Law 108–375 established an additional educational assistance program, educational assistance for certain reserve component members who performed active military service

under the provisions of 10 U.S.C. chapter 1607. *See* 118 Stat. 1811, 1890–94 (2004). This new program results in periodic monthly benefits that are paid under laws administered by the Secretary.

§ 5.555 Relationship Between Accrued-Benefits Claims and Claims Filed by the Deceased Beneficiary

We propose to revise paragraph (a) of this renumbered section (initially proposed as § 5.557) to clarify the distinction between, and relationship of, accrued-benefits claims and claims filed by the deceased beneficiary.

§§ 5.560–5.563 [Reserved]

We propose to delete the initially proposed rules concerning death compensation (proposed §§ 5.560 through 5.562) and reserve §§ 5.560 through 5.562 for later use. There are fewer than 300 beneficiaries currently receiving death compensation. VA has not received a claim for death compensation in over 10 years, and we do not expect to receive any more claims. However, should VA receive such a claim, it could process the claim under the controlling statute, 38 U.S.C. 1121 (for survivors of wartime veterans) or 1141 (for survivors of peacetime veterans). Except for one small group of beneficiaries, death compensation is payable only if the veteran died before January 1, 1957. Because of the small number of beneficiaries of death compensation, the provisions concerning death compensation do not need to be carried forward to part 5.

Additionally, we have determined that the rule initially proposed as § 5.563, ''Special rules when a beneficiary dies while receiving apportioned benefits'', relates to apportionments more than to accrued benefits so we propose to move it to subpart M, ''Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries''. We propose to reserve § 5.563 for later use.

§ 5.564 Cancellation of Checks Mailed to a Deceased Payee; Payment of Such Funds as Accrued Benefits

Under 38 U.S.C. 5122, VA must pay, in accordance with the hierarchy of payments of accrued benefits, the amount of benefits represented in a ''check received by a payee in payment of accrued benefits . . . if the payee died on or after the last day of the period covered by the check.'' In addition, VA may pay such benefits if the check was wrongly negotiated, but the funds are recovered. In all other cases, 38 U.S.C. 5121(c) would apply, such that a person wishing to receive accrued benefits must file a claim for such benefits.

We propose to revise the title and paragraph (a) of § 5.564. First, we propose to clarify that VA is only authorized to pay the accrued benefits represented in a check mailed to a deceased payee for a period during which the payee was alive up to at least the last day of the period. As initially proposed, the regulation stated that it did not apply to benefits for ''the month in which the beneficiary died'', but did not clearly identify the periods to which the regulation could apply. Moreover, this language was not technically correct, because a payee could die on the last day of the period and still be covered by the statute, which explicitly applies when the payee died ''on . . . the last day of the period.''

Second, we propose to clarify that this regulation may apply to multiple checks received by the deceased payee. This is clear in the current rule, 38 CFR 3.1003(a)(1), but was not clear in § 5.564 as initially proposed.

Third, the initially proposed rule referred several times to ''non-negotiated'' checks, which could have been read to be unnecessarily limiting because VA may also pay funds that are recovered after a check was negotiated by someone other than the payee. (In the one remaining instance, we use the term ''unnegotiated'' instead of ''non-negotiated'' to be consistent with prior opinions by VA's Office of General Counsel. *See,* for example, VA General Counsel's Opinion, VAOPGCPREC 8–96, 61 FR 66749 (Sept. 26, 1996).

Finally, we propose to move initially proposed paragraph (d), concerning payment to the deceased payee's estate, into paragraph (a), for organizational reasons.

As revised, paragraph (a) will more closely track the statutory language and accurately represent the current rule in 38 CFR 3.1003; it will not represent a departure from VA's current practice and interpretation of 38 U.S.C. 5122.

We also propose to delete initially proposed paragraph (b) and redesignate the remaining paragraphs accordingly. As initially proposed, paragraph (b) was comprised of two unnecessary negative propositions, based on current § 3.1003(a)(1). First, proposed paragraph (b) provided that there is no limit on the retroactive period for which payment of the amount represented by the checks may be made. It is unnecessary to state this negative proposition, and this language might mislead readers into believing that there is an unstated time limit on the retroactive period of an award under other sections, when in fact there is no such time limit. Second, proposed paragraph (b) provided that there is no time limit for filing a claim to obtain the proceeds of the checks or for furnishing evidence to perfect a claim. It is unnecessary to state this negative proposition (that is, that there is no deadline) because this language might mislead readers into believing that there is a requirement to file a claim for the proceeds of VA checks under § 5.564, when in fact there is no such requirement.

§ 5.565 Special Rules for Payment of VA Benefits on Deposit in a Special Deposit Account When a Payee Living in a Foreign Country Dies

In § 5.565(b)(1) and (2), we propose to add the words ''in equal shares'' at the end of each paragraph, to clarify that payment to the children of the veteran or children of the surviving spouse is to be in equal shares. The authorizing statute, 31 U.S.C. 3330, is not specific in this regard, but payment in equal shares is consistent with VA practice and provides a simple and fair rule for administering payments.

Current § 3.1008, on which initially proposed § 5.565 was based, contains no statutory authority. In our initially proposed rule, we listed 31 U.S.C. 3329 and 3330 and 38 U.S.C. 6104 as the authority citations. In reviewing this rule, we have determined that section 6104 does not provide statutory authority for § 5.565 and that additional authority is provided by 38 U.S.C. 5309. We propose to correct this authority citation appropriately.

§ 5.566 Special Rules for Payment of Gratuitous VA Benefits Deposited in a Personal Funds of Patients Account When an Incompetent Veteran Dies

We propose to clarify § 5.566(d)(3) by adding ''on the date of the veteran's death''. Similar language is contained in current § 3.1009(a)(3) upon which the initially proposed rule was based, and the phrase should have been included in the proposed rule.

Paragraph 7 of VA General Counsel's opinion VAOPGCPREC 06–91, 56 FR 25156 (June 3, 1991), states that:

7. Interim Issue (CONTR–169), dated January 13, 1960, providing necessary instructions for the fiscal implementation of PL 86–146, provides in paragraph D.3 in pertinent part:

''a. Immediately upon death of a veteran who has been adjudged or rated incompetent, the balance in the Personal Funds of Patients account will be analyzed to determine the source thereof, i.e., funds derived from gratuitous benefits deposited by the VA under laws administered by the VA or from other sources. For this purpose gratuitous benefits are defined as all benefit payments

under laws administered by the VA except insurance payments (Servicemen's Indemnity benefits are not insurance payments).''

We therefore propose to replace ''gratuitous benefits'' with the phrase ''all benefits except insurance payments'' in § 5.556. For this same reason, we propose to make this change throughout part 5.

§§ 5.567 Special Rules for Payment of Old-Law Pension When a Hospitalized Competent Veteran Dies, and 5.568 Non-Payment of Certain Benefits Upon Death of an Incompetent Veteran

In the initially proposed rule for subpart G, we did not include the provisions from part 3 concerning payment of Old-Law Pension benefits withheld from hospitalized competent and incompetent veterans who die before payment is made, as found in §§ 3.1001 and 3.1007. This omission was inadvertent and we now propose to include these provisions as §§ 5.567 and 5.568.

In § 5.567(b), we are not including language equivalent to current § 3.1001(b)(1) stating, ''[t]here is no time limit on the retroactive period of an award''. It is unnecessary to state this negative proposition, and this language might mislead readers into believing that there is an unstated time limit on the retroactive period of an award under other sections when there is no such time limit.

Current § 3.1007 states that, ''The term 'dies before payment' includes cases in which a check was issued and the veteran died before negotiating the check''. Although there is no such provision in § 3.1001, VA's practice has been to apply this principle to that section as well. This is reflected by the fact that payments under both §§ 3.1001 and 3.1007 are excluded from VA's general rule on unnegotiated checks. *See* 38 CFR 3.1003(c). We therefore propose to add paragraph (d) to § 5.567 stating that the rule applies to ''cases in which a check was issued and the veteran died before negotiating the check.''

Changes in Terminology

We propose to make several changes to the wording throughout this portion of the regulations. For example, we propose to change both ''prior to'' and ''preceding'' to ''before'', and we propose to change ''prior'' to ''previous''.

We propose to change ''day following the date of last payment to the beneficiary'' to ''first day of the month after the month for which VA last paid benefits to the beneficiary'', where ''beneficiary'' represents either a child, parent, spouse, or the veteran. This phrasing is easier to understand and apply.

XIII. Subpart H: Special and Ancillary Benefits for Veterans, Dependents, and Survivors

In a document published in the **Federal Register** on March 9, 2007, we proposed to revise VA regulations governing special and ancillary benefits for veterans, dependents, and survivors, to be published in a new 38 CFR part 5. 72 FR 10860. We provided a 60-day comment period that ended May 8, 2007. We received submissions from two commenters: the Disabled American Veterans and a member of the general public.

Misdirected Comment

One commenter submitted a comment that states that it is intended for this regulatory package, RIN 2900–AL84, but it actually applies to RIN 2900–AL71. The issues raised in this comment are addressed in the portion of this preamble relating to RIN 2900–AL71.

§ 5.580 Medal of Honor Pension

Section 5.580 concerns Medal of Honor pension. Throughout § 5.580, we propose to change the initially proposed word ''person'' to ''servicemember or veteran'', because only servicemembers and veterans can qualify for that benefit.

The second sentence of initially proposed § 5.580(a) stated, ''After a person has been placed on the Medal of Honor Roll, and if such person has indicated a desire to receive the Medal of Honor pension, the Secretary concerned will provide VA with a certified copy of the certificate setting forth such person's right to the Medal of Honor pension.'' We propose to delete this sentence, which seemed to delineate administrative duties of the service departments. The sentence did not require or provide for any VA action. We leave it to those departments to establish appropriate procedures to administer these duties as, for example, 32 CFR 578.9(c) does for the Department of the Army. For VA's purposes, it is necessary to note only that VA receipt of a certified copy of the certificate from the service department is a prerequisite to an award of Medal of Honor pension.

We propose to move initially proposed paragraph (b) into paragraph (a) to emphasize that VA cannot adjudicate entitlement to placement on the Medal of Honor Roll or to a certificate establishing the right to Medal of Honor pension. VA adjudicates only the amount of the initial payment (that is, the lump-sum payment) and of the effective date of the monthly pension, which is set forth in the next paragraph. We were concerned that as written, initially proposed paragraph (b), which stated that ''Medal of Honor pension will be awarded by VA once the certification under paragraph (a) of this section is provided to VA'', could have been misinterpreted to provide an effective date.

In paragraph (b), we assign the effective date of monthly payment of such pension based on the date that the servicemember or veteran entitled to the pension files the appropriate form with the appropriate service department. Although we have generally interpreted 38 U.S.C. 5101(a) to require claimants for VA benefits to file a claim in the form prescribed by VA, that statute does not apply to claimants for the Medal of Honor pension, because the Secretary of the appropriate service department, and not VA, authorizes payment of the Medal of Honor pension. 38 U.S.C. 1561(c). Therefore, no additional claim to VA is necessary to establish entitlement to the Medal of Honor pension.

We propose to redesignate initially proposed paragraph (c) as (b), initially proposed paragraph (d) as (c), and initially proposed paragraph (e) as (d). We changed a phrase in proposed (c)(1) [now (b)(1)] from ''application for placement on the Medal of Honor Roll'' to ''form requesting placement on the Medal of Honor Roll''. We have previously proposed, for VA purposes, that "'application' means a specific form required by the Secretary that a claimant must file to apply for a benefit'' (§ 5.1). The statute authorizing the Medal of Honor Roll provides for placement on the roll ''[u]pon written application,'' 38 U.S.C. 1560(b), ''in the form . . . prescribed by the Secretary concerned''. Although either ''application'' or ''form'' would be reasonable and accurate terms derived from the statute, we propose to change ''application'' to ''form'' in paragraph (b)(1) to preserve the distinction between ''application'' as we define it for VA purposes and any other use of the term.

Initially proposed § 5.580(c)(3) stated that VA would pay a lump sum ''to each person who is receiving or who in the future receives a Medal of Honor pension''. If a veteran ''is receiving'' a Medal of Honor pension at the time that this regulation becomes effective, then he or she will already have received the lump-sum payment. We therefore propose to revise the sentence to provide a lump-sum payment ''to each servicemember or veteran who receives a Medal of Honor pension''. This change is needed because part 5 will apply only

to new claims, and not to existing entitlements.

The initially proposed text also stated that the lump-sum payment ''will be based on the monthly Medal of Honor pension rates [in effect during a prescribed period].'' The phrase ''will be based on'' was potentially confusing. We propose to change the text to read, ''VA will calculate the amount of the lump-sum payment using the Medal of Honor pension rates in effect for each year of the period for which the retroactive payment is made.''

§ 5.581 Awards of VA Benefits Based on Special Acts or Private Laws

In initially proposed § 5.581(b)(2), we had included the parenthetical definition of ''pending claim''. We propose to delete this definition as we have already defined ''pending claim'' in § 5.57(d). In addition, we clarified that the claim must be pending ''at the time that the special act becomes effective.'' This change makes the provision more explicit.

We propose to change § 5.581(c)(1) to improve readability.

We propose to change § 5.581(c)(2) to make clear that the rule pertains to a period of service rather than to a specific date.

Initially proposed § 5.581(d)(1) stated, ''VA will apply and will not change, . . . the rate, effective date, and discontinuance date that is specified in a special act.'' We propose to remove ''and will not change'' because it merely restates the fact that ''we will apply'' the elements of the special act addressed in paragraph (d)(1). This will make the rule more readable without changing its meaning.

The initially proposed text in § 5.581(d)(2) stated that the effective date is determined in accordance with the applicable law, but it did not state which law. We propose to include a cross reference to § 5.152, which implements 38 U.S.C. 5110(g), to clarify what date to apply in these situations.

In § 5.581(e)(1), we propose to add the terms, ''hospital, domiciliary, or nursing home care'' to more accurately describe the content of several sections cited. Similarly, in § 5.581(e)(2), we propose to add the phrase, ''or . . . while a fugitive felon'' to more accurately describe the content of several sections cited. We also propose to include in § 5.581(e)(2) that payments will be suspended while the veteran is a fugitive felon. We also propose to add 38 U.S.C. 5313B, governing fugitive felons, to the authority citation for the section.

§ 5.583 Special Allowance Under 38 U.S.C. 1312

In § 5.583(d), we propose to add, ''after VA receives a claim'' to clarify that the claimant must file a claim to obtain the benefit.

We propose to make a few changes to § 5.583(e) to enhance clarity and reduce ambiguity. We also propose to correct the reference to Subpart E, so that the text will correctly direct the reader to Subpart K. We also propose to add the statutory authority 38 U.S.C. 107, which is the statutory authority for § 5.583(b)(2).

§ 5.584 Loan Guaranty for a Surviving Spouse: Eligibility Requirements

In § 5.584, we propose to change the initially proposed phrase ''may be extended'' to ''will be extended'' to clarify that the action is not discretionary. We also propose to insert the phrase, ''all of the following conditions are met'' at the end of the introductory sentence and redesignate the paragraphs to enhance clarity and reduce ambiguity of the section.

In § 5.584(b)(2), we propose to add that a veteran's death treated by VA ''as if'' it were service connected, under 38 U.S.C. 1318, does not qualify the veteran's surviving spouse for loan guaranty certification.

We also propose to revise initially proposed § 5.584(e) to clarify that this section does not apply if the claimant is a surviving spouse who is eligible for a loan guaranty benefit as a veteran in his or her own right.

§ 5.586 Certification for Dependents' Educational Assistance

In § 5.586, ''Certification for dependents' educational assistance'', paragraph (c)(2), we propose to change the reference to 38 CFR 3.361 to its part 5 counterpart, § 5.350. Current §§ 3.358 and 3.800 apply to claims under 38 U.S.C. 1151(a) that VA received before October 1, 1997. Because part 5 will apply only to future claims, we will not repeat the provisions of current §§ 3.358 and 3.800 in part 5.

Initially proposed § 5.586(a) failed to state who is potentially eligible to receive dependents' educational assistance. Accordingly, we propose to add ''payable to a veteran's spouse, surviving spouse, or child,'' after ''education benefit'' to clarify who is potentially eligible for this benefit.

Also in § 5.586, we propose to remove paragraph (d)(2) and (3), which merely cross referenced the definitions of ''spouse'' and ''surviving spouse''. Because these terms are defined for purposes of all benefits administered under part 5, there is no need to include this paragraph. We propose to move the language of (d)(1) into paragraph (a).

§ 5.587 Minimum Income Annuity and Gratuitous Annuity

We propose to revise the regulation text of initially proposed § 5.587 for clarity.

In initially proposed § 5.587(a)(1), the reference to the citations to the sections of Public Law 92–425 were mistakenly written as ''4(a)(2) and (3)''. We propose to correct this error by changing the citations to ''4(a)(1) and (2)'', as stated in 38 CFR 3.811(a)(1). Further, we propose to reword the end of paragraph (c) to clarify its meaning. The initially proposed rule read, ''An individual . . . shall be considered eligible for pension for purposes of determining eligibility for the minimum income annuity even though as a result of adding the amount of the minimum income annuity authorized under Public Law 92–425 as amended to any other countable income, no amount of pension is due.'' The reworded version reads, ''A person . . . will still be considered eligible for pension for purposes of determining eligibility for the minimum income annuity, even though no amount of pension is payable after adding the minimum income annuity, authorized under Public Law 92–425, 86 Stat. 706, as amended, to any other countable income.''

Public Law 92–425 authorizes payment of benefits for commissioned officers of the Public Health Service and the National Oceanic and Atmospheric Administration. The two agencies that govern these officers were not referenced in part 3. We propose to correct this omission in part 5 by adding the Department of Health and Human Services as well as the Department of Commerce in § 5.587(a)(1).

§ 5.588 Special Allowance Payable Under Section 156 of Public Law 97–377

In § 5.588(a)(1), we propose to change the regulation text to clarify that VA makes the determination of eligibility.

In § 5.588(e), we propose to eliminate the terms ''formal and informal'' from the initially proposed title. We have already defined the term ''claim'' in § 5.1 as a formal or informal communication requesting a determination of entitlement. Likewise, we refer to filing an ''application'' rather than ''Formal claims . . . on a form prescribed by the Secretary'', because we have already defined ''application'' in § 5.1.

We propose to remove the last sentence of initially proposed § 5.588(e), because it would impose a restriction

not authorized by the governing statute. *See Cole* v. *Derwinski,* 2 Vet. App. 400 (1992), *aff'd,* 35 F.3d 551 (Fed. Cir. 1994). The effective date of payment of this special allowance is not based on the date of the claim, except that the date of payment cannot be prior to August 13, 1981. The last sentence of initially proposed § 5.588(e), based on current § 3.812(e), limits retroactive payment of the special allowance contrary to the governing statute. Current VA practice is consistent with this interpretation of the statute.

We propose to update the statutory authority citations contained in initially proposed §§ 5.589 and 5.590 to reflect that sec. 102(a)(1) of Public Law 108–183, 117 Stat. 2651, 2653, redesignated 38 U.S.C. 1822, 1823, and 1824 as 38 U.S.C. 1832, 1833, and 1834, respectively.

§ 5.589 Monetary Allowance for a Vietnam Veteran or a Veteran With Covered Service in Korea Whose Child Was Born With Spina Bifida

In § 5.589, we propose to replace the term ''individual'' with ''person'' to maintain consistency in our usage throughout the regulations. We have also modified the wording of initially proposed § 5.589(b) to clarify any ambiguity resulting from this change.

On January 25, 2011, VA published Final Rule AN27, ''Herbicide Exposure and Veterans with Covered Service in Korea'' to implement the Veterans Benefits Act of 2003, Public Law 108–183, 117 Stat. 2651. 76 FR 4245. We propose to incorporate these provisions as a new paragraph (c)(2) in § 5.589 and make conforming amendments to §§ 5.57(b), 5.150(a), 5.152(a) and (d), 5.228(a), 5.262(a)(1)(ii), 5.589(a) and (e), 5.590(i), and 5.591.

In redesignated § 5.589(c)(3) we propose to change the last sentence of initially proposed § 5.589(c)(2) for clarification purposes.

§ 5.590 Monetary Allowance for a Female Vietnam Veteran's Child With Certain Birth Defects

In § 5.590, we propose to replace the term ''individual'' with ''person'' to maintain consistency in our usage throughout the regulations. We have also modified the wording of initially proposed § 5.590(b) to clarify any ambiguity resulting from this change. We also propose to clarify the regulation text of § 5.590(b) to reflect that that provision is subject to § 5.590(a)(3), which governs the payment of monetary allowance where a covered birth defect is spina bifida. We propose to add the phrase, ''[e]xcept as provided in paragraph (a)(3) of this section''.

In proposed §§ 5.589(a) and 5.590(a), we propose to add language from § 3.27(c), providing for an increase in monthly allowance rates under 38 U.S.C. chapter 18 whenever there is a cost-of-living increase in benefit amounts payable under the Social Security Act. We inadvertently failed to add this language in the initially proposed rule and propose to add it now.

§ 5.591 Effective Date of Award for a Disabled Child of a Vietnam Veteran or a Veteran With Covered Service in Korea

We propose to delete initially proposed § 5.591(a)(6). Paragraph (a)(6) stated a general rule applicable to all effective dates. Because this general rule is stated in § 5.152(a), there is no need to restate it here.

§ 5.592 Awards Under Nehmer Court Orders for Disability or Death Caused by a Condition Presumptively Associated with Herbicide Exposure

We propose to add § 5.592. It is the counterpart to current § 3.816, which we inadvertently omitted from the March 9, 2007, notice of proposed rulemaking for these rules. 72 FR 10860. We intend to insert it here.

Paragraph (b)(2) of § 3.816 states, in pertinent part, ''Covered herbicide disease means a disease for which the Secretary of Veterans Affairs has established a presumption of service connection before October 1, 2002 pursuant to the Agent Orange Act of 1991, Public Law 102–4, other than chloracne.'' In July 2007, the U.S. Court of Appeals for the Ninth Circuit rejected VA's position that its duties under the *Nehmer* stipulation have ended and held that VA's duties extend through at least 2015. *Nehmer* v. *U.S. Dept. of Veterans Affairs,* 494 F.3d 846, 862–63 (9th Cir. 2007). Accordingly, the requirements of the Nehmer court orders for review of previously denied claims and for retroactive payment apply to new presumptions. We therefore propose to omit the phrase ''before October 1, 2002,'' from § 5.592. We also propose to update § 5.592(b)(2) to encompass the presumptive diseases listed in § 3.309(e), by cross referencing § 5.262(e). 38 CFR part 3 has already been amended to remove this date and the removal of the date from part 5 conforms to the part 3 change. 78 FR 54763, Sept. 6, 2013.

§ 5.603 Financial Assistance To Purchase a Vehicle or Adaptive Equipment

One commenter stated that ''proposed § 5.603(b)(1)(ii) establishes limitations on the types of adaptive equipment for which an eligible person may receive financial assistance from VA to purchase.'' The commenter was concerned that the list of adaptive equipment found in initially proposed § 5.603(b)(1)(ii) would exclude any equipment not listed in that section.

The commenter pointed out that parts of the authorizing statutes and parts of current VA regulations use ''but is not limited to'' in conjunction with ''includes''. Further, other regulations in the initially proposed rule used language such as ''including, but not limited to''.

In order to eliminate any confusion, we propose to adopt the commenter's suggestion and add the ''but is not limited to'' language to § 5.603(b)(1)(ii), to read, ''Adaptive equipment includes, but is not limited to: ''. For the same reason, we propose to add similar language to §§ 5.589(d)(2), 5.590(d)(1)(xii), 5.590(d)(2), 5.590(d)(6)(ii), 5.590(e)(1)(ii)(B), 5.590(e)(1)(iii)(B), 5.590(e)(1)(iv)(D), 5.590(e)(1)(v)(C), 5.590(e)(2)(i), 5.606(b)(1), and 5.606(b)(2).

We propose to change the regulation text in initially proposed § 5.603(b)(1)(i) to conform with the language of current § 3.808(e). The initially proposed text did not include part of the required text. The text will read, '''Adaptive equipment' means equipment that must be part of or added to a vehicle manufactured for sale to the general public to:''.

Initially proposed paragraph (b)(1)(ii)(A) said, ''Automatic transmission as to an eligible person who has lost, or lost the use of, a limb''. We propose to delete ''as to an eligible person who has lost, or lost the use of, a limb'', because with that phrase in the regulation the eligible person with ankylosis of the knees or hips would not qualify for VA assistance to obtain an automatic transmission.

We propose to combine initially proposed § 5.603(b)(1)(ii)(D) and (F) (which were based on 38 CFR 3.808(e)(2) and (3)) as paragraph (b)(1)(ii)(D). They were substantially redundant. It was the intent of both § 3.808(e)(2) and (3) to set limits on the amount of assistance that VA may pay for adaptive equipment. We have always interpreted these two regulations in this way. This interpretation is also in accordance with 38 CFR 17.158(b), which also sets the same limitations on the amount of assistance for adaptive equipment.

We propose to delete initially proposed § 5.603(b)(1)(ii)(C) and redesignate initially proposed § 5.603(b)(1)(ii)(E) as § 5.603(b)(1)(ii)(C).

The requirement that an air conditioner be included in the list of adaptive equipment is no longer necessary. The vast majority of new cars have air conditioners included in their standard equipment package. If VA were to receive a claim for an air conditioner, this claim could be granted because § 5.603(b)(1)(ii) contains the phrase ''includes, but is not limited to'', which advises the reader that this is not an exclusive list.

In paragraph (c)(2), we propose to change the phrase ''loss or permanent loss of use [of a named body part]'' to ''Anatomical loss or permanent loss of use [of a named body part].'' We intend to make this change throughout part 5. Part 3 uses both phrases interchangeably, sometimes in a single regulation and this resulted in confusion. *See,* for example, 38 CFR 3.350.

The statute defining the disabilities a person must have to be eligible for an automobile or adaptive equipment requires ''loss or permanent loss of use'' of particular body parts, 38 U.S.C. 3901, and VA interprets ''loss'' in that phrase as meaning anatomical loss. This interpretation is consistent with the qualification for certain levels of special monthly compensation for ''anatomical loss or loss of use''. *See* 38 U.S.C. 1114(k) through (n) and (p). We propose to change ''loss of'' to ''anatomical loss or'' in § 5.606, paragraph (b), for the same reason. We note that 38 CFR 3.810(a)(1) pertains to clothing allowance for veterans with disabilities rated as specified in § 3.350(a), (b), (c), (d), and (f), which implement provisions of 38 U.S.C. 1114 that authorize special monthly compensation for anatomical loss or loss of use [of a named body part]. Therefore, this change is consistent with statutory intent.

We propose to revise initially proposed paragraph (c)(2)(iv) to make clear that a person with ankylosis of one or both knees, or one or both hips may only receive financial assistance to purchase adaptive equipment.

Section 803 of Public Law 111–275, 124 Stat. 2864, 2889 (2010) amended 38 U.S.C. 3901 which lists the disabilities that qualify a veteran for VA assistance to purchase a vehicle or adaptive equipment for a vehicle. We propose to add paragraph (c)(2)(v) to implement the statutory amendment by adding ''[s]evere burn injury'' as a qualifying disability. Section 803 indicated that what qualifies as a ''severe burn injury'' for purposes of obtaining automobile or adaptive equipment will be ''determined pursuant to regulations prescribed by the Secretary.'' VA's Compensation Service is drafting a rulemaking to comply with that provision in 38 CFR part 3. Once that has been completed, the new regulatory language will be incorporated into § 5.603.

We propose to redesignate paragraph (c)(3) as paragraph (d)(1), because the content of paragraph (c)(3) is more relevant to the subject of paragraph (d), ''Limitations on assistance'', than to paragraph (c), ''Eligibility criteria.'' We also propose to add a provision to paragraph (d)(1)(i) based on 38 U.S.C. 3902(d), that VA will assist a person who cannot qualify to operate a vehicle to purchase a vehicle, if another person will drive the vehicle for him or her.

As a result of redesignating initially proposed paragraph (c)(3) as paragraph (d)(1), we propose to redesignate initially proposed paragraphs (d)(1) and (d)(2) as paragraphs (d)(2) and (d)(3). We propose to clarify the text in redesignated § 5.603(d)(3). As written, the initially proposed text failed to include the reference to circumstances beyond the control of the eligible person. We propose to revise the text by inserting the phrase, ''due to circumstances beyond the eligible person's control,'' between ''a 4-year period unless,'' and ''one of the adapted vehicles''. We also propose to add to the second sentence the words ''or reimbursements'' after ''payments'', because we unintentionally omitted it from the original text. We therefore propose to revise the sentence to read, ''The Under Secretary for Health or designee may authorize payments or reimbursements for the repair, replacement, or reinstallation of adaptive equipment deemed necessary for the operation of the vehicle.'' We also propose to delete ''§§ 17.156 through'' from the cross reference, which is now only to § 17.158, because §§ 17.156 and 17.157 do not pertain to the subject of the cross reference.

We have determined that initially proposed § 5.603(f), ''Redemption of certificate of eligibility'', was inaccurate. Therefore, we propose to restructure this paragraph to encompass both the purchase of the vehicle and the purchase of adaptive equipment. Paragraphs (f)(1)(i) and (2)(i) address redemption of a certificate of eligibility by the seller, and paragraphs (f)(1)(ii) and (2)(ii) address redemption of a certificate of eligibility by the eligible person. Together, these paragraphs cover the scenarios where the vehicle or adaptive equipment was purchased prior to an eligible person acquiring the certificate of eligibility.

§ 5.604 Specially Adapted Housing Under 38 U.S.C. 2101(a)

In our proposed rulemaking, 72 FR 10860, Mar. 9, 2007, we had reserved §§ 5.604 and 5.605 while VA completed a rulemaking to implement housing provisions of the Veterans Benefits Act of 2003, the Veterans Benefits Improvement Act of 2004, the Veterans' Housing Opportunity and Benefits Improvement Act of 2006, and the Housing and Economic Recovery Act of 2008. VA has now amended 38 CFR 3.809, ''Specially Adapted Housing under 38 U.S.C. 2101(a)'', and § 3.809a, ''Special Home Adaptation Grants under 38 U.S.C. 2101(b)''. 75 FR 57859, Sept. 23, 2010. We now propose to incorporate §§ 3.809 and 3.809a, as amended, into part 5 with several stylistic changes.

§ 5.606 Clothing Allowance

We propose to clarify initially proposed § 5.606(a) to state: ''VA will pay an annual clothing allowance to a veteran with a qualifying disability. However, VA will pay more than one annual clothing allowance if VA determines that the veteran has more than one qualifying disability.'' This is consistent with the decision in *Sursely* v. *Peake,* 551 F.3d 1351, (Fed. Cir. 2009). The court held that Congress intended to allow each eligible veteran one clothing allowance per year per qualifying disability. On February, 2, 2011 VA proposed a rule, AN64 Clothing Allowance, to implement *Sursely.* 76 FR 5733. Once the Final Rule has been published, it will be incorporated into § 5.606.

We also propose to clarify the term ''veteran'' as it applies to a person who is eligible for clothing allowance. VA General Counsel's opinion VAOPGCPREC 4–2010, (May 25, 2010), held that the ''term [veteran] includes individuals who have returned to active duty after previously meeting the definition of 'veteran.' '' We propose to incorporate this holding in proposed § 5.606(a).

We propose to consolidate initially proposed § 5.606(a), (b), and (b)(1) for clarity and simplicity, without changing the meaning.

Initially proposed § 5.606(b)(2) addressed all service-connected disabilities for which the veteran wears or uses a prosthetic or orthopedic appliance that wears or tears clothing. Current § 3.810 distinguishes disabilities compensated at a rate specified in § 3.350(a) through (d) or (f) and other service-connected disabilities that require an appliance. We propose to revise the paragraph to maintain the

distinction in the current regulation. We propose to address the disabilities compensated at the rate specified in §§ 5.322 through 5.329, 5.331, or § 5.332 and redesignate the paragraph as (b)(1).

Initially proposed § 5.606(b)(2) did not distinguish between applications for clothing allowance that VA can grant after a required examination and those that require certification by the Under Secretary for Health or designee, as does current § 3.810. We propose to revise the paragraph to maintain this distinction, and redesignate it as paragraphs (b)(1) through (3).

In initially proposed § 5.606(b)(2), we used the term ''VA determines'' in place of the term ''Chief Medical Director or designee'', which part 3 uses for the VA office now designated as Under Secretary for Health. We propose to revise paragraph (b)(2) to use ''Under Secretary for Health or designee''. This change eliminates any ambiguity about who makes the determination.

We propose to change § 5.606(c)(1) and (2) to state the circumstances in which the veteran need not file the claim for a clothing allowance annually. VA has provided for the annual clothing allowance without requiring the filing of an annual claim, as stated in paragraphs (c)(1) and (2), since the inception of the clothing allowance benefit in 1972. VA form 10–8678, ''Application for Annual Clothing Allowance (Under 38 U.S.C. 1162)'', implements this long-standing practice.

We propose to rewrite initially proposed § 5.606(d) for clarity. We propose to delete the term ''anniversary date''. Although we had defined the term, we have determined that it is confusing to the reader, and have opted to use the actual date of August 1 instead. We also propose to define the ''payment year'' for which VA pays the annual clothing allowance as the ''12-month period beginning August 1 and ending July 31 of the following year.'' For this reason, we propose to delete the term ''anniversary date'' in § 5.606(e) as well.

We propose to rewrite initially proposed § 5.606(e) for clarity. We propose to change ''within 1 year of'' and ''within 1 year from'' to ''no later than 1 year after''. This change makes clear that the time to file a claim relative to August 1 means the year after August 1. We also propose to remove the term ''initial anniversary date'' and instead, describe the first period for which VA pays a veteran a clothing allowance as the ''initial year of payment eligibility''.

We propose to remove initially proposed § 5.606(f). Paragraph (f) contained information already in Subpart I of part 5, which pertains to Filipino veterans. One purpose of proposed Subpart I is to assemble in one place all of the adjudication regulations dealing with benefits for certain Filipino veterans. It would be redundant to repeat that information in § 5.606. Additionally, paragraph (f) stated that claims for clothing allowance by Filipino veterans are processed in Manila. This is purely a matter of internal VA administration of claims. The paragraph conferred no benefit on the veteran, and it did not require the claimant to take any action. We propose to remove the paragraph as an unnecessary regulation.

We propose to remove initially proposed § 5.606(g). Paragraph (g) informed the veteran living abroad that the VA Medical Center (VAMC) with jurisdiction over his permanent address has jurisdiction over a claim for a clothing allowance. The assignment of claims to specific facilities is purely a matter of internal VA administration of claims. The paragraph conferred no benefit on the veteran. We propose to remove the paragraph as an unnecessary regulation. As a result of removing paragraphs (f) and (g), we will redesignate paragraph (h) as paragraph (f).

Technical Corrections

In addition to considering any necessary changes to proposed part 5 regulations based on comments received from the public, we propose to make certain additional changes in this reproposed rule: adding, updating, and moving some authority citations, correcting a citation, and correcting citation format. For example, proposed § 5.584, ''Loan guaranty for a surviving spouse: eligibility requirements'', lacked an authority citation at the end of the section. We intend to correct this omission by adding the authority citation, 38 U.S.C. 3701(b)(2). We also propose to add to the authority citation for § 5.587.

Changes in Terminology

For consistency of terminology throughout part 5, we propose to replace the term ''evaluation'' with the term ''rating'', and ''evaluated'' with ''rated'', whenever either appears in §§ 5.589(d), 5.590(a)(3), and 5.590(e).

We also propose to correct our use of the terms ''claim'' and ''application''. Under 38 CFR 3.1(p), ''Claim–Application'' is defined as ''a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit.'' Under § 5.1, ''Claim'' is defined as ''a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit.'' Under § 5.1, ''Application'' is defined as ''a specific form required by the Secretary that a claimant must file to apply for a benefit.'' Accordingly, the following changes are proposed to be made. We propose that the words ''formal application'' be replaced with the word ''claim'' every time they appear in § 5.581(b), and the phrase ''in the form prescribed by VA'' be removed. We also propose that the phrase ''on a form prescribed'' be removed from § 5.583(c). We also propose that the words ''an application'' be replaced with the words ''a claim'' in the introductory text of § 5.584. In addition, we propose that the phrases and word ''on a form prescribed by the Secretary of Veterans Affairs'', ''form'', and ''on the prescribed form'' be removed from § 5.588(e). Finally, we propose that the words ''application form'' and ''application'' be replaced with the word ''claim'' in every place they appeared in initially proposed §§ 5.603(d)(1), 5.606(b)(3), and 5.606(e).

XIV. Subpart I: Benefits for Certain Filipino Veterans and Survivors

In a document published in the **Federal Register** on June 30, 2006, we proposed to revise VA's regulations governing benefits for certain Filipino veterans and their survivors, to be published in a new 38 CFR part 5. 71 FR 37790. The title of this proposed rulemaking was, ''Benefits for Certain Filipino Veterans and Survivors'' (RIN: 2900–AL76). We provided a 60-day comment period that ended August 29, 2006. We did not receive any submissions from commenters pertaining to this proposed rule.

Although no comments were received regarding our publication on June 30, 2006, an internal review of proposed Subpart I revealed minor typographical errors and a need for further clarification in several areas. Accordingly, based on the rationale set forth in the initially proposed rule and this proposed document, we propose to adopt the provisions of proposed Subpart I, with the following changes discussed below.

Publication of Revisions to Subparts

The publication for proposed Subpart I also contained minor revisions to Subpart B, ''Service Requirements for Veterans'', and Subpart E, ''Claims for Service Connection and Disability Compensation'', which had been previously published in proposed rulemaking packages. Those revisions will be contained in this proposed rule segment. The package for Subpart I was

one of two packages that contained revisions to other subparts, and since then we have decided to publish all revisions to the various subparts together in this proposed rule in order to facilitate an easier referencing process.

§ 5.610 Eligibility for VA Benefits Based on Philippine Service

Initially proposed § 5.610(b)(3) incorrectly stated that service as an officer commissioned in connection with administration of Public Law 79–190 is not active military service for purposes of VA benefits. Administrator's Decision 778 (Mar. 5, 1948) concluded that service as a commissioned officer in connection with administration of Public Law 79–190 would constitute regular active military service—that is, it would qualify for all benefits available to U.S. veterans. Among other things, that opinion noted that because such commissioned service was not service pursuant to section 11 of Public Law 79–190 (relating to enlistments), it was not subject to the limitations currently codified in 38 U.S.C. 107(b). Therefore, we propose to correct this error in paragraph (a) of § 5.610.

In § 5.610(c)(1), we propose to change ''General Officer, U.S. Army'' to ''Commander-in-Chief, Southwest Pacific Area, or other competent authority in the Army of the U.S.'' to further specify the type of authority needed to establish active military service in the Commonwealth Army of the Philippines.

§ 5.613 Payment of Disability Compensation or Dependency and Indemnity Compensation at the Full Dollar Rate for Certain Filipino Veterans or Their Survivors Residing in the U.S.

In order to clarify the list of acceptable items of evidence in regards to a veteran's or veteran's survivor's eligibility for compensation at the full-dollar rate under § 5.613(c)(2) and a veteran's burial benefits at the full-dollar rate under § 5.617(c)(2), a valid original or a valid copy of any of the enumerated items, such as a U.S. passport, is required. In both instances, we propose to add the modifier word ''valid'' to the terms ''copy'' and ''original'', and remove the unnecessary word ''valid'' in front of ''U.S. passport''.

§ 5.614 Effective Dates of Benefits at the Full-Dollar Rate for a Filipino Veteran and His or Her Survivor

We propose to divide initially proposed § 5.614(b)(3) into paragraphs (b)(3) and (b)(4) and clarify these provisions. First, we propose to insert the word ''veteran's'' before ''survivor'' in both places where the term ''survivor'' is used. Second, we propose to clearly set out the rules for the following classes of beneficiaries: those who were absent from the U.S. for a total of 183 days or more and returned to the U.S. during the same calendar year, and those who were absent from the U.S. for a total of 183 days or more and returned to the U.S. in a later calendar year but less than 183 days after the beginning of such calendar year. This revision does not reflect a new policy; rather it is a clarification of current § 3.405(b)(2). We also propose to redesignate the remaining paragraphs under § 5.614(b) accordingly.

Technical Corrections

We propose to make several changes to certain provisions describing the dates relevant to eligibility for burial benefits at the full-dollar rate. Initially proposed § 5.610(b)(1) and the chart in initially proposed § 5.612 referred to deaths occurring ''on or after December 16, 2003''. We propose to revise this to refer to deaths occurring ''after December 15, 2003'' in order to conform to the format used in current 38 CFR 3.43 and the format generally used for dates throughout part 5. Initially proposed § 5.617(b) referred to deaths occurring ''after November 1, 2000''. However, the corresponding provisions of the chart in proposed § 5.612 inaccurately referred to deaths occurring ''on or after 11/1/00''. As stated in the notice of proposed rulemaking, the chart in § 5.612 is intended only to summarize the provisions in Subpart I and not to confer any additional rights. Accordingly, we propose to correct the inadvertent error in the chart by replacing ''on or after 11/1/00'' with ''after 11/1/00'' to ensure that the chart accurately reflects the applicable rule.

XV. Subpart J: Burial Benefits

In a document published in the **Federal Register** on April 08, 2008, we proposed to revise Department of Veterans Affairs (VA) regulations governing burial benefits, to be published in a new 38 CFR part 5. 73 FR 19021. The title of this proposed rulemaking was ''Burial Benefits'' (RIN: 2900–AL72). We provided a 60-day comment period that ended June 9, 2008. We received submissions from two commenters: two members of the general public.

General Comment

One commenter expressed satisfaction with the rewritten provisions in proposed RIN 2900–AL72, ''Burial Benefits''. The commenter explained that veterans have a right to these more detailed regulations with a ''plain layout'' that one ''can read . . . without any misunderstanding.'' The commenter went on to say that ''there is nothing wrong with being more straight forward with the provisions especially when it comes to burial provisions. Pass the rule and be done with it, let the confusion be dismissed.'' No changes to the proposed rule were suggested. Although we are pleased that the commenter finds these rules an improvement over part 3, we regret that we cannot accelerate the effective date of one subpart of part 5 because, administratively, it would be too cumbersome and costly to establish part 5 in stages. We propose not to make any changes based on this comment.

§ 5.630 Types of VA Burial Benefits

We propose to add a definition of ''burial'' as new paragraph (b) to ensure that readers know that VA pays burial benefits for all the legal methods of disposing of the remains of deceased persons, including, but not limited to, cremation, burial at sea, and medical school donation.

We propose to revise this paragraph by adding the phrase ''or interment'' after ''memorialization'' to clarify the distinction between interment and memorialization. Interment refers to placing a body into the ground. Memorialization honors a person whose remains have not been found.

In addition, to avoid potential confusion for readers, we propose to clarify that the burial regulations in part 5 do not apply to the benefit programs listed in paragraph (c), which operate under separate statutes and regulations.

§ 5.631 Deceased Veterans for Whom VA May Provide Burial Benefits

We propose to redesignate the paragraphs of this rule according to the revisions described below. First, we propose to delete initially proposed paragraph (b), which had required that the veteran upon whom a claim for burial benefits is based to have been discharged or released from service under conditions other than dishonorable, and added such a requirement to what is now proposed paragraph (a). This makes the rule simpler to read and easier to apply.

Second, we propose to delete initially proposed paragraph § 5.631(c). This paragraph was derived from current 38 CFR 3.1600(d). The paragraph was ambiguously written, but was intended to state merely that VA can reopen a claim for service-connected death if new and material evidence is presented. This rule is not a rule concerning burial

benefits, but is a more general rule that can affect the provision of any benefit based on a service-connected death. We propose to delete initially proposed § 5.631(c) for these reasons, and because it is redundant of the new-and-material-evidence rule found in § 5.55.

§ 5.633 Claims for Burial Benefits

We propose to revise *§ 5.633*(a)(1) to clarify that a claim to reopen nonservice-connected burial allowance must be filed no later than 2 years after the date of the veteran's burial. This revision is consistent with § 3.1600(b), and current VA practice.

In paragraph (a)(2), we propose to revise the first sentence to eliminate any reference to the nonservice-connected burial allowance. Neither the law nor VA policy prevents providing the service-connected burial allowance to a person whose discharge is upgraded posthumously. The initially proposed regulation had not provided for such a limitation because, although this specific provision had applied only to nonservice-connected burial benefits, there was no time limit to file a claim for service-connected burial benefits and, therefore, there was no bar against filing a claim (or a claim to reopen) for a service-connected burial allowance at any time after the veteran's death. However, the regulation is clearer without the reference to nonservice-connected burial benefits in the first sentence because it cannot be misinterpreted as a rule that limits to the nonservice-connected burial allowance the applicability of an award based on a posthumously upgraded character of discharge.

In initially proposed § 5.633(b)(1), we stated, ''Evidence required to substantiate a claim for burial benefits must be submitted no later than 1 year after the date VA requests such evidence.'' This sentence was based on current § 3.1601(b), which was intended to implement 38 U.S.C. 2304. That statute provides, in pertinent part:

> If a claimant's application is incomplete at the time it is originally submitted, the Secretary shall notify the applicant of the evidence necessary to complete the application. If such evidence is not received within one year from the date of such notification, no [non-service connected burial] allowance may be paid.

Instead of using § 3.1601(b)'s term, ''complete a claim'', we mistakenly used ''substantiate a claim''. The rule on filing of evidence to ''substantiate [a] claim'' is contained in the portion of § 5.90 that is based on current § 3.159(b)(1). *See* also § 5.136, which is based on current § 3.158(a). The rules on filing an ''incomplete application'' are contained in the portion of § 5.90 that is based on current §§ 3.109(a)(1) and 3.159(b)(2). Because these rules are already contained elsewhere in part 5, there is no need to repeat them in subpart J and so we propose to delete the above referenced sentence from § 5.633(b)(1).

One commenter suggested that § 5.633(b)(1)(iii), regarding the information needed in a statement of account, should read ''the dates of expenses incurred for services rendered'' and not ''the dates and expenses incurred for services rendered''. We disagree with the commenter's suggestion. By placing ''of'' instead of ''and'' in this part of § 5.633(b)(1)(iii), the meaning of the regulation would be changed. Using the word ''of'' in this context would restrict the information that VA requires for a statement of account to only the dates on which the expenses were incurred. In contrast, using the word ''and'' signifies that VA requires the dates as well as the expenses incurred for the services rendered. This interpretation is supported by the similar language found in § 3.1601(b), upon which § 5.633(b) is based. However, we propose to clarify the sentence to eliminate the possibility that it could be read to refer only to the dates of the expenses incurred.

We propose to revise initially proposed § 5.633(b)(1)(iv) for clarity, and to eliminate redundancy.

§ 5.634 Reimbursable Burial Expenses: General

Initially proposed § 5.634(b)(2) had barred reimbursement for an item or service ''previously provided or paid for by the U.S. Government.'' We propose to clarify this sentence because we will, in fact, reimburse for the cost of a uniform if a new uniform was purchased because the veteran's service uniform was not in a condition suitable for burial.

§ 5.635 Reimbursable Transportation Expenses for a Veteran Who is Buried in a National Cemetery or Who Died While Hospitalized by VA

A commenter suggested that the word ''persons'' should be replaced by the word ''veterans'' in the introductory sentence of § 5.635. The commenter stated that otherwise it is awkward wording since the sections referred to in the introduction, §§ 5.639 and 5.644, do refer to veterans specifically. We understood the commenter's point to be that VA will only reimburse expenses connected with the transportation of a deceased veteran. To the extent that the introductory sentence to the regulation could have been read otherwise by use of the word ''persons'', we propose to revise the sentence for clarity.

Proposed paragraphs § 5.635(a) and (b) are not an exclusive list of reimbursable transportation expenses. We propose to reword and add the phrase ''but are not limited to'' to the introductory sentence in § 5.635, in order to be consistent with § 3.1606 and with current practice.

§§ 5.643 Burial Allowance Based on Nonservice-connected Death, and 5.644 Burial Allowance for a Veteran Who Died While Hospitalized by VA

A commenter suggested that we replace ''based upon'' with ''for'' in §§ 5.643(b) and 5.644(b). The commenter believes that the revision would make the regulatory language plainer, simpler, and more reader-focused. We agree with the suggestion and propose to replace the words ''based upon'' with ''for'' in the introductory sentences of §§ 5.643(b) and 5.644(b).

§ 5.644 Burial Allowance for a Veteran Who Died While Hospitalized by VA

One commenter questioned the reasoning behind referring to the Canal Zone in § 5.644(d). The commenter stated that since the U.S. returned ownership of the Canal Zone to Panama, the location should not be listed. Section 5.644 listed the Canal Zone because it is included in the applicable statute (*see* 38 U.S.C. 101(20)). However, we now propose to include the Canal Zone in our definition of ''State'' in § 5.1, as stated above. Therefore, we propose to remove all references to the Canal Zone in proposed § 5.644(d), and simply use the term ''State''.

We received one comment regarding a proposal not to include a part 5 counterpart to § 3.1605(b), which denies eligibility for transportation expenses to ''retired persons hospitalized under section 5 of Executive Order 10122 . . . issued pursuant to Public Law 351, 81st Congress, and not as Department of Veterans Affairs beneficiaries''. Section 5 of Executive Order 10122 relates to current and former servicemembers who had been hospitalized for chronic diseases between May and October of 1950. The commenter noted that, in a preliminary draft, VA proposed to delete this section. The commenter approved removing this section, but only if there was evidence that removing it would not affect any veteran's benefits.

As stated in the AL72 NPRM preamble, we proposed not to include in part 5 the rule in current § 3.1605(b) that denies eligibility for transportation expenses to ''retired persons

hospitalized under section 5 of Executive Order 10122 . . . issued pursuant to Pub. L. 351, 81st Congress, and not as Department of Veterans Affairs beneficiaries.'' Section 5 of Executive Order 10122 related to current and former servicemembers who had been hospitalized for chronic diseases between May and October of 1950. Executive Order 10122 is more than half a century old and applied to a very small group of veterans. The reference is outdated and no longer necessary. In response to the comment, we note that if any such claim arises in the future, VA will process it under Public Law 351, 81st Congress, and Executive Order 10122, so no veterans benefits will be affected by the omission from part 5.

§ 5.649 Priority of Payments When There is More Than One Claimant

We propose to clarify initially proposed § 5.649(e) to state that ''Any claimant may waive his or her right to receive burial benefits in favor of assigning his or her right to another claimant.'' This change is consistent with current VA practice.

§ 5.651 Effect of Contributions by Government, Public, or Private Organizations

In § 5.651(c)(2), we propose to use active voice to clarify that VA will not pay burial allowance in the circumstances stated. We also propose to improve readability by changing ''in'' to ''occurring during'' before ''active military service'', and removing the comma after ''service''.

Technical Corrections

One commenter pointed out several necessary technical changes and a correction that we propose to make. First, we propose to move the misplaced opening parenthesis in § 5.636(a)(2)(ii). Second, we propose to correct the grammar when referring to interment in §§ 5.638(c)(2) and 5.643(e)(2) by adding the word ''a'' before ''State veterans cemetery'', both places these words appear. Finally, we propose to correct the date in § 5.653 from ''December 1, 1957'' to correctly read ''December 31, 1957'', as provided in the enabling statute, 38 U.S.C. 2305.

In addition to considering any necessary changes to proposed part 5 regulations based on comments received from the public, we propose to make certain technical corrections. For example, we propose to replace ''in line of duty'' with ''in the line of duty''. In addition, the initially proposed rule used ''at the time of death'' interchangeably with ''on the date of death''. In most VA claims, the time of death is not relevant, only the date of death. The only exception is § 5.644(b)(6), which discusses whether a veteran was hospitalized by VA but was not at the VA facility at the time of death. We therefore propose to replace ''at the time of death'' with ''on the date of death'' throughout the burial regulations. These changes are meant to achieve consistency throughout the part 5 regulations.

XVI. Subpart K: Matters Affecting the Receipt of Benefits

In a document published in the **Federal Register** on May 31, 2006, we proposed to revise VA regulations governing matters affecting the receipt of benefits, to be published in a new 38 CFR part 5. 71 FR 31056. The title of this proposed rulemaking was ''Matters Affecting the Receipt of Benefits'' (RIN: 2900–AM05). We provided a 60-day comment period that ended on July 31, 2006. We received submissions from four commenters: American Psychiatric Association, Disabled American Veterans, the National Organization of Veterans' Advocates, and Vietnam Veterans of America.

§ 5.660 In the Line of Duty

Initially proposed § 5.660(a) stated, ''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.'' This was a misstatement of the language in § 3.301(a) that states, ''. . . service connection may be granted only when a disability or cause of death was incurred or aggravated in line of duty, and not the result of the veteran's own willful misconduct. . .'' Under its authorizing statutes, VA service connects disability or death, not injury or disease *per se,* so we propose to correct § 5.660(a) to read, ''. . . VA may grant service connection only for a disability or death that was incurred or aggravated in the line of duty.''

Initially proposed § 5.660(c)(4) provided that an injury was not incurred in the line of duty if it was incurred while the veteran was ''Confined under a sentence of civil court for a felony as determined under the laws of the jurisdiction where the veteran was convicted by such court.'' A virtually identical rule appears in 38 U.S.C. 105(b). However, we were concerned that the phrase ''civil court'' could be misconstrued to exclude a criminal court. Clearly, such an interpretation is incorrect as shown by the statutory and regulatory references to a felony. We interpret the statutory reference to a ''civil'' court to be a reference to a court other than a U.S. military court, that is, it refers to a ''civilian'' court, and propose to modify the paragraph accordingly.

Initially proposed § 5.660(d) read, ''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.'' In responding to our proposed rule, a commenter opined that use of the terms ''patently'' and ''clearly'' created a new evidentiary standard, and suggested that VA ''stick with evidentiary standards for which there are precedents in VA law.''

Under our current regulation, 38 CFR 3.1(m), a service department line-of-duty finding is binding on VA unless it is ''patently inconsistent with'' VA law. The purpose of this regulatory presumption is pro-veteran; VA does not intend to question a service department line-of-duty finding unless that finding would lead to a result that is contrary to the laws concerning the provision of veterans' benefits. An example of such an inconsistent finding might be that a veteran's injury was incurred as a result of the abuse of alcohol, but nevertheless was in the line of duty. VA could not accept such a finding because we are barred from providing service-connected disability compensation if ''the disability is the result of . . . abuse of alcohol''. 38 U.S.C. 1110.

The binding nature of a service-department line-of-duty finding is a regulatory interpretation of 38 U.S.C. 105(b), which reads that, ''The requirement for line of duty will not be met'' if the veteran was avoiding duty, confined under sentence of court martial or for felony charges in a civil court, etcetera. These are all legal issues where, as a matter of law, the veteran was not performing a duty for the military. There is no need to weigh evidence under such circumstances because, as a matter of law, the evidence cannot overcome the statutory bar. For this reason, we reject the commenter's suggestion that we use a common evidentiary standard of proof in this situation; the question is neither about the quality of the evidence, nor the weight of the evidence. For these reasons, we also do not describe the evidentiary rule as a ''presumption.'' Therefore, we propose not to revise the rule to include a standard of proof.

However, based on the comment, we understand that addition of the word ''(clearly)'' caused confusion, leading the commenter to believe that this regulation does in fact establish an evidentiary burden. Therefore, we

propose to use the language in current § 3.1(m), which uses the word ''patently'', without ''(clearly)''.

We note that the above analysis does not apply in the same way to § 5.661(f), which also proposed to use the phrase, ''patently (clearly)'', as discussed below.

§ 5.661 Willful Misconduct

We have determined that the definitions of ''willful misconduct'', ''proximately caused'', and ''drugs'' proposed in the NPRM should be moved into § 5.1, ''General definitions'', because they relate to other sections in addition to those found in this subpart.

One commenter suggested that VA should adjudicate claims in the following manner:

- Identify the act that was the proximate cause of the disability; and then,
- Determine whether that act constituted willful misconduct.

For the reasons stated below, we propose to make no changes based on this comment.

A chronic disability first shown in service or aggravated by service is considered to have been incurred in the line of duty unless (1) it is not an injury or disease ''within the meaning of applicable legislation'', *see* 38 CFR 3.303(c); or (2) the evidence shows that the disability was due to willful misconduct. A determination of whether willful misconduct is the proximate cause of a claimed disability is only made when the evidence shows or indicates the disability may have been caused by the veteran's willful misconduct. If there is evidence that the disability may have been due to willful misconduct, the adjudicator develops for additional evidence, if needed. The entire body of evidence is reviewed and the determination concerning proximate cause and willful misconduct are made at the same time based on the same evidence. If the claimed disability was not proximately caused by willful misconduct, service connection is granted. We propose to make no changes based on this comment because it might lead a reader to mistakenly believe that VA develops the issue of willful misconduct in every claim for service connection. In addition, we do not believe it is generally appropriate to mandate the precise order in which VA adjudicators must consider the evidence in a particular adjudication, because the most effective order may depend on the facts of the case.

One commenter expressed the opinion that the words ''substance,'' ''alcohol,'' ''addiction,'' and ''frequent'' should be defined. We decline to do so by regulation because these words have commonly understood meanings. We propose to make no changes based on this comment.

One commenter noted that VA referred to alcohol and drugs separately, which could cause confusion because, the commenter asserted, alcohol is also a drug. In 38 U.S.C. 105(a), Congress identified the use of alcohol and drugs, separately. 38 U.S.C. 105(a) (barring a line-of-duty finding where injury or disease was a result of ''abuse of alcohol or drugs''). Our regulation uses both terms for consistency with the statute.

One commenter was concerned with whether the frequency of use or the addiction of the user was to be used by VA to determine willful misconduct. The commenter suggested the regulation be amended to clarify which standard was to be used. There are two issues here. First, whether the addiction itself may be service connected, and second, whether a disability that was proximately caused by frequency of use or addiction to alcohol or drugs may be service-connected. The law is clear that primary disability of addiction, at least when such addiction is due to alcohol or drug abuse, cannot be service connected. 38 U.S.C. 1110. We propose to make no changes based on this portion of the comment.

Neither frequency of use nor addiction of the user determines whether an event is due to willful misconduct. Rather, the determination is based on whether the veteran was intoxicated by drugs or alcohol at the time of the event that caused the disability, and whether that intoxication was the proximate cause of the disability. *See* § 5.661(c)(1)(i) and (ii), (c)(2)(i) and (ii). Because VA considers neither addiction nor frequency of use to determine whether the specific event that caused the disability was due to use of alcohol, drugs, or other substances, we propose to remove initially proposed paragraph (c)(2)(i), renumber the remaining paragraphs in (c), and remove the reference to addiction from proposed (c)(2)(v).

A commenter asserted that the use of the phrase ''isolated and infrequent'', in initially proposed paragraph (c)(2)(i), was contradictory because ''isolated'' suggests a one-time use and ''infrequent'' means multiple uses. One commenter recommended that there be a regulatory requirement that addiction to alcohol, drugs, or other substances, or other use disorders, be determined by a psychiatrist on a medical basis. Because we are removing paragraph (c)(2)(i) and the reference to addiction in proposed paragraph (c)(2)(v) (now (c)(2)(iv)), these comments are moot and we propose to make no changes based upon them.

One commenter felt the regulation should be revised conceptually, and modernized to preclude a finding of ''willful misconduct'' on the basis of a claimant's medically documented drug addiction or drug abuse. The commenter noted that the influence of drug addiction or abuse affects a veteran's ability to formulate sufficient intent and to appreciate the consequences of his or her actions. Another commenter expressed the opinion that the determination of proximate cause should be separated in the regulatory scheme from willful misconduct and that the determination should focus on the act causing the disability. We are prohibited from amending the regulations to comply with these comments. The prohibition against granting service connection for willful misconduct and the prohibition against granting service connection for disability caused by alcohol or drug abuse is contained in 38 U.S.C. 105(a), which reads, ''An injury or disease incurred during active military . . . service will be deemed to have been incurred in line of duty . . . unless such injury or disease was a result of the person's own willful misconduct or abuse of alcohol or drugs.'' Thus, we cannot make any changes based on these comments because the suggested changes are beyond our statutory authority.

One commenter discussed § 5.661(c), stating that after VA determines that a person was intoxicated at the time of committing a particular act, the next step should be a determination of whether the person was mentally capable of committing the act in a deliberate or intentional manner with knowledge of, or wanton and reckless disregard of, its probable consequences. The commenter speculated that an intoxicated person may not be capable of forming the intent. While intent is an element in willful misconduct determinations, intent is not an element in determining whether alcohol or drug abuse was the proximate cause of the disability. In 38 U.S.C. 105, Congress made a distinction between willful misconduct, an act with an intent element, and abuse of alcohol or drugs, an act without an intent element. Since abuse of alcohol or drugs has no intent element, we propose to make no changes based on this comment.

One commenter stated that initially proposed ''[§] 5.661(c) provides that 'intoxication' can be considered 'willful misconduct' if it is the 'proximate cause' of the claimed disability or death.'' The commenter then opined that under the

proposed regulation VA would use an indirect finding of intoxication in order to find willful misconduct, instead of basing that finding on the act causing the disability or death. This is not correct. In § 5.661(c)(1)(i), we stated, ''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.'' Alcohol or drug abuse that does not cause a disability or death is not willful misconduct. Alcohol or drug abuse that causes disability or death, whether because of impaired physical capability or judgment, or both, is willful misconduct. We therefore propose to make no changes based on this comment.

One commenter expressed the opinion that the provisions of § 5.661(a) and (b) that prohibit granting service connection, and because of that prohibition dependency and indemnity compensation, as a result of a veteran's misconduct, were an expansion of the current prohibition and unfair to innocent survivors. This commenter noted that this issue was being litigated, at the time of the preparation of the commenter's comment. However, after the commenter submitted the comment, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) decided *Myore* v. *Nicholson,* 489 F.3d 1207 (Fed. Cir. 2007). In *Myore,* the Federal Circuit held that ''38 U.S.C. 1310 authorizes DIC for the survivors of a servicemember who dies while on active duty if the death is not the result of the servicemember's own willful misconduct.'' *Id.* at 1212. The Federal Circuit agreed with VA's long-standing interpretation of the statutes that willful misconduct, for purposes of death benefits and as the cause of death, prohibits the servicemember's survivors from being granted benefits. Because the part 5 rule is consistent with *Myore,* we propose to make no changes based on this comment.

Initially proposed § 5.661(d)(2)(iii) read, ''A reasonable, adequate motive for suicide may be established by affirmative evidence showing circumstances which could lead a rational person to self-destruction.'' In § 5.3(e), we propose to state that ''VA may consider the weight of an absence of evidence in support of, or against, a particular fact or issue.'' Although we are not aware of any particular cases in which VA reversed a service department finding of mental unsoundness based on the absence of any evidence of record corroborating such finding of mental unsoundness, our regulation should not foreclose the possibility. We therefore propose to remove the word ''affirmative'' from § 5.661(d)(2)(iii) and insert the word ''competent'' in its place. We note as well that although this may be viewed as a restrictive change, in fact and practice, VA never intended a result other than that which is compelled by the revision.

The same commenter opined that the requirement in § 5.661(d)(2)(iii) that suicide not be considered an act of mental unsoundness if the evidence shows that the deceased had a ''reasonable, adequate motive for suicide'' is a ''heretofore unknown[ ] standard of evidence'' that requires VA to make ''grim, heartless, and at their center, irrational decisions.'' First, the requirement of a showing of a ''reasonable, adequate motive'' is not ''heretofore unknown''. Section 5.661(d)(2)(iii) restates current § 3.302(b)(2), which also uses the phrase ''reasonable adequate motive''. Second, this evidentiary rule has not led VA to make irrational decisions in determinations concerning suicide, and most cases involving suicide are, quite understandably, ''grim''. We see no reason to change VA policy based on this comment. However, we propose to add a comma after the second word of the paragraph, changing the wording from ''A reasonable adequate motive'' to ''A reasonable, adequate motive''. We propose this change in order to clarify that the word, ''reasonable'' modifies ''motive'' and not ''adequate.''

The same commenter argued against the use of the ''affirmative evidence'' standard in § 5.661(d)(2)(iii) because the commenter believed that ''affirmative evidence'' was a quantitative level of proof that is less than a preponderance. The commenter opined that the standard of proof was too low to determine whether suicide was due to willful misconduct, and urged VA to adopt a ''clear and convincing evidence'' standard. We propose to make no changes based on this comment for several reasons. First, as explained above, we are eliminating the reference to ''affirmative evidence''. Second, that standard is a qualitative one—it describes the nature of the evidence—and not a quantitative one. Thus, it has no effect on the burden of proof and could not be read to permit VA to find that suicide was not evidence of mental unsoundness based on less than a preponderance of the evidence. To the extent that the commenter believes that such a finding ought to be based on more than a preponderance of the evidence, we note, as discussed in the preamble to § 5.3, that the statutory default standard for rebutting findings favorable to a claimant is the preponderance standard. The application of a higher standard is appropriate only when a law mandates that higher standard.

In initially proposed § 5.661(e) we repeated current § 3.301(c)(1) which states, ''[W]hether 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 the line of duty will not govern.'' We have determined that this provision is unnecessary because it potentially conflicts with the first sentence of § 5.661(e) (based on the first sentence of § 3.301(c)(1)), which simply states, ''VA will not consider the residuals of venereal disease to be the result of willful misconduct.'' Moreover, it has been decades since the military services penalized servicemembers for failing to promptly report venereal disease (see 37 FR 20336 (Sep. 29, 1972)), so the sentence is outdated. We therefore propose not to include it in § 5.661(e).

Finally, regarding § 5.661(f), we address the proposal to replace the ''patently (clearly) inconsistent'' standard to rebut a service-department finding that a particular injury, disease, or death was not due to willful misconduct. As to the line-of-duty presumption in § 5.660(d), discussed above, we removed the word ''(clearly)'' because it gave the wrong impression that that rule established an evidentiary presumption. But unlike §§ 5.660(d) and current 3.1(m), §§ 5.661(f) and current 3.1(n) do in fact establish an evidentiary presumption. The current rule reads: ''A service department finding that injury, disease or death was not due to misconduct will be binding on [VA] unless it is patently inconsistent with the facts and the requirements of laws administered by [VA].'' Because the presumption must be consistent with both fact and law, determining whether it has been rebutted requires factual determinations, weighing evidence, and applying the law to those factual determinations. Indeed, the mere process of determining a cause of an injury is quite different from the question presented in a line-of-duty determination, as to which the only relevant inquiry is whether there is a legal bar to VA's adoption of the service department's finding. Here, then, it does make sense for VA to adopt an evidentiary standard.

We note that §§ 3.1(n) and 5.661(f) apply only where there has been a service department finding that would tend to be favorable to a claimant, that

is, that a particular injury, disease, or death was not due to willful misconduct. In cases where there has been no such finding, or where the service department found that an injury, disease, or death was due to willful misconduct, VA must review the evidence as it does any other factual issue, and determine whether the preponderance of the evidence shows that the veteran's claimed condition is service connected, with misconduct being one relevant factual question. *Cf. Thomas* v. *Nicholson,* 423 F.3d 1279, 1280 (Fed. Cir. 2005) (''concluding that a 'preponderance of evidence' establishing willful misconduct is sufficient to rebut a presumption of service-connection for peacetime disabilities under § 105(a)''). Additionally, this pro-claimant presumption is not created by statute, and we are free to establish by regulation an appropriate standard of proof.

In this case, we mean to adopt the elevated ''clearly and unmistakably'' standard suggested by the commenter. Although the general standard for rebutting a presumption is the preponderance standard (*see* § 5.3, ''Standards of Proof''), in this case, VA is rebutting a finding made by another agency based on that agency's specific review of the veteran's circumstances. Thus, unlike, for example, a presumption that a veteran who served in Vietnam was exposed to herbicides, which applies to all veterans, the service department's willful misconduct finding is particular to one veteran, and is based on the facts of that veteran's case. Therefore, it is appropriate here to raise the evidentiary threshold to rebut that finding.

§ 5.662 Alcohol and Drug Abuse

We propose to delete from the definition of alcohol abuse in § 5.662(a)(1), the requirement that the abuse be ''sufficient to proximately cause injury, disease, or death to the person consuming such beverages.'' The proximate cause requirement is addressed in paragraph (b), and it was redundant to include it in the definition. This makes the definition consistent with the definition of ''drug abuse'' in paragraph (a)(2), and with the use of the term ''abuse of alcohol'' throughout the regulation.

§ 5.663 Homicide as a Bar to VA Benefits

One commenter wanted VA to consider mercy killings of terminally ill veterans as a justifiable homicide. This commenter equated a mercy killing with a veteran's suicide. We propose to make no changes based on this comment. Federal law prohibits mercy killings. *See* 18 U.S.C. Chapter 51, Homicide. As a matter of policy, VA will not make regulations which would encourage anyone to violate Federal law.

One commenter objected to § 5.663(d), noting that many states permit a finding of guilty of homicide where the killing happened during the commission of another crime (the felony murder rule), or where an intoxicated person causes an automobile accident that kills someone else. The commenter suggested that we amend § 5.663(d) to accept only a court of law conviction of intentional homicide as binding on VA.

We agree that such a change would be consistent with § 5.663(a), where we define homicide as ''intentionally causing the death of a person without excuse or justification.'' We therefore propose to insert the phrase, ''Subject to the requirement of intent in paragraph (a),'' before the phrase, ''VA will accept a court of law conviction of homicide as binding'' in paragraph (d)(1).

A commenter noted that while we allow insanity as a defense to homicide, we did not define insanity. The commenter urged VA to revise the regulatory language to include all legally permissible excuses for homicide culpability, such as from intoxication, mental immaturity, low intelligence, and other factors. We agree that a regulatory definition of insanity is needed, but we have already provided one elsewhere in proposed Part 5. In § 5.1, RIN 2900–AL87, General Provisions, 71 FR 16461, Mar. 31, 2006, now proposed § 5.1, we proposed to define ''insanity,'' as a defense to commission of an act, as meaning a person was laboring under such a defect of reason resulting from injury, disease, or mental deficiency as not to know or understand the nature or consequence of the act, or that what he or she was doing was wrong. Behavior that is attributable to a personality disorder does not satisfy the definition of insanity. This definition excuses mental immaturity and low intelligence, as urged by the commenter, to the extent that these qualities prevent the affected person from knowing or understanding the nature or consequences of their act or that what he or she was doing was wrong.

We propose to decline to include intoxication as a legally permissible excuse for homicide in the definition of insanity. Congress, in 38 U.S.C. 105 and 1110, specifically prohibited VA from paying compensation for disabilities due to abuse of alcohol or drugs. It would be inconsistent with Congress' intent if we were to prohibit granting service connection to a veteran because of a disability proximately due to the abuse of alcohol or drugs, but to allow the abuse of alcohol or drugs to be an excuse for homicide or to be included in the definition of insanity for any purpose. While Congress has not prohibited VA from including abuse of alcohol or drugs in our definition of insanity, allowing the abuse of alcohol or drugs to be used as an excuse in those determinations requiring the formation of an intent to do an act would be inconsistent with Congressional intent and VA policy. This is a reasonable gap-filling decision within the Secretary's power under 38 U.S.C. 501(a) to promulgate regulations to carry out the laws administered by the Department. We therefore propose to make no changes based on this comment.

One commenter asked that VA consider including regulatory language to allow all legally permissible excuses for homicide culpability, reasoning that if intent is required to bar benefits for homicide, a lack of intent for any reason should excuse the homicide and allow eligibility for benefits. As we stated in the proposed regulation, ''homicide means intentionally causing death''. This language requires that the person who caused the death have the intent to do so, and therefore we propose not to make any changes based on this comment.

One commenter suggested that we accept as binding all court decisions, civil as well as criminal, in § 5.663(d)(1). As explained in the NPRM, we chose to accept as binding a conviction in a criminal judicial proceeding because of the higher standard of proof required for a criminal conviction, which is guilt beyond a reasonable doubt. We noted in the NPRM that this is a higher standard than is applicable in civil matters. As stated in the NPRM, we chose not to use a finding of liability in a civil court proceeding because of the lower standard used in those proceedings. We therefore propose to make no changes based on this comment.

This commenter noted that, in § 5.663(e), concerning the effect of a court of law proceeding on VA findings of insanity at the time of the killing, we did not specify what type of finding must be made. The commenter noted that the finding of insanity could be expressed as a verdict, for example, not guilty by reason of insanity, or be a finding of fact within the court's decision. In § 5.663(e), we stated, ''VA will accept as binding a court's determination that a person was insane at the time of the killing.'' It is immaterial whether the determination is

announced in the verdict or in the body of the written decision. If a court determines the person was insane at the time of the killing, VA will accept that determination in whatever form the court chooses to issue the determination. We propose to make no changes based on this comment.

This commenter then stated that if a court does not make the determination, then VA will need to make the determination. The commenter opined that, that determination should be based on a psychiatrist's objective review and an independent medical opinion, not solely on VA's consultation with a psychiatrist or an opinion from a psychiatrist employed by the VA. While an independent medical opinion is an option we may use when needed, one is not required in all cases. In § 5.92, we explained the situations in which VA will request an independent medical opinion. Absent a medical problem of such obscurity or complexity, or one that has generated such controversy in the medical community at large, we need not solicit an independent medical opinion. VA will determine on a case-by-case basis whether an independent medical opinion is needed for us to decide whether the veteran's actions constituted willful misconduct. As to the requirement of a non-VA psychiatric opinion, VA's psychiatrists and psychologists are experts, and we have no reason to believe that their opinions are biased against providing benefits to veterans. We propose to make no changes based on this comment because VA has an adequate system for obtaining medical opinions from VA psychiatrists or psychologists as needed, or obtaining an independent medical opinion when one is needed.

One commenter opposed the § 5.663(c)(2) requirement that the person have ''no way to escape or retreat in order to'' justify a finding that a killing was in self-defense. The commenter felt that this may create an unjust hardship on claimants and may deprive some claimants of benefits, even though they did not violate their state's laws or any federal criminal statute. The commenter noted that some states do not require a threatened person to flee and have ''stand your ground'' laws that allow a person to defend himself or herself without requiring the person to attempt to escape or retreat from the situation.

While some states have enacted ''stand your ground'' laws, many others have not. We note that, according to Corpus Juris Secundum, ''generally, one who seeks to excuse a homicide on the ground of self-defense must show that he did all he reasonably could to avoid the killing; before resorting to the use of deadly force the person attacked must retreat if he or she is consciously aware of an open, safe, and available avenue of escape.'' 40 C.J.S. 133 (2008). VA has applied the duty-to-retreat requirement for many years and has not found that it produces unjust results. Moreover, it is appropriate for VA to continue to apply this duty because it is still followed in most jurisdictions.

One commenter was concerned that this regulation does not establish procedures or standards for adjudicating whether the homicide was intentional. This issue would not be adjudicated any differently than any other factual issue presented in a particular case. There are no special procedures applicable to a finding of intentional homicide, and we propose not to adopt any based on this comment.

However, we do propose to make certain revisions based on this comment and our review of this regulation. We have determined that an elevated standard of proof should apply to determinations of intentional homicide because the generally applicable ''preponderance of the evidence'' standard does not afford the claimant sufficient protection. As noted in the NPRM for this regulation, we accept a criminal conviction as proof that the person convicted did the killing because of the high standard of proof (''beyond a reasonable doubt'') used in criminal prosecutions. It is inconsistent with this high standard of proof to require only a preponderance of the evidence to support a finding that a claimant intentionally committed homicide in cases where the claimant was not convicted of such a crime. Thus, we propose to adopt the ''clearly and unmistakably'' standard of proof in the revised regulation.

Additionally, in initially proposed § 5.663(d)(2), we stated that we will ''determine whether the person was guilty'' of homicide. But this is not correct. VA does not make determinations of guilt or innocence; VA makes administrative determinations concerning benefit entitlement. Hence, we propose to remove this statement from the regulation.

Additionally, § 5.663(e) stated that ''VA will develop the necessary evidence'' to determine whether a person is guilty. This instruction was redundant because there are other provisions of part 5 that adequately address the development of claims. We therefore propose to remove the phrase, ''will develop the necessary evidence and'' from the sentence.

One commenter felt that VA adjudicators were not trained and experienced enough in criminal or tort law to properly adjudicate claims involving homicide. This commenter felt that the regulation was vague and implied that this vagueness violated the due process rights of claimants. The commenter was also concerned that this regulation did not specifically provide for development of evidence except for that relied on in a court hearing. The commenter felt that documentary evidence is inherently hearsay evidence (citing the Federal Rules of Evidence, sec. 801(c)) and was not a proper basis for making a determination of this complexity and gravity, and that VA intended to make a decision based only on a paper or record review. The commenter also noted that the claimant in such a situation lacks the ability to confront an adverse witness under oath. The commenter expressed the opinion that this type of claim may only properly be determined in an adversarial proceeding with formal rules of evidence. For the following reasons, we propose to make no changes based on these comments.

This regulation is an expansion of 38 CFR 3.11, ''Homicide'', and incorporates the provisions of 38 CFR 3.11 and long-standing VA procedures for determining entitlement to benefits when a killing is involved. While it does not include specific provisions for the procedures to be followed in making the determination of whether the claimant intentionally killed another without excuse or justification, the procedures in § 5.90 for developing and adjudicating a claim will be followed. There is no reason to include the procedures in this regulation when they are included elsewhere. Proposed § 5.663 is not intended to be a replacement for any criminal or civil legal proceeding concerning the death of a veteran or other beneficiary and we decline to adopt the standards applicable to a criminal or civil court proceeding. This regulation is not intended to function as a stand-alone regulation but is to be read in conjunction with the other applicable regulations concerning the provision of VA benefits. We propose not to create special provisions for procedures for this type of claim since no special procedures are needed.

We disagree that this regulation is vague. It is very specific concerning what constitutes a homicide, what is an excuse or justification for a homicide, and what impact a homicide has on claimants. The regulation provides specific notice to claimants that a killing that would otherwise provide or increase the killer's benefits, unless excused or with justification, will result

in a denial of benefits. This regulation, when applied in concert with the other applicable VA regulations governing provision of benefits, provides full due process rights to the claimant.

We disagree that we will make decisions based only on paper evidence. While documentary evidence is normally what VA uses in adjudicating a claim, every claimant has a right to a hearing and to present evidence at that hearing. Determinations concerning homicide are not excluded from the right to a hearing and to present testimony and evidence at the hearing. We also disagree that documentary evidence is inherently hearsay evidence and therefore not appropriate for deciding a matter of this complexity and gravity. The Federal Rules of Evidence, in addition to the definition of hearsay cited by the commenter, also provide in sections 803, 804, and 807 exceptions to the hearsay rule. Fed. R. Evid. 803, 804, and 807. Most evidence considered by VA in adjudicating claims falls within one of these exceptions. However, even if the evidence does not fall within one of these exceptions, VA is still required to ''consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary.'' 38 U.S.C. 5107(b).

We also disagree that VA adjudicators are not trained and experienced enough to properly adjudicate claims involving homicide. First, VA adjudicators do not adjudicate claims under criminal or tort laws, so it is irrelevant whether they are trained to adjudicate such matters. VA adjudicators make administrative decisions based on the laws and regulations providing for benefits. Second, VA has an extensive training program for VA adjudicators, which includes training in determining if a killing was a homicide. Additionally, every agency of original jurisdiction has an Office of Regional Counsel available to advise the adjudicators. If criminal or tort law is involved, VA adjudicators may contact the Regional Counsel, or the Office of General Counsel, Office of the Inspector General, or other offices as appropriate, for advice and guidance. We propose to make no changes based on this comment.

In addition to the changes to § 5.663 discussed above, we propose to alphabetically reorder the definitions in paragraph (a) to make them easier to find and to be consistent with similar lists within part 5. Finally, we propose to remove the references to ''benefits awarded, but unpaid at death'' from § 5.663(f)(6). For the reasons stated in the preamble to § 5.550, and those that follow, we propose not to include that term in part 5.

§ 5.676 Forfeiture for Fraud

Initially proposed § 5.676(b)(5) authorized the suspension of benefits when a case is recommended for forfeiture for fraud, but it did not clearly state the date that the suspension would begin. We propose to revise the rule by adding an effective date that is consistent with current part 3 and the manual provisions in the Manual M21–1MR. We made a similar provision in § 5.677(b)(5), concerning forfeiture for treasonable acts.

§ 5.678 Forfeiture for Subversive Activity

In proposed § 5.678(b)(2)(ii), we propose to change ''first day of the month that follows the month for which VA last paid benefits'' to ''day benefits were suspended'', to improve readability.

§ 5.679 Forfeiture Decision Procedures

One commenter noted a typographic error in § 5.679(b)(6). We propose to correct that error by replacing ''Information about that fees'' with ''Information that fees''.

One commenter objected to the term ''recommendation for forfeiture'' used in both §§ 5.676 and 5.679, observing that the term is not defined. This commenter felt the term, without a definition, is overly broad. We propose to make no changes based on this comment. While the commenter is correct that we do not define the term ''recommendation for forfeiture,'' the term's use in relationship to VA benefits is explained in § 5.679. In this regulation, we explain who may file a recommendation for forfeiture, what the procedures for preparing a recommendation for forfeiture are, and who the official is that will make a decision on the recommendation for forfeiture. This procedure is largely unchanged from the previous regulations and is long-standing VA policy.

The phrase is self-explanatory. Both ''forfeiture'' and ''recommendation'' have the meanings commonly assigned them by dictionaries of the English language. We do not propose to define the phrase since there is no need to define the phrase as it is not overly broad or subject to multiple interpretations. We therefore propose to make no changes based on this comment.

One commenter was concerned that § 5.679 would deny the claimant due process of law by suspending payments of any benefits before a final decision has been made on whether to invoke forfeiture. For the following reasons, we propose to make no changes based on this comment.

The forfeiture sections of the new Part 5 regulations, §§ 5.676 and 5.679, do not change VA's procedures for determining forfeiture or for suspending payments for forfeiture. Section 5.676(b)(5) provides that benefits will be suspended if forfeiture for fraud is recommended in accordance with § 5.679. Proposed § 5.679 provides that before a recommendation for forfeiture is made, the recommending Regional Counsel, or in the Philippines, the Veterans Service Center Manager (VSCM), must provide written notice to the beneficiary or claimant of the specific charges against the person, a detailed statement of the evidence supporting the charges, a citation and discussion of the applicable statute, the right to file a statement or evidence within 60 days of the notice, the right to a hearing within 60 days after the notice with representation of the person's choosing, the limitations on fees any representative may charge the beneficiary or claimant, and information that fees for representation are limited and that VA will not pay expenses incurred by a claimant, his or her counsel, or witnesses. Only after all of these procedures are followed will a Regional Counsel, or in the Philippines, the VSCM, make a recommendation for forfeiture. These procedures provide the person subject to the forfeiture with full due process rights.

The commenter also felt that it would be impossible to determine when the suspension of benefit payments would take place since there is no definition of ''recommendation for forfeiture''. The commenter also asserted that under the proposed rules, it is unclear whether a recommendation for forfeiture is different from a final decision on forfeiture. We propose to make no changes based on these comments.

The date of suspension of benefit payments based on a recommendation for forfeiture is clearly stated in § 5.676(b)(5) (regarding suspension for fraud). Benefit payments will be suspended when the recommendation for forfeiture is filed with the Director of the Compensation Service or personnel of that service designated by the Director to determine whether a claimant or payee has forfeited the right to all VA benefits except insurance payments. The regulation is clear in explaining that the suspension occurs when the recommendation for forfeiture is filed with the appropriate official by Regional Counsel or the Manila VSCM.

Likewise, the regulations are clear in explaining that a recommendation for forfeiture is different from a final

decision on forfeiture. Under § 5.679, a recommendation for forfeiture is made by a VA official described in paragraph (a)(2) and the final decision is made by a VA official described in paragraph (a)(1). Nevertheless, to avoid the possibility of confusion on this point, we propose to revise paragraph (a)(2) of § 5.679 by changing the phrase ''such official'' to ''an official described in paragraph (a)(1) of this section''.

§ 5.680 Revocation of Forfeiture

In *§ 5.680*(b)(1), we propose to change the sentence, ''VA will remit a forfeiture upon a showing that the forfeiture decision involved clear and unmistakable error'', to replace the word ''involved'' with ''was the product of'', to clearly show the role that the error must have played in leading to the forfeiture decision. This is merely a clarification. We also propose to reorganize the contents of paragraph (b) for clarity.

The term ''remission'' (the term used in 38 U.S.C. 6103(d)(2) and current VA regulations in part 3) may not be commonly understood by the public and we therefore propose to replace it with ''revocation''. We propose to make conforming changes of ''remit'' to ''revoke''.

§ 5.681 Effective Dates: Forfeiture

In paragraphs (b)(1) and (3), we propose to change ''starting date'' to ''effective date''. We do not use the term ''starting date'' in part 5.

§ 5.683 Renouncement of Benefits

One commenter recommended removing this section because in a situation where the person renouncing the benefit is not the guardian or custodian of the veteran's child, an unjust result may occur and the child may lose benefits.

If a surviving spouse of a veteran is receiving DIC and is not the guardian or custodian of the veteran's child, then the veteran's child's portion of the DIC would have been or would be apportioned to the veteran's child (and paid to the custodian or guardian of the child). The surviving spouse's renouncement of benefits would not affect the amount paid based on the existence of a child. The commenter was incorrect in implying that the renouncement would affect the amount paid based on the existence of a child. We therefore propose to make no changes based on this comment.

As initially proposed, § 5.683(b) stated that a fiduciary may not renounce benefits on behalf of a beneficiary. The main duties of a fiduciary are to preserve and disburse funds that the beneficiary is entitled to receive. However, if a fiduciary is court appointed or a guardian of a minor child, this person may have the authority to act in the stead of the beneficiary and renounce benefits on behalf of the beneficiary, if it is to the beneficiary's advantage. In order to avoid any confusion as to what type of fiduciary is able to renounce benefits on behalf of the beneficiary, we propose to remove the phrase ''by a fiduciary'' from initially proposed § 5.683(b).

In reviewing initially proposed § 5.683, we noted that it did not address renouncement by a person who VA has determined is entitled, but who is not yet receiving benefits. VA has always permitted such persons to renounce benefits, so we propose to change ''beneficiary'' to ''a person entitled to that benefit'' in (b) and (d)(1) to clarify that point.

XVII. Subpart L: Payments and Adjustments to Payments

A. Payments and Adjustments to Payments AM06

In a document published in the **Federal Register** on October 31, 2008, we proposed to rewrite VA regulations governing payments and adjustments to payments, to be published in new 38 CFR part 5. 73 FR 65212. We provided a 60-day comment period that ended on December 30, 2008. We received a submission from one commenter, National Organization of Veterans' Advocates, Inc.

§ 5.690 Where to Find Benefit Rates and Income Limits

Initially proposed § 5.690 listed benefit programs as a continuous series. To aid readability, we have revised this series to read as two enumerated lists. Paragraph (a) would list the benefits for which VA publishes rates. Paragraph (b) would list the benefits for which VA publishes income limitations.

Although 38 CFR 3.21, from which § 5.690 derives, does not include death compensation in its list of benefits for which VA publishes rates, it has always been VA's practice to publish death compensation rates. We therefore propose to add the term ''death compensation'' to proposed § 5.690.

§ 5.691 Adjustments for Fractions of Dollars

The commenter stated, ''For consistency with section 5.691(b), section 5.691(c) should also require rounding up, rather than down, to the nearest dollar, the amount of Improved Pension or Section 306 Pension payable.'' Section 5312(c)(2) of title 38 U.S.C., which governs the rounding of the rates and income limitations for the benefits listed in proposed § 5.691(b). It gives the Secretary discretion to round such rates and income limitations in a manner that he or she ''considers equitable and appropriate for ease of administration.'' Another statute, 38 U.S.C. 5123 of title 38 U.S.C. governs rounding of payments of the pension benefits to which proposed § 5.691(c) applies. It prescribes rounding payments down to the nearest dollar. In contrast to section 5312(c)(2), section 5123 does not authorize the Secretary to vary from that practice according to his or her discretion. Because a statute requires that the pension rates covered in § 5.691(c) be rounded down, we propose to make no change based on the commenter's suggestion.

§ 5.693 Beginning Date for Certain VA Benefit Payments

The commenter indicated that this section ''should provide for payments beginning as of the effective date, rather than as of the first day of the month after the month in which the payment becomes effective.'' The commenter urged VA to make this change in order to ''be consistent with section 5.705 which institutes a reduction or suspension as of the effective date.'' Pursuant to 38 U.S.C. 5111(a), payment of a VA benefit ''may not be made to an individual for any period before the first day of the calendar month following the month in which the award or increased award became effective.'' Thus, we lack the authority to make the change suggested.

We propose to revise initially proposed § 5.693(b). We propose to replace a reference to ''payment'' with ''award or increased award'' and add ''or increased award'' to a reference to ''award''. We made the former change to correct an error and the latter change to clarify the provision. Further, as initially proposed, the title purported to state the beginning date of certain benefits, but the regulation text actually required the reader to infer the beginning date of payments from the negative statement, ''[B]enefits . . . will not be paid for any period before the first day of the month after the month in which the award or increased award becomes effective.'' This preclusion against paying before a certain time does not inform the reader, or instruct VA, when payments will begin. We propose to state the rule affirmatively: ''VA will pay benefits identified in this paragraph beginning the first day of the month after the month in which the award or increased award becomes effective,

except as provided in paragraph (c) of this section.''

We propose to revise initially proposed paragraph (c) by restating it in the active voice. We also propose to delete the statement that paragraph (b) does not apply to the benefits listed in paragraph (c). It is unnecessary, because paragraph (b) would already state that it applies, ''except'' to paragraph (c).

We propose to revise § 5.693(c)(4)(iii) to reflect the terminology used in VA's regulations regarding the reduction of compensation and pension based on the receipt of hospital, domiciliary, or nursing home care. *See* §§ 5.720 to 5.730. Initially proposed § 5.693(c)(4)(iii) referred to ''hospitalization'' and ''institutionalization''. With respect to specific types of VA care or VA facilities, the terms ''institution'', ''institutional'', and ''institutionalization'' are obsolete. Further, reductions based on the receipt of domiciliary care or nursing home care are similar to, and in some instances the same as, reductions based on the receipt of hospital care.

Section 605 of Public Law 111–275, 124 Stat. 2864, 2885–86 (2010), amended 38 U.S.C. 5111 to create a new exception to the general rule on the beginning date for VA benefit payments for veterans who were retired or separated from the active military service for a catastrophic disability. We propose to incorporate this exception into § 5.693 by adding new paragraphs (c)(10) and (e).

§ 5.694 Deceased Beneficiary

In the NPRM AM06, VA inadvertently omitted the provision in current 38 CFR 3.500(g)(1). To correct this, we propose to add this provision as § 5.694. We have renumbered initially proposed § 5.694 as § 5.695, and initially proposed § 5.695 as § 5.696. We also omitted from the initial NPRMs an equivalent to 38 CFR 3.500(g)(3) without an explanation for its exclusion. Section 3.500(g)(3) provides an effective date for discontinuance of an award of ''retirement pay'' administered by VA upon the death of a veteran. VA no longer administers any veteran's benefit titled ''retirement pay.'' VA previously paid emergency officers' retirement pay and retirement pay under Public Law 77–262, which are no longer active benefits. Although military retirement pay may also be discontinued upon the death of a veteran, VA does not administer that benefit. Therefore, we propose to not include an equivalent to § 3.500(g)(3) in part 5.

§ 5.695 Surviving Spouse's Benefit for the Month of the Veteran's Death

The commenter stated:

> We believe that this section should provide that payments to the surviving spouse will be for the month of death and for the month immediately following the veteran's death. This would provide a more equitable transition for the surviving spouse and would not result in confusion and inadvertent overpayments where a veteran dies during the last days of the month and the notification of the veteran's death does not reach the VA or is not processed until the weeks following death. Eliminating the cost to the VA of attempting to recoup the inadvertent overpayments should cover the costs of the additional month's payments.

The month-of-death benefit is governed by 38 U.S.C. 5111(c) and 5310, and the proposed regulation is consistent with those statutes. Sections 5111 and 5310 do not authorize VA to pay a benefit for both the month of death and the next month unless VA awards the surviving spouse a death benefit for the month in which the veteran died and the amount of that benefit is less than or equal to the amount of compensation or pension the veteran would have been entitled to for the month of death but for his or her death. Barring this situation, there is no statutory authority for issuing payment for the month of the veteran's death and the month immediately following the veteran's death. We propose to make no change based on the commenter's suggestion.

In initially proposed § 5.694 (b)(2), we used the phrase, ''then the surviving spouse is entitled to death pension or DIC for the month of the veteran's death''. It is more precise to say, ''then VA will pay the surviving spouse death pension or DIC for the month of the veteran's death''.

In § 5.695(c), initially proposed as § 5.694(c), we propose to add language to provide that the veteran must have been receiving disability compensation or pension at the time of death for the surviving spouse to be entitled to the month-of-death benefit. Both the authorizing statute, 38 U.S.C. 5310(b)(1), and the current part 3 equivalent, § 3.20(c)(1), require the veteran to have been in receipt of disability compensation or pension at the time of death. Similar language was incorrectly omitted from the initially proposed rule. In § 5.695(c), we also propose to clarify that a provision that was inadvertently omitted from the initially proposed rule (§ 5310(b)) does not authorize a month-of-death benefit for the surviving spouse of a veteran who died on December 31, 1996. In the initially proposed rule, we addressed the deaths of veterans occurring before and after that date but not on that date.

We propose to revise initially proposed § 5.694(d), now § 5.695(d) to clarify that the payment made to a deceased veteran for the month in which the veteran died is a payment of compensation or pension, not ''the month-of-death benefit''. We propose to make this change because the ''month-of-death benefit'', defined in § 5.695(a), is ''a payment to a deceased veteran's surviving spouse'', not a payment to a veteran.

Subsequent to the publication of proposed § 5.695, section 507 of Public Law 112–154 (2012) amended 38 U.S.C. 5310 by making surviving spouses whose spouse died on or after August 6, 2012, entitled to a benefit for the month of a veteran's death if, at the time of the veteran's death: (1) the veteran was receiving disability compensation or Improved Pension, or (2) the veteran is determined to have been entitled to receive such compensation or pension for such month. The amendment also states that if a claim for such benefits was pending on the date of a veteran's death and the pending claim is subsequently granted, any additional benefits for that month would be paid as accrued VA benefits.

§ 5.696 Payments to or for a Child Pursuing a Course of Instruction at an Approved Educational Institution

We have renumbered initially proposed § 5.695 as § 5.696. Initially proposed paragraph (a) defined ''approved educational institution''. Because that term is already defined in § 5.220(b)(2), we now propose to simply cross reference that definition rather than repeat it in paragraph (a).

We propose to reorganize initially proposed paragraph (b) to enhance clarity and to note the statutory requirement under 38 U.S.C. 1115 that additional disability compensation will only be paid for a qualifying child where the veteran has a service-connected disability rated at least 30 percent disabling.

We propose to reorganize initially proposed paragraph (c), pertaining to payment of dependency and indemnity compensation (DIC) directly to a child, to clarify the relationship between proposed paragraphs (c)(1) and (3). The proposed paragraphs were both derived from current § 3.667(a)(3), which applies to a child pursuing a course of instruction at an approved educational institution upon reaching age 18. Initially proposed paragraph (c)(3) has now been redesignated as § 5.696(c)(1)(i). Initially proposed paragraph (c)(1) has now been

redesignated as § 5.696(c)(1)(ii). The distinction between the two paragraphs is that under paragraph (c)(1)(i), the child was a dependent on a surviving spouse's DIC award immediately before the child's 18th birthday. Under paragraph (c)(1)(ii), he or she was not.

As initially proposed, a reference to an exception for paragraph (f)(2) was placed incorrectly in paragraph (g)(1) instead of in paragraph (g)(2). We propose to correct this in paragraph (g). Further, we propose to revise paragraph (g), which pertains to the discontinuance of benefits to a child pursuing a course of instruction at an approved educational institution, consistent with the part 5 convention for describing how VA implements a reduction or discontinuance of benefits.

We propose to add 38 U.S.C. 3562 as the specific statutory authority for § 5.696(i)(1), which bars the payment of Improved Pension, additional disability compensation, and DIC to or for a child pursuing a course of instruction at an approved educational institution who has elected educational assistance under 38 U.S.C. chapter 35.

§ 5.696 Awards of Dependency and Indemnity Compensation When Not All Dependents Apply

As proposed in the NPRM, § 5.696, ''Awards of dependency and indemnity compensation when not all dependents apply'', pertained only to awards of dependency and indemnity compensation. Therefore, we now propose to renumber it as § 5.525 in subpart G of this part under the undesignated center heading ''Dependency and Indemnity Compensation—Eligibility and Payment Rules for Surviving Spouses and Children''.

§ 5.697 Exchange Rates for Income Received or Expenses Paid in Foreign Currencies

Initially proposed § 5.697(b) and (c) provided the same general rule and exception to the payment of benefits under subpart J of this part and under § 5.551(e). The same general rule and exception also apply to funds paid in accordance with §§ 5.565(b)(4), 5.566(d)(4), and 5.567(a)(4). Therefore, we propose to combine initially proposed § 5.697(b) and (c) into paragraph (b) and expand the applicability of paragraph (b) to include the payment of these other funds. We also propose to make changes to the general rule and the exception, paragraphs (b)(2) and (3) respectively, to improve readability or simplify language.

Also in new § 5.697(b), we propose to clarify language from initially proposed paragraph (c). In initially proposed § 5.697(c), we used the phrase ''last illness and/or burial''. Title 38 U.S.C. 5121(a)(6) states, ''[A]ccrued benefits may be paid . . . to reimburse the person who bore the expense of last sickness and burial.'' VA interprets the word ''and'' as used in the statute to mean ''or''. We do not believe that Congress intended to require that a person have paid expenses of both the last illness and burial to qualify for some reimbursement. For example, if a person expended his or her savings paying for health care bills resulting from the veteran's last illness and therefore could not pay for the burial, it would be unfair not to reimburse him or her for the health care bills. We propose to change the proposed language from ''and/or'' to simply ''or'' because this term includes ''and''. Furthermore, this change is consistent with current § 3.1000(a)(5), which uses the phrase ''last sickness or burial''.

§ 5.705 General Effective Dates for Reduction or Discontinuance of Benefits

The commenter indicated that for ''similar reasons as what is now proposed section 5.694 [now proposed 5.695], the effective date for reduction or discontinuation of benefits should be the month following the triggering event for the reduction or discontinuance.'' The effective dates for reductions and discontinuances are governed by 38 U.S.C. 5112. Under section 5112, in most circumstances reductions and discontinuances of disability compensation, pension, or dependency and indemnity compensation must be on the last day of the month in which a described event occurs. We note as well that the effect of this rule is that any new benefit that may be paid as a result of the reduction or discontinuance, such as a newly elected but exclusive benefit or a benefit to a survivor or an apportionee, can be paid in the month immediately after the month in which the benefit is reduced or discontinued. Moreover, VA reduces or discontinues benefits only when the beneficiary is no longer entitled by law to receive the benefits. The commenter's suggestion is that we continue to pay such benefits for a full month after we determined that the beneficiary is not entitled to receive them. We have no authority to adopt the commenter's suggestion.

§ 5.707 Deductible Medical Expenses

Section 5.707 describes the medical expenses that VA will deduct for purposes of three of VA's benefit programs that are based on financial need. Paragraph (c) lists six categories of such expenses and then lists subcategories within some of them. Certain expenses may fall within more than one category or subcategory. In order to ensure that VA makes decisions that grant every benefit that the laws supports, we have added to the introductory text of paragraph (c), ''If there is more than one way to categorize a medical expense under this paragraph (c), VA will categorize it in the way that is most favorable to the claimant or beneficiary.'' *See* 38 CFR 3.103(a) (''[I]t is the obligation of VA . . . to render a decision which grants every benefit that can be supported in law.''); *see* also 71 FR 16475, Mar. 31, 2006 (proposed 38 CFR 5.4(b), based on 38 CFR 3.103(a)).

As initially proposed, the text of paragraph (c)(1) listed care typically provided by a licensed health care provider but failed to specify that in order for payments for the care to be deducted as medical expenses under paragraph (c)(1), the care must have been provided by a licensed health care provider. That requirement was intended in the proposed rule, as shown by the heading of paragraph (c)(1), ''Care by a licensed health care provider''; nevertheless, we propose to add the requirement to the text of the paragraph for clarity.

In initially proposed § 5.707(c)(4), we specified the mileage rate for deductible medical expenses as 20 cents per mile traveled. Following the publication of the proposed rule, VA raised that mileage rate. VA publishes that mileage rate on VA Form 21–8416, Medical Expense Report, which is updated periodically. In order to ensure that the public has the most current information, we propose to change § 5.707(c)(4) to refer to ''the amount stated on VA Form 21–8416, Medical Expense Report'' rather than a specific rate. We also inform the reader that this form is available on the VA Web site.

Initially proposed § 5.707(c)(6) began, ''The following payments are 'medical expenses' that will be deducted from income:''. We determined that this introductory language is redundant because it is already stated in the introductory text of paragraph (c): ''The following payments are 'medical expenses' that will be deducted from income if they are not reimbursed''. We therefore propose to remove the introductory language from paragraph (c)(6).

We further propose to revise paragraph (c)(6) to more accurately describe current VA practice. In paragraph (c)(6)(ii), regarding payments for an in-home attendant, we propose to

clarify the circumstances under which the attendant must be a licensed health care provider. We also propose to remove the initially proposed language that states that the attendant may be a family member. Although the proposed language was accurate, it was superfluous, and including the language might confuse a reader regarding whether the attendant could be someone from another general class, such as a friend or a neighbor.

In paragraph (c)(6)(iv), regarding payments for custodial care, we propose to delete language providing that payments made strictly for custodial care were not deductible. That language does not accurately describe VA's practice. Payments for custodial care (including room and board) are deductible if the other requirements of the paragraph are met. We also propose to add conditions that clarify the circumstances under which the paragraph permits described payments to be deducted as medical expenses.

In paragraph (c)(6)(v), regarding payments for custodial care in a government institution, we propose to add conditions to clarify the circumstances under which the paragraph permits described payments to be deducted as medical expenses.

In paragraph (c)(6)(vi), regarding payments to an adult day care facility, rest home, group home, or similar facility, we propose to delete initially proposed language stating that if the individual is not in need of regular aid and attendance and is not housebound, VA will deduct all reasonable fees paid to the facility, but only to the extent that they are for medical treatment provided by a licensed health care provider. Such language is unnecessary in paragraph (c)(6)(vi) because payments for medical treatment provided by a licensed health care provider are always deductible under paragraph (c)(1).

We also propose to delete paragraph (c)(6)(vi)(C), which provided that if the adult day care or similar facility was a government facility, paragraph (c)(6)(v) applied. The proposed revisions to paragraph (c)(6) clarify the circumstances under which each of the paragraphs applies in order to be consistent with and accurately describe VA's current practice. More specific direction is unnecessary and could be confusing or inaccurate. As discussed above regarding the introductory text of paragraph (c), to the extent that the categories and subcategories of medical expenses in paragraph (c) may overlap, VA will always categorize a medical expense in the way that is most favorable to the claimant or beneficiary.

We also propose to make a few changes to initially proposed § 5.707 to improve readability or simplify language.

§ 5.708 Eligibility Verification Reports

Initially proposed § 5.708(a) incorrectly referred only to Improved Pension and parents' dependency and indemnity compensation (DIC). We propose to revise § 5.708(a) to clarify that eligibility verification reports (EVRs) pertain to all three VA pension programs—Old-Law Pension, Section 306 Pension, and Improved Pension—as well as parents' DIC.

Initially proposed § 5.708(b)(1) incorrectly indicated that VA may require claimants to complete an EVR annually. Only beneficiaries may be required to file an EVR annually. We have deleted the term ''annually'' from § 5.708(b)(1).

Initially proposed § 5.708(c) incorrectly implied that certain parents receiving parents' DIC were never required to file an EVR. Paragraph (c) should have made clear that it was an exception to the general requirement that such parents file an EVR annually. Accordingly, we propose to delete initially proposed paragraph (c) and place the material proposed in paragraph (c) in a note to revised paragraph (b)(2)(i) pertaining to the requirement for beneficiaries to file an EVR annually. We have not included in that note the sentence from initially proposed paragraph (c) stating, ''However, a parent receiving parents' DIC must notify VA whenever there is a material change in his or her annual income.'' That sentence is unnecessary given that similar information is provided in §§ 5.708(b)(2)(ii) and 5.709. In the note to paragraph (b)(2)(i), we propose to add two more groups who are exempted from the annual EVR requirement, beneficiaries of Old-Law Pension and Section 306 Pension and certain beneficiaries of Improved Pension. This change is consistent with current practice and facilitates VA's efficient administration of these programs.

The third sentence of initially proposed paragraph (d), redesignated as paragraph (c), described the action VA takes when expected income is uncertain. The sentence referred to other more specific provisions elsewhere in part 5. In order to avoid confusion about the purpose and meaning of the sentence, as well as its relationship to the first sentence in the paragraph, we propose to delete the sentence and provide instead a clear cross reference to the relevant specific provisions to which the deleted sentence referred. We also propose to clarify the cross reference to § 5.478 to describe more accurately the circumstances under which that provision applies. The initially proposed language described § 3.260(b), upon which § 5.478(a) is based, but it would not accurately describe the content of § 5.478(a).

We propose to clarify § 5.708(e)(2), redesignated from initially proposed paragraph (f)(2). As initially proposed, the paragraph stated that VA would notify a beneficiary that an EVR was incomplete and inform the beneficiary of the information needed to complete the EVR. We have simplified the paragraph. If VA notifies a beneficiary of additional information needed to complete an EVR, it is implicit in that notice that the EVR, as filed, is incomplete.

We propose to clarify initially proposed § 5.708(g)(1)(ii) and redesignate it as initially proposed paragraph (f)(1)(ii). As initially proposed, the rule was limited to instances in which the discontinuance of payments was effective before the date on which benefits were suspended. Such a limitation on the rule is misleading. Whether or not discontinuance of benefits was effective before the date on which benefits were suspended is irrelevant; in either case, the effective date of resumption under this paragraph is the date the benefits were discontinued. This change is consistent with current practice.

Initially proposed § 5.708(h), redesignated as § 5.708(g), stated, ''A former beneficiary who owes or owed money to VA because VA discontinued payments for failure to file an EVR within the time limit . . . may submit the EVR at any time'', and further stated, ''If, based on information in the EVR, VA decides that the former beneficiary was entitled to benefits for any part of the period of time in which payment had been discontinued for failure to file an EVR, VA will offset the debt for that part of the period.'' We have determined that in some instances, a former beneficiary might file a new claim after VA has discontinued his or her benefits. If such a claim were granted, that person would become a current beneficiary. Nevertheless, he or she might still file the previously requested EVR, which could reduce or eliminate the debt. Therefore, in contemplation of that scenario, we propose to add the term ''beneficiary'' before ''former beneficiary'' in each sentence where ''former beneficiary'' was initially proposed.

We also propose to clarify paragraph (g) to state that an EVR may be accepted

for purpose of reducing or eliminating a debt. Finally, to be consistent with the rest of the paragraph, we propose to replace ''offset'' with ''reduce'' and ''completely offset'' with ''eliminated''. The new terms more accurately describe the action that VA takes and are easier for the public and VA personnel to understand.

§ 5.710 Adjustments in Benefits Due to Reduction or Discontinuance of a Benefit to Another Payee

Section 5.710 was initially proposed as a plain language rewrite of current § 3.651. For clarity, we propose to revise § 5.710 to describe more specifically the procedures VA uses to adjust awards of benefits that result from the reduction or discontinuance of the same benefit to another payee. Initially proposed § 5.710(b) referred to VA requesting information or evidence but failed to explain when or why VA would make such a request. We propose to revise paragraph (b) to explain that if there is sufficient information and evidence for VA to award or increase the benefit to the payee, then VA will do so. If there is not, then VA will request additional information or evidence. We also clearly state the effective date rules for the various scenarios.

§ 5.711 Payment to Dependents Due to the Disappearance of a Veteran for 90 Days or More

Like current § 3.656(a), initially proposed § 5.711 provided that when a veteran who was receiving or entitled to receive disability compensation, Section 306 Pension, or Improved Pension disappears for 90 days or more, benefits will be paid to the veteran's dependent(s). However, neither the current rule nor the initially proposed rule defines the term ''entitled to receive''. The relevant statutory authorities only refer to a veteran who is ''receiving compensation'' (38 U.S.C. 1158) or ''receiving pension'' (38 U.S.C. 1507). VA has interpreted such statutory language liberally so that ''under certain circumstances'' actual physical receipt of the benefit is not required. *See* VAOPGCPREC 7–91, 56 FR 25156 (June 3, 1991); *see* also VAOPGCPREC 21–92, 58 FR 12449 (Mar. 4, 1993) (''Certain opinions interpreting the terms 'receiving' or 'in receipt' of compensation or pension as found in . . . portions of title 38, United States Code . . . have . . . recognized limited exceptions to the literal meaning of the terms.''). Consistent with that interpretation, we propose to add a definition of the term ''entitled to receive'' in paragraph (a): ''For purposes of this section, *entitled to receive* means that VA has granted a claim for one of the benefits listed in paragraph (a)(1) of this section but has not yet paid the veteran.''

We propose to revise initially proposed paragraphs (b) and (c), which provided similar rules, to refer to the ''rate'' of payment rather than the ''amount'' of a payment to be more consistent with terminology actually used by VA personnel. We also propose to revise these paragraphs, so that the rules are phrased similarly. In these paragraphs, we also propose to delete the initially proposed phrases ''for benefits under this section'' and ''for benefits'' in reference to a claim for benefits under § 5.711. We had used (or not used) the phrases inconsistently in initially proposed § 5.711. The uses of ''claim'' to refer to a claim for benefits under § 5.711 are clear in context without the deleted phrases.

We propose to add a note to initially proposed paragraph (b)(1), which states, ''Note to paragraph (b)(1): If there is a dependent parent, then the rate for parents' DIC may vary depending on the parent's annual income.'' By law, the amount payable for parents' DIC is based on the parent's annual income. This is different from other DIC programs, which are not income-based. We propose to add the note to ensure that readers are aware of this distinction.

In initially proposed § 5.711(b)(1)(ii), we stated, ''If VA pays disability compensation pursuant to this paragraph, then it will pay benefits in equal amounts to the dependents.'' However, on further review, we note that 38 U.S.C. 1158 does not permit such an equal distribution of benefits. Rather, it states that, payments to each dependent ''shall not exceed the [rate of DIC] payable to each if the veteran had died from service-connected disability.'' If benefits were distributed equally, it is likely that the rate payable to some dependents would exceed the rate authorized by the statute. Accordingly, we propose to revise § 5.711(b)(1)(ii) to remove the provision regarding ''equal amounts''. In its place, we propose to provide that VA will pay benefits to each dependent in the same proportion as if the DIC rate were being paid. Although this revised method is more complex than the method we initially proposed, it is fair to the dependents, and it complies with section 1158 because the rate payable can never exceed the maximum rate authorized by that statute.

We propose to add two paragraphs, (c)(1)(i) and (ii), to initially proposed § 5.711(c) so that it is organized like § 5.711(b). For the same reason we have used a proportional formula for compensation benefits in paragraph (b)(1)(ii), we propose to add paragraph (c)(1)(ii) stating that pension paid under paragraph (c) at the veteran's rate will be paid using the proportional formula. Like 38 U.S.C. 1158 discussed above, 38 U.S.C. 1507 states, ''Where a veteran receiving pension . . . disappears, the Secretary may pay the pension otherwise payable to such veteran's spouse and children . . . Payments made to a spouse or child under this section shall not exceed the amount to which each would be entitled if the veteran died of a non-service-connected disability.'' The proportional payment method is fair to the dependents, and it complies with section 1507.

Initially proposed § 5.711(d)(1) stated the effective date for the discontinuance of payments to a veteran's dependent(s), as a result of the veteran's whereabouts being known. However, initially proposed paragraph (d)(2) did not provide information about the effective date for the discontinuance of the dependent's benefits if the veteran is presumed dead. We propose to correct this omission by stating that the date of the veteran's death is presumed to be 7 years after the date the veteran was last known to be alive. This is consistent with the provisions of paragraph (b) of § 5.503, ''Establishing the date of death'', as well as the statute, 38 U.S.C. 108. We also propose to add a reference to § 5.694, which provides the effective date for the discontinuance of benefits based upon the death of a beneficiary.

§ 5.712 Suspension of VA Benefits Due to the Disappearance of a Payee

In § 5.712(a), we propose to add the effective date for the suspension of benefits. Paragraph (a) would state that upon the disappearance of a payee, benefits will be suspended effective the first day of the month after the month for which VA last paid benefits to the payee. This revision is based on current § 3.500(t).

§ 5.713 Restriction on VA Benefit Payments to an Alien Located in Enemy Territory

Initially proposed § 5.713(a) did not provide an effective date for discontinuance of benefits due to an alien being located in an enemy territory. We propose to correct this omission by adding a sentence stating that ''VA will discontinue benefits to an alien located in territory described in this paragraph (a) of this section, effective the first day of the month after the month for which VA last paid benefits.'' This statement is consistent with current VA practice, as well as the

statute 38 U.S.C. 5308(a), which requires VA to discontinue benefits ''forthwith''.

§ 5.714 Restriction on Delivery of VA Benefit Payments to Payees Located in Countries on Treasury Department List

Initially proposed § 5.714(a)(1) defined ''payee'' (for purposes of part 5) as a person to whom a VA benefit check is payable. However, § 5.1 defines ''payee'' as ''a person to whom monetary benefits are payable.'' We believe that the general definition of ''payee'' in § 5.1 properly defines ''payee'' for purposes of § 5.714. Having two different but very similar definitions of ''payee'' in part 5 might cause confusion, so we propose to remove the definition from § 5.714.

§ 5.715 Claims for Undelivered or Discontinued Benefits

We propose to change ''may'' in initially proposed § 5.715, referring to claims for undelivered or discontinued benefits, to ''must'' in paragraph (b)(1) to clarify that filing a claim is necessary for the payment of benefits under § 5.715. In initially proposed § 5.715(b)(1), we had restated the provisions of § 3.653 using ''may'' because a claim need not be filed by a payee who requests the alternative means of delivery under § 5.714(d). In using ''may'', we unintentionally suggested that filing a claim was permissive, not mandatory. We propose to revise § 5.715(b)(1) to clearly state that a claim is necessary unless the exception for alternative means of delivery applies. We also propose to clarify paragraph (b)(1) to specify that, for benefits discontinued under § 5.713, the paragraph applies to both the retroactive restoration of benefits not paid and the prospective resumption of benefits.

In initially proposed § 5.715(b)(2), we stated, ''There is no time limit for filing such a claim.'' We have determined that it is unnecessary to state this negative proposition and this language might mislead readers into believing that there is an unstated time limit for filing claims under other sections, when in fact there is no such time limit. Accordingly, we propose to delete proposed paragraph (b)(2).

Initially proposed paragraphs (b)(3)(ii) and (iii) respectively stated that amounts that were not delivered under § 5.714 will be released or a discontinued benefit resumed only if ''the payee is no longer subject to the restriction in § 5.714(c)'' or ''the country in which the payee is located is removed from the Treasury Department list''. We have determined that with regard to any payee described in paragraph (b)(3)(iii), paragraph (b)(3)(ii) would have the same effect. Any payee described in paragraph (b)(3)(iii) would by definition no longer be subject to the restriction in § 5.714(c), which only applies if a payee is located in a country on the Treasury Department list. Paragraph (b)(3)(ii) (which we propose to redesignate as (b)(2)(ii)) encompasses other scenarios in addition to the one addressed in initially proposed paragraph (b)(3)(iii). Therefore, we propose to delete initially proposed paragraph (b)(3)(iii) as unnecessary.

§ 5.720 Adjustments to Special Monthly Compensation Based on the Need for Regular Aid and Attendance While a Veteran is Receiving Hospital, Domiciliary, or Nursing Home Care

Our proposal to rewrite the VA regulations governing hospital, domiciliary, and nursing home care reductions and resumptions in new 38 CFR part 5 (proposed §§ 5.720—5.730) was included in a document published in the **Federal Register** on January 14, 2011, that also proposed to rewrite VA regulations governing apportionments to dependents and payments to fiduciaries and incarcerated beneficiaries. 76 FR 2766. We provided a 60-day comment period that ended on March 15, 2011. We received submissions from four commenters; however, only the submission from the National Organization of Veterans' Advocates, Inc., pertained to the regulations governing hospital, domiciliary, and nursing home care reductions and resumptions.

Concerning initially proposed § 5.720, one commenter stated that the language in current 38 CFR 3.556(f) defining a ''regular discharge'' as occurring when the veteran has ''received maximum hospital benefits'' is clearer than the new language in § 5.720(a)(3), i.e., when ''there is no medical reason to continue care.'' The commenter asserted that the proposed definition is problematic because it ''could interject administrative or budget issues into what is intended to be a medical decision concerning necessary and reasonable medical care.''

We disagree that our proposed definition would have the effect suggested by the commenter. To the contrary, we have clarified that a ''medical professional'' must make the determination, and we specify that the decision must be based on whether there is a ''medical reason'' to continue care. Our proposed language would reduce, not increase, the risk that the commenter describes. We therefore propose to make no change based on this comment. More fundamentally, we note that neither current § 3.556(f), nor initially proposed § 5.720(a)(3) or (4), regulate the practice or procedures of VA medical staff regarding the discharge of patients. Rather, they are intended to guide VA Regional Offices staff in determining how to adjust benefits when a beneficiary is receiving hospital, domiciliary, or nursing home care.

Current 38 CFR 3.556(f) defines ''irregular discharge'' as ''[a] discharge for disciplinary reasons or because of the patient's refusal to accept, neglect of or obstruction of treatment; refusal to accept transfer, or failure to return from authorized absence''. In initially proposed § 5.720(a)(4), we merely restated these reasons in an easier to read format. The commenter urged that we revise our definition to:

> incorporate language which reflects actions indicative of intentional and unreasonable refusal of treatment such as ''refusal to accept reasonable and necessary treatment, which refusal is not the result of a mental condition,'' ''intentional and unreasonable neglect of treatment, which is not the result of a mental condition,'' ''intentional and unreasonable obstruction of treatment, which is not the result of a mental condition,'' ''refusal to accept medically indicated transfer to another facility, which is not the result of a mental condition,'' and ''intentional and unreasonable failure to return from unauthorized or authorized absence, which is not the result of a mental condition.''

The commenter asserted these changes are ''especially important in view of the large number of VA patients who suffer from organic brain damage or mental illness and whose symptoms might include being resistant to treatment.''

The purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, because proposed § 5.720(a)(4) is merely a restatement of the current regulations, the comment is outside the scope of this rulemaking.

5.721 Resumption of Special Monthly Compensation Based on the Need for Regular Aid and Attendance After a Veteran Is on Temporary Absence From Hospital, Domiciliary, or Nursing Home Care or Is Discharged or Released From Such Care

Initially proposed § 5.721(b) stated:

> *Discharge or release.* If a veteran is discharged or released from hospital, domiciliary, or nursing home care, VA will resume any payment reduced or discontinued under § 5.720 effective the date the veteran was discharged or released. Payment will be resumed at the rate in effect

before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required.

One commenter urged VA to revise this paragraph to require ''clear and convincing evidence'' to resume benefits at a lower rate than the rate which had been in effect prior to the reduction or discontinuation. We note that pursuant to the language ''unless the evidence of record shows that a different rate is required'' (which we also use in §§ 5.721(b), 5. 725(c)(1) and (2), 5.729(d)(1), and 5.730(c) and (d)), VA might increase or reduce a beneficiary's payment. Such a change would be based on a change in disability level or income, or other relevant factors. The change might be based on newly discovered evidence or the discovery of clear and unmistakable error in a prior decision. (In a reduction case, VA would of course comply with all applicable regulations concerning due process before making a reduction.) Since there are different situations where VA might change benefit payments, and these could involve various standards of proof, it would be erroneous to specify one standard of proof here. Moreover, in part 5 we have stated the default standards of proof in § 5.3 and the other standards in the appropriate specific sections (e.g., clear and unmistakable error in § 5.162). We therefore propose to make no change based on this comment.

§ 5.723 Reduction of Improved Pension While a Veteran, Surviving Spouse, or Child Is Receiving Medicaid-Covered Care in a Nursing Facility

Section 3.551(i) states, ''Effective November 5, 1990, and terminating on September 30, 2011, if a veteran having neither spouse nor child, or a surviving spouse having no child, is receiving Medicaid-covered nursing home care, no pension or death pension in excess of $90 per month shall be paid to or for the veteran or the surviving spouse for any period after the month in which the Medicaid payments begin.'' Section 601 of Public Law 111–275, 124 Stat. 2864, 2884 (2010) amended 38 U.S.C. 5503(d)(7) to extend that delimiting date through May 31, 2015, but we inadvertently failed to include the new date in initially proposed § 5.723(a). Subsequently, section 262 of Public Law 112–56 (2011) amended 38 U.S.C. 5503(d)(7) to extend that delimiting date through September 30, 2016. Subsequent to that, section 203 of Public Law 112–260 extended the date to November 30, 2016. We propose to update paragraph (a) to reflect this most recent amendment.

We also propose to add ''surviving child'' where appropriate in § 5.723 to state that the Medicare reduction pertains to a surviving child claiming or receiving pension in his or her own right, as required by section 601 of Public Law 111–275, 124 Stat. 2864, 2884 (2010).

B. Payments to a Beneficiary Who is Eligible for More Than One Benefit

In a document published in the **Federal Register** on October 2, 2007, we proposed to establish in a new 38 CFR part 5 VA regulations governing payments to beneficiaries who are eligible for more than one benefit, based on regulations currently contained in 38 CFR part 3. 72 FR 56136. The title of this proposed rulemaking was, ''Payments to Beneficiaries Who Are Eligible for More than One Benefit'' (RIN: AL95). We provided a 60-day comment period that ended on December 3, 2007. We received one comment from a member of the general public.

§ 5.740 Definitions Relating to Elections of Benefits

In initially proposed § 5.740(a), we stated: ''Election means any writing, signed by a person authorized by § 5.741, 'Persons who may make an election,' expressing a choice between two or more VA benefits to which the person is entitled, or between VA and other Federal benefits to which the person is entitled.'' This language may confuse the concept of what an election is with the concept of who may file an election. An election is the written expression of choice. However, VA will only ''accept'' elections in accordance with § 5.741. We therefore propose to remove the language, ''signed by a person authorized by § 5.741, 'Persons who may make an election,'" from this section. For the same reason, we propose to remove all references to § 5.741 from § 5.740.

§ 5.742 Finality of Elections of Benefits; Cancellation of Certain Elections

The election finality rules in 38 CFR part 3 pertain to reelections as well. To ensure that this concept is clear in part 5, we propose to add to the introductory paragraph on § 5.742, the sentence, ''Reelections are subject to the finality rules stated in paragraphs (a) through (e) of this section.''

When provisions similar to proposed § 5.742(d) and (e) were previously proposed as § 5.461(b)(2) and (3), they provided that a request to cancel the election must be received within 1 year from the date that the election had become effective. Following internal reconsideration of this provision, we have determined that this limitation might be overly narrow in some cases. Therefore, we now propose that § 5.742(d) and (e) contain no such limitation.

§ 5.743 General Effective Dates for Awarding, Reducing, or Discontinuing VA Benefits Because of an Election

In initially proposed § 5.743(a)(1), we stated:

> Unless otherwise provided in this part, when a claim is pending and an election is timely filed under § 5.740(d), the effective date for an award of an elected benefit shall be the same as the effective date VA would assign for the awarded benefit if no election were required.

We have determined this paragraph can be shortened by removing the phrase ''when a claim is pending and an election is timely filed under § 5.740(d)''.

§ 5.745 Entitlement to Concurrent Receipt of Military Retired Pay and VA Disability Compensation

In § 5.745(a), we propose to clarify the references to ''the Coast and Geodetic Survey'' (C&GS) and ''the Environmental Science Services Administration'' (ESSA), because both entities became part of the National Oceanic and Atmospheric Administration (NOAA). *See* Reorganization Plan No. 4 of 1970, July 9, 1970. *See* Dane Konop, ''175 years of service to the Nation: The History of NOAA's National Ocean Survey—1807–1982.'' (Editor's Preface to the 1981 National Ocean Survey Annual Report). May 1982. Unpublished. We therefore propose to revise initially proposed § 5.745(a) to refer to NOAA, ''(including its predecessor agencies, the Coast and Geodetic Survey and the Environmental Science Services Administration).''

In the proposed rulemaking, we stated in proposed § 5.745(c)(1)(ii) that, ''For veterans receiving disability compensation based on a VA determination of individual unemployability, the phase-in period ends on December 30, 2009.'' According to statute 10 U.S.C. 1414, this phase-in period actually ends on September 30, 2009. We intend to correct paragraph (c)(1)(ii) to accurately reflect the statute.

We propose to revise the various provisions of § 5.745 regarding entitlement to full concurrent receipt of military retired pay and veterans disability compensation based on a VA determination of individual unemployability (IU). These proposed revisions are intended to implement section 642 of the National Defense

Authorization Act of 2008, Public Law 110–181, 122 Stat. 3, 157 (2008), which provides that veterans who are entitled to receive veterans disability compensation based on a VA determination of IU are no longer subject to a phase-in period. On March 16, 2009, VA published a final rule that amended 38 CFR 3.750 by removing language that made veterans who receive disability compensation based on a VA determination of IU subject to a phase-in period. *See* 74 FR 11646. To avoid confusion, the final rule also made changes that clarified that both veterans who are rated 100 percent disabled under the VA rating schedule and veterans who are entitled to receive 100 percent disability compensation based on a VA determination of IU do not need to file a waiver of military retired pay. The proposed revisions of § 5.745 are therefore necessary to incorporate the amendments to § 3.750 outlined in 74 FR 11646.

In initially proposed § 5.745(d)(2), we stated that, ''An election filed within 1 year from the date of notification of VA entitlement will be considered as 'timely filed' for effective date purposes.'' We are concerned that this provision could be read out of context to apply to all elections. Because it applies only to elections involving military retired pay and VA disability compensation, we propose to insert the phrase, ''between military retired pay and disability compensation under this section that is'' after ''An election'' in the above-quoted sentence. Similarly, we note that the preamble to initially proposed § 5.740 cited § 3.750(b) for the definition of a ''timely filed'' election; however, § 3.750 was amended on November 20, 2006. *See* 71 FR 67061. That rulemaking did not change the definition of ''timely filed'', but it redesignated the paragraphs in that section so that the correct citation to the definition of ''timely filed'' should have read § 3.750(d).

§ 5.746 Prohibition Against Receipt of Active Military Service Pay and VA Benefits for the Same Period

The commenter requested that the proposed regulation address situations where a veteran who is receiving VA disability compensation fails to notify VA when he or she returns to active duty and is later assessed with an overpayment due to the prohibition against concurrent receipt of active military service pay and VA disability compensation. In the commenter's example, a veteran receiving VA disability compensation benefits returned to active duty for two periods of service but never informed VA. He continued to receive VA disability compensation benefits during these active duty periods and for several years after discharge, at which time he notified VA of his return to active duty. The commenter said that the VA regional office, citing 38 CFR 3.654(b)(2), discontinued the veteran's disability compensation retroactively to the date of the veteran's first return to active duty, which resulted in a large overpayment. Moreover, the regional office did not reestablish entitlement to disability compensation after the veteran's discharge but before his second period of active duty because the veteran had not requested that VA do so. According to the commenter, because the veteran had continued to receive his disability compensation during his return to active military service, he obviously had no reason to request reinstatement of that compensation. The commenter said VA should have only created an overpayment in the veteran's account for the period he/she was actually receiving both active military service pay and VA disability compensation benefits. The commenter also felt that VA and the Department of Defense should do a better job in working together to ensure these types of cases do not occur. The commenter noted that VA benefits are intended to be dispersed in a clear and consistent manner and a veteran should not be adversely affected by creating an overpayment for periods the veteran is not receiving both active military service pay and VA disability compensation benefits.

For the following reasons, we propose not to make any changes based on this comment. First, we note that when VA awards disability compensation, VA regularly instructs veterans to inform VA if they return to active duty, so that VA can properly adjust their benefits. Moreover, VA annually sends letters to all veterans receiving disability compensation notifying them whenever there is a legislative increase in the amount of their benefits for the following year. In that letter, we remind them to inform VA if they return to active duty, so that VA can properly adjust their benefits. Thus, veterans are clearly informed of their duty to notify VA.

Second, the types of cases described by the commenter are very rare. This is because, in light of the procedures described above, most veterans notify VA in advance of their return to active duty in order to avoid an overpayment. Moreover, VA exchanges data with the Department of Defense, showing which veterans have returned to active duty, on a quarterly basis. VA uses this information to discontinue the disability compensation of any veteran who failed to notify VA in advance. It is not clear why this did not happen in the particular case described by the commenter, but, again, this type of oversight is very rare.

Third, VA may waive an overpayment when collection would be against ''equity and good conscience''. *See* 38 CFR 1.965. This relief was apparently provided to the veteran described by the commenter. For these reasons, we respectfully propose to decline to make any changes based on this comment.

§ 5.747 Effect of Military Readjustment Pay, Disability Severance Pay, and Separation Pay on VA Benefits

Proposed paragraph (a) of § 5.747 informs the reader when lump-sum readjustment pay is available to a veteran. We propose to change ''on or after September 15, 1981'' to ''after September 14, 1981'' in order to conform to the format generally used for dates throughout part 5.

In addition, we propose to add § 5.747(b)(3) to implement the National Defense Authorization Act for Fiscal Year 2008, Public Law 110–181, sec. 1646(b), 122 Stat. 3. Public Law 110–181 amended 10 U.S.C. 1212 to provide that no deduction may be made from VA disability compensation for disability severance pay received for disabilities incurred in a combat zone or in combat-related operations as designated by the Department of Defense (DoD). Also, initially proposed § 5.747(b) and (d) included as an authority citation, 10 U.S.C. 1212(c). This citation is no longer accurate based on the changes enacted by Public Law 110–181. We propose to correct the authority citations in § 5.747(b) and (d) to correctly reflect 10 U.S.C. 1212(d).

In initially proposed § 5.747(d), concerning recoupment from VA disability compensation for veterans who received lump-sum readjustment pay, disability severance pay, separation pay, or special separation pay, we inadvertently omitted language which appears in 38 CFR 3.700(a). We now propose to add the language to § 5.747.

§ 5.750 Election Between VA Benefits and Compensation Under the Federal Employees' Compensation Act for Death or Disability Due to Military Service

Initially proposed § 5.750(a)(1) described an election as ''irrevocable''. To be consistent with the other sections in this subpart using the term ''irrevocable'', and to ensure clarity, we propose to add the parenthetical ''(there is no right of reelection)'' to this paragraph.

§ 5.757 Elections Between VA Disability Compensation and VA Pension

Initially proposed § 5.757(b) stated ''A person who is entitled to receive both death compensation and death pension may elect or reelect at any time to receive either benefit unless otherwise provided in this part, . . . '' The reference to death compensation here refers to dependency and indemnity compensation (DIC). Once a spouse or parent elects out of death compensation, they cannot elect back into the program because DIC has replaced death compensation. We therefore propose to change the term ''death compensation'' with ''dependency and indemnity compensation''.

We propose to add the phrase ''at any time'' in the first sentence of § 5.757(c), so that it now reads, ''A person who is entitled to receive both disability compensation and Old-Law Pension or Section 306 Pension may elect at any time to receive either benefit.'' This is necessary to clarify that, consistent with current § 3.701(a), there is no time limit for either election or reelection under this paragraph.

Initially proposed § 5.757(f) omitted an exception to the rule of elections between VA benefits, found in § 3.666(d). Such exception states that ''an election to receive disability compensation in lieu of pension is not required for an incarcerated veteran who does not have a dependent spouse or child.'' We propose to correct this omission by adding § 5.757(f)(2).

§ 5.760 Electing Improved Death Pension Instead of Dependency and Indemnity Compensation

Initially proposed § 5.760 stated that a surviving spouse who is entitled to receive dependency and indemnity compensation (DIC) may elect to receive Improved Death Pension instead of DIC. However, it did not explicitly state that the election was revocable. Generally, all elections are revocable unless specifically stated otherwise. To clarify this point, we propose to add the sentence, ''Such surviving spouse may subsequently reelect either benefit'' to this section.

§ 5.762 Payment of Multiple VA Benefits to a Surviving Child Based on the Service of More Than One Veteran

Initially proposed § 5.762(c)(4) stated that a child has the right to elect or reelect one or more times to receive benefits based on the death of either parent in the same parental line. We propose to remove the phrase ''one or more times'' because it is unnecessary and possibly confusing in light of the general rule that there is no limit on the number of times a person may reelect a different benefit. However, this general rule is subject to exceptions stated in certain sections in this subpart.

§ 5.764 Payment of Survivors' and Dependents' Educational Assistance and VA Death Pension or Dependency and Indemnity Compensation for the Same Period

In initially proposed § 5.764, ''Payment of Survivors' and Dependents' Educational Assistance and VA death pension or dependency and indemnity compensation for the same period'', we proposed to restate current § 3.707(a) and (b) and add the statement that a child who is eligible for death pension and dependents' educational assistance (DEA), ''must elect between VA death pension and DEA''. We now propose to consolidate the rule on dependency and indemnity compensation (initially proposed § 5.764(a)(1)(i)) with the rule on death pension (initially proposed § 5.764(a)(1)(ii)) to improve readability. We note that current § 3.707(a) and (b) refers to ''compensation'' as one of the benefits to a child or spouse that cannot be paid concurrently with DEA. In the initially proposed rule, we had simply eliminated the reference to ''compensation'' because a dependent of a veteran has no right to disability compensation. Further review indicated that in § 3.707(a) and (b) the references to ''compensation'' are to the additional disability compensation payable to a veteran based on a dependent. Hence, we propose to insert into § 5.764(a)(1)(ii) and (iii), rules governing this issue.

§ 5.765 Payment of Compensation to a Parent Based on the Service or Death of Multiple Veterans

In the initially proposed rule, we reserved § 5.765. However, we inadvertently omitted § 3.700(b)(3) and now propose to add it as § 5.765, ''Payment of compensation to a parent based on the service or death of multiple veterans.''

Technical Corrections

Other technical corrections will include changes based on typographical errors or changes in wording that are necessary to maintain consistency throughout part 5. For example, we mean to add either ''disability'' or ''death'' in front of the term ''compensation,'' where doing so would specify the type of compensation at issue. We also propose to replace the term ''helpless,'' as it relates to a child, with the more descriptive term, ''became permanently incapable of self-support before reaching age 18'' for purposes of conformity with § 5.227. Section 5.227 pertains to the considerations that VA will use in determining whether a person can be recognized as a ''child'' for benefit purposes. As another example, we propose to substitute the word ''if'' for ''when'' where appropriate and vice versa. We use the word ''when'' to describe instances where an event is certain to occur, such as the eventual death of a veteran. We use the word ''if'' to describe instances where an event is not certain to occur, such as the marriage or divorce of a veteran.

XVIII. Subpart M: General Provisions AL74 Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries

In a document published in the **Federal Register** on January 14, 2011, we proposed to rewrite VA regulations governing apportionments to dependents and payments to fiduciaries and incarcerated beneficiaries, to be published in new 38 CFR part 5. 76 FR 2766. We provided a 60-day comment period that ended on March 15, 2011. We received submissions from four commenters, the National Organization of Veterans' Advocates, Inc.; Swords to Plowshares; and two private individuals.

§ 5.770 Apportionment Claims

The preamble to initially proposed § 5.770 discussed the omission of death compensation provisions from part 5. The preamble said that 3.450(d) refers to § 3.459, a death compensation provisions to which part 5 would have no counterpart. We failed to state that § 5.770(d) would restate the § 3.450(d) rule of apportionment among children, for DIC benefits.

§ 5.790 Determinations of Incompetency and Competency

Two of the commenters addressed initially proposed §§ 5.790(c) and (d). In the AL74 preamble to initially proposed § 5.790, ''Determinations of incompetency and competency,'' we stated:

> Proposed § 5.790 is based on current §§ 3.353 and 3.400(x) and (y). Proposed § 5.790(c) is based on current 38 CFR 3.353(c) which begins, ''Unless the medical evidence is clear, convincing and leaves no doubt as to the person's incompetency, the [agency of original jurisdiction] will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities.'' The phrase ''clear, convincing and leaves no doubt'' is inconsistent with traditional legal evidentiary standards. Traditionally, ''clear

and convincing'' is a distinct standard. ''Leaves no doubt,'' however, suggests a significantly higher standard. Further, if compared to the standard for conviction in a criminal case (''beyond a reasonable doubt''), ''leaves no doubt'' could be considered an even higher standard that is inconsistent with other areas of the law. Therefore, we are removing the term ''leaves no doubt'' and instead simply specifying a ''clear and convincing'' standard. ''Clear and convincing'' is a high evidentiary standard that will permit VA to make a determination of incompetency without requesting an essentially unnecessary medical opinion. Further, the standard is sufficiently high to prevent unwarranted determinations of incompetency. *See Thomas* v. *Nicholson,* 423 F.3d 1279, 1283 (Fed. Cir. 2005) (''The 'clear and convincing' standard is 'reserved to protect particularly important interests in a limited number of civil cases' where there is a clear liberty interest at stake, such as commitment for mental illness, deportation, or denaturalization.'') (citations omitted).

Initially proposed § 5.790(d) was an exact restatement of current 38 CFR 3.353(d), except that we had proposed to update the citation from the part 3 citation, § 3.102, to the part 5 equivalent, § 5.3(b)(2) (now § 5.3(b)(3)).

Regarding initially proposed § 5.790(c), the first commenter asserted that VA should never make a determination of incompetency without medical evidence that the claimant is mentally incompetent to manage his or her affairs. The commenter also urged that VA establish a higher burden of proof for incompetency: ''beyond a reasonable doubt.'' The commenter asserted that this standard is necessary to preserve consistency with the evidentiary standard in initially proposed § 5.790(d), which stated, ''Where reasonable doubt arises regarding a beneficiary's mental capacity to contract or to manage his or her own affairs, including the disbursement of funds without limitation, such doubt will be resolved in favor of competency.'' The commenter also asserted that the higher standard was needed ''to protect claimants from incorrect administrative incompetency decisions made by lay VA employees.'' The commenter asserted that a declaration of incompetency has implications for many activities, including potentially criminalizing firearms ownership.

The second commenter similarly urged VA not to omit ''leaves no doubt'' from its rewrite of § 3.353(c) and ''to maintain 'leaves no doubt' as a standard for showing incompetence.'' The commenter asserted that omitting ''leaves no doubt'' from the standards for determining incompetency would prove beneficial only to VA and not to beneficiaries. While acknowledging VA's heavy administrative burden, the commenter asserted that allowing VA to ''independently determine'' whether an individual is incompetent to receive benefits without requiring a medical examination would be a violation of the individual's constitutional due process rights. Citing *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), to support that assertion, the commenter stated that ''[i]n *Mathews* . . ., the Supreme Court acknowledged the legitimacy of a medical examination as an appropriate procedural indicator of eligibility for welfare benefits.''

These comments demonstrate an apparent misunderstanding of proposed § 3.353(c) and (d) and initially proposed §§ 5.790(c) and (d). Both commenters appear to mistakenly think that ''clear, convincing and leaves no doubt'' is the general evidentiary standard for showing incompetency under current § 3.353. It is not. It is an evidentiary standard that VA, under current § 3.353(c), requires medical evidence to meet for an agency of original jurisdiction to make an incompetency determination without first obtaining ''a definite expression regarding the question by the responsible medical authorities.'' In accordance with § 3.353(d), the standard of proof to find a beneficiary incompetent when a medical opinion is of record is the preponderance of the evidence. Contrary to the first commenter's assertion, the standard in initially proposed § 5.790(c) is not inconsistent with the standard in initially proposed paragraph (d). Each standard serves a different purpose: the standard in paragraph (c) must be met for VA to make an incompetency determination without a medical opinion on competency; the standard in paragraph (d) applies to weighing all the evidence if a medical opinion is of record.

Similarly, the comments demonstrate an apparent misinterpretation of the language of § 3.353(d) to mean that VA's standard for finding incompetency is ''beyond a reasonable doubt'', a standard which is used for criminal cases. In fact, the intent of this provision is to state that VA's ''reasonable doubt'' (or benefit of the doubt) doctrine applies to competency determinations, in the same manner that it applies to VA benefit determinations that are the subject of 38 CFR 3.102. In order to clarify this point, we propose to replace the language of initially proposed § 5.790(d) with language that is substantially the same as proposed § 5.3(b)(3), so that it would read, ''When the evidence is in equipoise regarding a beneficiary's mental capacity to contract or to manage his or her own affairs, including the disbursement of funds without limitation, VA will give the benefit of the doubt to the beneficiary and find that he or she is competent.''

As to the concerns of both commenters about the standard of proof in proposed § 5.790(c), for the reasons stated in the AL74 NPRM preamble, we decline to include ''leaves no doubt'' in § 5.790(c) as a standard of proof of incompetency in addition to clear and convincing evidence.

In this regard, the first commenter does not refute any of the statements we made regarding § 5.790(c) in the preamble. We construe the second commenter's statement that ''the Supreme Court acknowledged the legitimacy of a medical examination as an appropriate procedural indicator for welfare benefits'' as an assertion that VA violates an individual's due process rights if it makes an incompetency determination without requiring a medical examination.

The second commenter's reliance on *Mathews* v. *Eldridge* is misplaced. The issue in *Mathews* was ''whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.'' 424 U.S. at 323. The Court compared termination of welfare payments with the termination of Social Security disability insurance (SSDI) payments. The court held that ''an evidentiary hearing is not required prior to the termination of [Social Security] disability benefits and that the present administrative procedures fully comport with due process.'' 424 U.S. at 349.

Though a VA incompetency determination is not a termination (or even a reduction) of benefits, initially proposed § 5.790(e) affords an evidentiary hearing prior to making the determination. We cannot agree that initially proposed § 5.790 violates any person's right to due process; it would afford beneficiaries the very process that the Court determined to be necessary only when the beneficiary of a government benefit program is most burdened by termination of the benefit. 424 U.S. at 339–43.

The commenter apparently construes the Court's mention of physical examinations in *Mathews* to mean that due process requires VA to examine a person as part of the process in an incompetency determination. We disagree. The Court mentioned medical examinations in the context of discussing SSA's process in determining continuing entitlement to SSDI. 424 U.S. at 337 (''If there is a conflict between the information provided by

the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician''). Nothing in that process requires the agency to examine the beneficiary. Likewise, VA is not required to examine a beneficiary under § 5.790; however, nothing in initially proposed § 5.790 precludes VA from arranging for a beneficiary's examination if necessary to determine competency.

To the extent that the second commenter means that VA should simply obtain an examination in every incompetency determination, and that failure to do so violates constitutional due process, the commenter essentially argues for part 5 to create a new requirement for incompetency determinations. The purpose of the Regulation Rewrite program is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

For the sake of complete discussion of the comment, we also interpret it to mean that VA violates a beneficiary's right to due process to allow an AOJ to make an incompetency determination based on merely ''clear and convincing evidence'' without first obtaining a medical opinion. The commenter would have us include ''leaves no doubt'', asserting that due process requires that the AOJ obtain a medical opinion unless the evidence ''leaves no doubt'' about incompetency. We disagree.

Even if the evidentiary standard for when an AOJ must obtain a medical opinion prior to making an incompetency determination were a matter of due process, the ''clear and convincing evidence'' standard is sufficient. ''Leaves no doubt'' would be an excessively high evidentiary standard. *See Mathews,* 424 U.S. at 335 (Factors to determine the requirements of due process in various proceedings).

As we explained in the prior NPRM, 76 FR 2777, ''clear and convincing'' and ''leaves no doubt'' are inconsistent evidentiary standards, the latter amounting to a standard higher even than that required for criminal conviction, that is, beyond a reasonable doubt. ''Leaves no doubt'' is a higher evidentiary standard than in any other regulation governing VA compensation or pension benefits. The Supreme Court has held that a ''clear and convincing'' standard of proof meets the due process requirements for such significant deprivation of liberty as involuntary indefinite commitment to a state mental hospital, and that the ''beyond a reasonable doubt'' standard is not required. *Addington* v. *Texas,* 441 U.S. 418 (1979). In contrast, liberty is not at stake in VA incompetency determinations.

The result of a VA determination of incompetency is appointment of a fiduciary to receive VA funds for the beneficiary. Clear and convincing medical evidence as to a person's incompetency is sufficient for the specific purpose of authorizing the AOJ to make an incompetency determination without first obtaining an additional medical opinion. The clear and convincing standard provides a beneficiary adequate protection against an erroneous finding of incompetency resulting from a determination made without obtaining ''a definite expression as to the question by the responsible medical authorities.'' We propose to make no change in response to an assertion that due process requires that the AOJ obtain a medical opinion before determining incompetency unless medical the evidence ''leaves no doubt'' of incompetency.

The second commenter asserted that omitting ''leaves no doubt'' would benefit only VA and not beneficiaries. We think the omission benefits both VA and its beneficiaries. Including ''leaves no doubt'' would cause needless delay in making incompetency determinations that conserve the benefits of those who cannot manage them. That delay is a detriment to beneficiaries. Eliminating that delay would be a benefit to persons who need the protection of a fiduciary to manage their funds. Including ''leaves no doubt'' in § 5.790(c) would increase administrative costs and consume scarce VA human resources to obtain medical opinions that are unlikely to bring helpful new information to the determination, and the risk of erroneous determinations without those opinions is slight. Consequently, we propose to make no change based on this comment.

Finally, we agree with the first commenter that VA should always have medical evidence in order to determine competency. Nothing in initially proposed § 5.790 contradicts that premise. Indeed, proposed § 5.790(c) and (d) both make clear that medical evidence is required to find a beneficiary incompetent. Under these provisions, either clear and convincing ''medical evidence'' of incompetency is already of record or a medical opinion addressing competency is obtained. Accordingly, we need make no change to address this concern of the commenter. Further, regarding the first commenter's sweeping comment about the need to protect beneficiaries from incorrect competency decisions by lay VA employees, we note that there is an administrative remedy if a beneficiary believes he or she has been wrongly declared incompetent: appeal to the Board of Veterans' Appeals and, if he or she disagree with that decision, to the U.S. Court of Appeals for Veterans Claims. Accordingly, we make no change based on this concern of the commenter.

§ 5.810 Incarcerated Beneficiaries—General Provisions and Definitions

One commenter on initially proposed § 5.810 urged VA to include felony convictions from foreign countries in the definitions governing incarcerations in § 5.810(b) only if the courts of the foreign country are subject to a standard Status of Forces Agreement or have due process and procedural rights equivalent to those which apply in courts in the U.S. As discussed in the AL74 preamble, initially proposed § 5.810 incorporates significant protections with regard to foreign convictions: it excludes incarceration in a foreign prison and includes incarceration in a U.S. prison based on a foreign conviction only if the offense is equivalent to a felony (or a misdemeanor for purposes of 38 U.S.C. 1505) under the laws of the U.S. Moreover, the purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

Initially proposed § 5.810(c) stated, ''The 60-day periods of incarceration described in §§ 5.811 through 5.813 begin on the day after the beneficiary is convicted of a felony (or misdemeanor for pension), if the beneficiary is incarcerated as of that date, even if the beneficiary is not sentenced on that date.'' One commenter urged that the incarceration period in paragraph (c) not begin on the date of conviction ''in recognition of the realities of sentencing.'' The commenter added ''[a]t the sentencing hearing, the trial judge might impose an alternate sentence involving no incarceration, such as home confinement or probation.''

As we stated in the preamble to AL74, ''This [paragraph (c)] accords with 38 U.S.C. 1505 and 5313, which are concerned with the time spent imprisoned for a felony, or for a misdemeanor in pension cases, and not with the amount of time that the beneficiary is sentenced to serve. It also

accords with VAOPGCPREC 3–2005, 72 FR 5801, 5802 (Feb. 7, 2007).'' The fact that the sentence ultimately imposed by the court might not include incarceration does not alter VA's duty to limit payments when a beneficiary has been incarcerated for more than 60 days after being convicted. We therefore propose to make no change based on this comment.

One commenter objected to the rule set forth in initially proposed § 5.810(d), requiring that claimants or beneficiaries inform VA if they are incarcerated. The commenter asserted that the rule puts an undue burden on incarcerated veterans because they are ''often impoverished or unfamiliar with system procedures'' and that VA's promulgation of this rule fails to ''take full account of the social, educational, and societal contexts that many incarcerated veterans come from.'' The commenter also asserted that ''VA should be able to gather that information from the Bureau of Prisons or the state.''

As stated in the preamble to initially proposed § 5.810, we believe the rule established in paragraph (d) is logical, fair, and consistent with other current provisions that require claimants or beneficiaries to inform VA of changes in circumstances affecting entitlement to benefits. *See* § 3.652, ''Periodic certification of continued eligibility'', and § 3.660(a)(1), ''Dependency, income and estate''. In addition, enabling VA to adjust benefits promptly on the 61st day of incarceration would be advantageous to both veterans and VA because if benefits are not promptly adjusted, VA must establish an overpayment and recoup the debt from the veteran. We do not believe that the social or educational background of incarcerated veterans prevents them from notifying VA of changes in circumstances. Veterans may notify VA via mail, email through *www.va.gov*, or by calling our toll free number, 1–800–827–1000.

Regarding the suggestion that ''VA should be able to gather that information from the Bureau of Prisons or the state,'' we note that VA already has data sharing agreements with the Federal Bureau of Prisons (BOP) and the Social Security Administration (SSA). Under our agreement with BOP, that agency periodically provides VA with a master record of all federal prisoners. Under our agreement with SSA, that agency provides VA with a master record of all prisoners who are incarcerated in state or local facilities. Although these records are intended to be comprehensive, errors or delays may prevent VA from learning of a veteran's incarceration in a timely manner. Requiring veterans to inform VA adds an additional means for VA to obtain this information, thus reducing the frequency and amount of erroneous payments. We therefore make no change based on this comment.

§ 5.811 Limitation on Disability Compensation During Incarceration

Initially proposed § 5.811 implemented the statutory requirement from 38 U.S.C. 5313 that VA limit the amount of disability compensation paid to a veteran who has been incarcerated for more than 60 days after conviction of a felony if the veteran committed the felony after October 7, 1980. One commenter noted that VA's Adjudication Manual, M21–1MR, requires VA employees to limit payments when notified by one of our federal data sharing agreements that a veteran is incarcerated. The commenter, a non-profit organization that represents veterans in their VA claims, stated that in their experience, when VA receives such notice, it presumes that the veteran has been convicted of a felony rather than a misdemeanor and remains incarcerated 60 days later. The commenter urged VA to add a provision to § 5.811(a) stating that VA will not limit benefits ''until it receives official verification that the veteran has been incarcerated for more than 60 days after a conviction of a felony.''

As a preliminary matter, we note that VA does not limit benefits based on incarceration without providing due process under 38 CFR 3.103. Under that provision, VA notifies the veteran that it proposes to limit benefits based on information indicating that he or she is incarcerated. Before VA will take action to limit benefits, the veteran has 60 days in which to respond (e.g., provide evidence to VA showing that he or she was incarcerated for less than 61 days or incarcerated for conviction of a misdemeanor, not a felony).

Moreover, the purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment recommending additional, new procedures is outside the scope of this rulemaking.

§ 5.812 Limitation on Dependency and Indemnity Compensation During Incarceration

Initially proposed § 5.812(d) stated, ''Whenever DIC is awarded to an incarcerated person, any amounts due for periods prior to the date of reduction under this section shall be paid to the incarcerated person.'' This language is restated for compensation (§ 5.811(b)). It is nearly identical to the wording found in current 38 CFR 3.665(k).

One commenter urged, ''In order to clarify that there will be no reduction for amounts due prior to the date of reduction, the language in subsection (d) should read as follows: 'Any amounts due for periods prior to the date of limitation under this section shall be paid to the incarcerated person without the limitation imposed under this section.' ''

We believe the language of §§ 3.665(k), 5.811(b), and 5.812(d) are entirely clear that ''amounts due for periods prior to the date of reduction under this section'' means the normal amount payable to an unincarcerated beneficiary. We therefore propose to make no change based on this comment.

§ 5.813 Discontinuance of Pension During Incarceration.

Initially proposed § 5.813(b)(2) stated, in part:

> If the veteran has a spouse or child but elects to receive disability compensation after VA has notified the veteran of the effect of electing disability compensation on the amount available for apportionment, then the award of disability compensation will be effective on the later of the date VA received the veteran's election or the date of discontinuance of pension under paragraph (a) of this section.

Regarding this proposed language, one commenter stated, ''The applicability of the 'mailbox rule' is not readily apparent in the proposed language'' and suggested that the following language be added: ''If the veteran's election is submitted by U.S. Mail, the date received will be considered to be the postmark date.'' The commenter offered no reason why this rule should be incorporated into paragraph (b)(2).

We did not imply nor intend that the ''mailbox rule'' apply in § 5.813. Current VA regulations in 38 CFR part 3 do not contain such a rule. The purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.814 Apportionment When a Primary Beneficiary Is Incarcerated.

One commenter approved of the regulations in AL74 limiting payments to incarcerated veterans and urged that VA stop apportioning such payments to the families of incarcerated veterans. The commenter did not explain the

basis for the comment that benefits should not be apportioned to the incarcerated beneficiary's family.

Congress specifically authorized VA to make apportionments of compensation and dependency and indemnity compensation to dependents of incarcerated beneficiaries in 38 U.S.C. 1505(b) and (c) and 5313(b), and such apportionments may be important in avoiding hardship to the beneficiary's dependents during the beneficiary's incarceration. Further, the purpose of the reduction of benefits is not to further punish the incarcerated beneficiary, but to prevent unnecessary expenditure of government funds to persons otherwise supported at government expense and to avoid accumulation of funds with prisoners who might use those funds to purchase contraband. Prohibiting apportionment to an incarcerated beneficiary's dependents would not further those objectives.

Moreover, the purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

§ 5.815 Resumption of Disability Compensation or Dependency and Indemnity Compensation Upon a Beneficiary's Release From Incarceration.

§ 5.816 Resumption of Pension Upon a Beneficiary's Release From Incarceration.

One commenter urged VA to remove the requirement in initially proposed §§ 5.815–5.816 that the veteran inform VA when he or she is released from incarceration, in order for VA to restore benefits by a certain date. The commenter noted that there is a link between military service during wartime and subsequent incarceration and asked that VA thank veterans for their service by not requiring them ''to re-legitimize their standing as war veterans.''

We note that these provisions are not new; they have existed in 38 CFR 3.665(i) and 3.666(c) for decades. We do not believe it is unduly burdensome for veterans to inform VA when they are released from incarceration; as stated above regarding proposed § 5.810, this can be easily done through a variety of methods—via mail, email through *www.va.gov*, or by calling our toll free number, 1–800–827–1000. Moreover, VA's data sharing agreements with BOP and SSA (also discussed above regarding § 5.810) do not provide VA with notice when a veteran is released from incarceration. For these reasons, we propose to make no change based on this comment.

§ 5.817 Fugitive Felons

Consistent with 38 U.S.C. 5313B and current 38 CFR 3.665–3.666, initially proposed § 5.817 stated that VA will not pay or apportion benefits to, for, or on behalf of a person for any period during which that person is a fugitive felon. Also consistent with those provisions, initially proposed § 5.817 defined fugitive felon as a person who is ''(i) Fleeing to avoid prosecution for a felony or for an attempt to commit a felony; (ii) Fleeing custody or confinement after conviction of a felony or conviction of an attempt to commit a felony; or (iii) Fleeing to avoid custody or confinement for violating a condition of probation or parole imposed for commission of a felony under Federal or State law.''

One commenter noted that, although the proposed language mirrors the statutory language, VA's Adjudication Manual, M21–1MR, states that a person is presumed to be a fugitive felon if there is an outstanding arrest warrant against them. This is problematic, the commenter asserted, because ''the warrant may be many years old and it is possible the veteran has no idea that a warrant was even issued, let alone outstanding.'' The commenter noted that the Social Security Administration (SSA) has a similar statutory requirement and previously operated under such a presumption. The commenter noted that ''multiple lawsuits forced SSA to alter enforcement of [its] regulation and pay back millions of dollars in benefits to affected individuals.'' The commenter urged VA to revise § 5.817 to define a fugitive felon as ''one who has a specific intent to flee or avoid prosecution for a felony, specific intent to flee or avoid custody after conviction of a felony, or specific intent to flee or avoid a condition of felony probation or parole.''

As with limitations of benefits for incarcerated benefits under § 5.811, VA provides the same type of due process for veterans who may be fleeing felons. These due process procedures would mitigate the situations that the commenter is concerned with. That is, the veteran has the opportunity to present evidence showing that he or she was not actually fleeing, and if that is shown, then VA will take no action to limit benefits.

Moreover, the purpose of the Regulation Rewrite Project is to make VA's compensation and pension regulations more logical, claimant-focused, and user-friendly, not to serve as a vehicle for making major changes to VA policies. Thus, the comment is outside the scope of this rulemaking.

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 new 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 Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the 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 effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' which requires review by the Office of Management and Budget (OMB), as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the

rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.'' The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

VA has determined that there are no direct costs or savings associated with this proposed rulemaking, because it will neither expand nor restrict the rights or benefits of VA claimants or beneficiaries and will not change the way VA develops, processes, or pays a claim for benefits. VA has not yet determined the exact manner in which it will transition from the current part 3 regulations to the part 5 regulations. Prior to publication of the final rule, VA will determine this and estimate the costs associated with this transition.

Executive Order 13563 also requires federal agencies to make regulations ''accessible, consistent, written in plain language, and easy to understand'' and requires ''retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them . . .'' This NPRM is the cornerstone of VA's compliance with this Executive Order. See *www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system*.

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 the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any 1 year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 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; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.115, Veterans Information and Assistance; and 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, approved this document on January 30, 2013, for publication.

List of Subjects in 38 CFR Parts 3 and 5

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

William F. Russo,

Deputy Director, Office of Office of Regulations Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons set forth in the preamble, VA proposes to amend 38 CFR part 3 and further amend 38 CFR part 5, as proposed to be added at 69 FR 4820, Jan. 30, 2004, and as further proposed to be amended at 69 FR 44614, July 27, 2004; 69 FR 59072, Oct. 1, 2004; 73 FR 19021, Apr. 8, 2008; 71 FR 37790, June 30, 2006; 70 FR 24680, May 10, 2005; 69 FR 77578, Dec. 27, 2004, 72 FR 10860, Mar. 9, 2007; 71 FR 16464, Mar. 31, 2006; 70 FR 61326, Oct. 21, 2005; 71 FR 55052, Sept. 20, 2006; 72 FR 56136, Oct. 2, 2007; 72 FR 28770, May 22, 2007; 72 FR 54776, Sept. 26, 2007; 71 FR 31056, May 31, 2006; and 73 FR 20136, Apr. 14, 2008, as follows:

PART 3—ADJUDICATION

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

■ 1. The authority citation for 38 CFR part 3, subpart A, continues to read as follows:

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

■ 2. Add § 3.0 to read as follows:

§ 3.0 Scope and applicability.

This part applies only to claims for benefits filed before [EFFECTIVE DATE OF FINAL RULE]. See § 5.0 of this chapter, Scope and applicability.

* * * * *

■ 3. Add part 5 to read as follows:

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

Subpart A: General Provisions

5.0 Scope and applicability.
5.1 General definitions.
5.2 Terms and usage.
5.3 Standards of proof.
5.4 Claims adjudication policies.
5.5 Delegations of authority.
5.6–5.19 [Reserved]

Subpart B: Service Requirements for Veterans

Periods of War and Types of Military Service

5.20 Dates of periods of war.
5.21 Service VA recognizes as active military service.
5.22 Service VA recognizes as active duty.
5.23 How VA classifies Reserve and National Guard duty.
5.24 How VA classifies duty performed by Armed Services Academy cadets and midshipmen, attendees at the preparatory schools of the Armed Services Academies, and Senior Reserve Officers' Training Corps members.
5.25 How VA classifies service in the Public Health Service, in the Coast and Geodetic Survey and its successor agencies, and of temporary members of the Coast Guard Reserve.
5.26 Circumstances where a person ordered to service, but who did not serve, is considered to have performed active duty.
5.27 Individuals and Groups that Qualify as Having Performed Active Military Service for purposes of VA Benefits Based on Designation by the Secretary of Defense.
5.28 Other groups designated as having performed active military service.
5.29 Circumstances under which certain travel periods may be classified as military service.
5.30 How VA determines if service qualifies for benefits.

Bars to Benefits

5.31 Statutory bars to benefits.
5.32 Consideration of compelling circumstances when veteran was separated for AWOL.
5.33 Insanity as a defense to acts leading to a discharge or dismissal from the service that might be disqualifying for benefits.

Military Discharges and Related Matters

5.34 Effect of discharge upgrades by Armed Forces boards for the correction of military records (10 U.S.C. 1552) on eligibility for VA benefits.
5.35 Effect of discharge upgrades by Armed Forces discharge review boards (10 U.S.C. 1553) on eligibility for VA benefits.

5.36 Effect of certain special discharge upgrade programs on eligibility for VA benefits.
5.37 Effect of extension of service obligation due to change in military status on eligibility for VA benefits.
5.38 Effect of a voided enlistment on eligibility for VA benefits.

Minimum Service and Evidence of Service

5.39 Minimum active duty service requirement for VA benefits.
5.40 Service records as evidence of service and character of discharge that qualify for VA benefits.
5.41–5.49 [Reserved]

Subpart C—Adjudicative Process, General

VA Benefit Claims

5.50 Applications VA Furnishes.
5.51 Filing a claim for disability benefits.
5.52 Filing a claim for death benefits.
5.53 Claims for benefits under 38 U.S.C. 1151 for disability or death due to VA treatment or vocational rehabilitation.
5.54 Informal claims.
5.55 Claims based on new and material evidence.
5.56 Report of examination, treatment, or hospitalization as a claim.
5.57 Claims definitions.
5.58–5.79 [Reserved]

Rights of Claimants and Beneficiaries

5.80 Right to representation.
5.81 Submission of information, evidence, or argument.
5.82 Right to a hearing.
5.83 Right to notice of decisions and proposed adverse actions.
5.84 Restoration of benefits following adverse action.
5.85–5.89 [Reserved]

Duties of VA

5.90 VA assistance in developing claims.
5.91 Medical evidence for disability claims.
5.92 Independent medical opinions.
5.93 Service records which are lost, destroyed, or otherwise unavailable.
5.94—5.98 [Reserved]

Responsibilities of Claimants and Beneficiaries

5.99 Extensions of Certain Time Limits.
5.100 Time limits for claimant or beneficiary responses.
5.101 Requirement to provide Social Security numbers.
5.102 Reexamination requirements.
5.103 Failure to report for VA examination or reexamination.
5.104 Certifying continuing eligibility to receive benefits.
5.105–5.129 [Reserved]

General Evidence Requirements

5.130 Submission of statements, evidence, or information affecting entitlement to benefits.
5.131 Applications, claims, and exchange of evidence with Social Security Administration—death benefits.
5.132 Claims, statements, evidence, or information filed abroad; authentication of documents from foreign countries.
5.133 Information VA may request from financial institutions.
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Payments to Incarcerated Beneficiaries

5.810 Incarcerated beneficiaries—general provisions and definitions.
5.811 Limitation on disability compensation during incarceration.
5.812 Limitation on dependency and indemnity compensation during incarceration.
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5.814 Apportionment when a primary beneficiary is incarcerated.
5.815 Resumption of disability compensation or dependency and indemnity compensation upon a beneficiary's release from incarceration.
5.816 Resumption of pension upon a beneficiary's release from incarceration.
5.817 Fugitive felons.

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

Subpart A—General Provisions

§ 5.0 Scope and applicability.

(a) *Scope.* Except as otherwise provided, this part applies only to benefits governed by this part.

(b) *Applicability.* This part will apply prospectively, not retroactively.

(1) This part will apply to all claims for benefits VA receives on or after [INSERT THE EFFECTIVE DATE OF THE FINAL RULE].

(2) This part will apply to new actions VA or a claimant or beneficiary initiated on or after [EFFECTIVE DATE OF THE FINAL RULE] that pertain to either a running award of benefits or, subject to § 5.162, to a prior final decision. Such new actions include, but are not limited to, actions involving reduction or discontinuance of benefits, pension maintenance, adjustment of awards based on dependents, and apportionments.

(3) Part 3 of this chapter will continue to apply to all claims VA received before [EFFECTIVE DATE OF THE FINAL RULE] and all actions VA or a claimant or beneficiary initiated before that date that were not finally decided by that date.

(4) Part 3 of this chapter will continue to apply to death compensation and Spanish-American War benefits.

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

§ 5.1 General definitions.

The following definitions apply to this part:

Accrued benefits means unpaid periodic monetary benefits to which a person was entitled, based on the evidence in the file on the date of his or her death, from a claim for benefits pending on the date of death.

Cross Reference: § 5.554(a) (identifying benefits that VA may pay as accrued benefits).

Active military service means active military, naval, or air service, as defined in 38 U.S.C. 101(24) and as described in § 5.21.

Agency of original jurisdiction means the Department of Veterans Affairs activity or administration, that is, the Veterans Benefits Administration, Veterans Health Administration, or National Cemetery Administration, that made the initial determination on a claim.

Alien means any person not a citizen or national of the U.S.

Application means a specific form the Secretary requires a claimant to file to apply for a benefit.

Armed Forces means the U.S. Army, Navy, Marine Corps, Air Force, and Coast Guard, including their reserve components.

(Authority: 38 U.S.C. 101(10))

Beneficiary means a person in receipt of benefits under this part. Under certain circumstances, a beneficiary may also meet the definition of a claimant (for example, when seeking an increased compensation rating or contesting a proposed reduction in benefits).

Benefit means any VA payment, service, commodity, function, or status, entitlement to which is determined under this part, except as otherwise provided.

Certified statement means a statement made and signed by a person who affirms that the statement is true and accurate to the best of that person's knowledge and belief.

Child born of the marriage and child born before the marriage. A *child born of the marriage* means a child of a deceased veteran born on or after the date of a marriage that is the basis of a surviving spouse's entitlement to benefits. A *child born before the marriage* means a child of a deceased veteran born before the date of a marriage that is the basis of a surviving spouse's entitlement to benefits. Neither of these terms includes an adopted child or a stepchild.

(Authority: 38 U.S.C. 103)

Claim means a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit under this part.

(Authority: 38 U.S.C. 5101)

Claim for benefits pending on the date of death means a claim filed with VA which had not been finally adjudicated by VA on or before the date of death. Such a claim may include a deceased claimant's claim to reopen a finally denied claim based upon new and material evidence or a deceased claimant's claim of clear and unmistakable error in a prior rating or decision. Any new and material evidence submitted to reopen the claim must have been in VA's possession on or before the date of the beneficiary's death.

Claimant means a person applying for, or filing a claim for, any benefit under this part.

(Authority: 38 U.S.C. 5100)

Competent evidence means competent expert evidence or competent lay evidence.

(1) *Competent expert evidence.* Expert evidence is a statement or opinion based all or in part on scientific, medical, technical, or other specialized knowledge. Examples include, but are not limited to, medical or scientific opinions. Expert evidence is competent if the person upon whose knowledge the evidence is based is qualified through education, training, or experience to offer the statement or opinion comprising the evidence.

(2) *Competent lay evidence.* Lay evidence is a statement or opinion offered by a lay person. A lay person is a person without relevant specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has personal knowledge of facts or circumstances described in the statement or opinion comprising the evidence and if those facts or circumstances can be observed and described by a lay person.

Note to the definition of competent evidence: In VA's nonadversarial system, all evidence is admitted into the record. VA does not exclude from the record evidence that is not ''competent'' under this section; however, such evidence may not be probative because it is not competent.

Custody of a child means that a person or institution is legally responsible for the welfare of a child and has the legal right to exercise parental control over the child. Such a person or institution is the ''custodian'' of the child.

Direct service connection means that the evidence proves that the veteran's injury or disease resulting in disability or death was incurred or aggravated in the line of duty during active military service without application of the presumptions of service connection in subpart E of this part; or of secondary service connection under § 5.246, or § 5.247.

Discharged or released from active military service includes, but is not limited to, either of the following events:

(1) Retirement from the active military service; or

(2) Completion of active military service for the period of time a person was obligated to serve at the time of entry into that period of service in cases where both of the following elements are true:

(i) The person was not discharged or released at the end of that period of time due to an intervening change in military status, as defined in § 5.37; and

(ii) The person would have been eligible for a discharge or release under conditions other than dishonorable at the end of that period of time except for the intervening change in military status.

(Authority: 38 U.S.C. 101(18))

Drugs means chemical substances that affect the processes of the mind or body and that may cause intoxication or harmful effects if abused. This includes prescription and non-prescription drugs, whether obtained legally or illegally.

Effective the date of the last payment means that VA's action is effective as of the first day of a month in which it is possible to suspend, reduce, or discontinue a benefit payment without creating an overpayment.

Evidence in the file on the date of death means evidence in VA's possession on or before the date of the deceased beneficiary's death, even if such evidence was not physically located in the VA claims folder on or before the date of death.

(Authority: 38 U.S.C. 501(a), 5121(a); Sec. 104, Pub. L. 108–183, 117 Stat. 2656)

Final decision means a decision on a claim for benefits of which VA sent the claimant written notice as required by § 5.83, and:

(1) The claimant did not file a timely Notice of Disagreement in compliance with § 20.302(a) of this chapter or, with respect to simultaneously contested claims, in compliance with § 20.501(a) of this chapter;

(2) The claimant filed a timely Notice of Disagreement, but did not file a timely Substantive Appeal in compliance with § 20.302(b) of this chapter or, with respect to simultaneously contested claims, in compliance with § 20.501(b) of this chapter; or

(3) In the case of a decision by the Board of Veterans' Appeals, the decision is final under § 20.1100 of this chapter.

(Authority: 38 U.S.C. 7105)

Fraud means any of the following, as applicable:

(1) As used in § 5.676, *fraud* means an act committed when a person knowingly makes or causes to be made or conspires, combines, aids, or assists in, agrees to, arranges for, or in any way procures the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, concerning any benefit except insurance payments.

(2) As used in §§ 5.196 and 5.203, *fraud* means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for purpose of obtaining, or assisting a person to obtain, an annulment or divorce, with knowledge that the misrepresentation or failure to disclose may result in the erroneous granting of an annulment or divorce.

(3) As used in §§ 5.172, 5.174, and 5.175, *fraud* means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for purpose of obtaining or retaining, or assisting a person to obtain or retain, eligibility for benefits, with knowledge that the misrepresentation or failure to disclose may result in the erroneous award or retention of such benefits.

(Authority: 38 U.S.C. 103, 110, 1159, 6103(a))

Insanity, as a defense to commission of an act, means a person had such a defect of reason resulting from injury, disease, or mental deficiency that he or she did not know or understand the nature or consequence of the act, or that what he or she was doing was wrong. Behavior that is attributable to a personality disorder does not satisfy the definition of insanity.

Nonservice-connected means, with respect to disability or death, that such disability was not incurred or aggravated, or that the death did not result from a disability incurred or aggravated, in the line of duty in active military service.

Notice means either:

(1) A written communication VA sends a claimant or beneficiary at his or her latest address of record, and to his or her designated representative and fiduciary, if any; or

(2) An oral communication VA conveys to a claimant or beneficiary.

Nursing home means any of the following facilities:

(1) Any extended care facility licensed by a State to provide skilled or intermediate-level nursing care;

(2) A nursing home care unit in a State veterans' home approved for payment under 38 U.S.C. 1742, Inspections of such homes; restrictions on beneficiaries; or

(3) A VA Nursing Home Care Unit.

(Authority: 38 U.S.C. 101(28))

Payee means a person to whom monetary benefits are payable.

Political subdivision of the U.S. means a State, as defined in this section, and the counties (or parishes), cities, or municipalities of a State.

Proximately caused means that the event resulted directly from the cause and would not have occurred without that cause.

Psychosis means any of the following disorders listed in ''Diagnostic and Statistical Manual of Mental Disorders'', Fourth Edition, Text Revision, of the American Psychiatric Association (DSM–IV–TR):

(1) Brief Psychotic Disorder;

(2) Delusional Disorder;

(3) Psychotic Disorder Due to General Medical Condition;

(4) Psychotic Disorder Not Otherwise Specified;

(5) Schizoaffective Disorder;

(6) Schizophrenia;

(7) Schizophreniform Disorder;

(8) Shared Psychotic Disorder; and

(9) Substance-Induced Psychotic Disorder.

(Authority: 38 U.S.C. 1101, 1112(a) and (b))

Reserve, or *reservist,* means a member of a reserve component.

(Authority: 38 U.S.C. 101(26))

Reserve component means the Army, Naval, Marine Corps, Air Force, and Coast Guard Reserves and the Army National Guard and Air National Guard of the U.S.

(Authority: 38 U.S.C. 101(27))

Secretary concerned means:

(1) The Secretary of the Army, with respect to matters concerning the Army;

(2) The Secretary of the Navy, with respect to matters concerning the Navy or the Marine Corps;

(3) The Secretary of the Air Force, with respect to matters concerning the Air Force;

(4) The Secretary of Homeland Security, with respect to matters concerning the Coast Guard;

(5) The Secretary of Health and Human Services, with respect to matters concerning the Public Health Service; or

(6) The Secretary of Commerce, with respect to matters concerning the Coast and Geodetic Survey, the Environmental Science Services Administration, and the National Oceanic and Atmospheric Administration.

(Authority: 38 U.S.C. 101(25))

Service-connected means, with respect to disability or death, that such

disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in the line of duty in active military service.

Service treatment records means, regarding an applicant for membership in, or a member of, the Armed Forces, records of medical treatment and examinations conducted by the Armed Forces or by a civilian health care provider at Armed Forces' expense.

State means each of the several States, Territories, and possessions of the U.S.; the District of Columbia; and the Commonwealth of Puerto Rico. For purposes of 38 U.S.C. 101(20), and 38 U.S.C. chapters 34 and 35, ''State'' will also include the Canal Zone.

(Authority: 38 U.S.C. 101(20))

Uniformed services means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time federal National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency.

VA means all organizational units of the Department of Veterans Affairs.

Veteran means any of the following persons, as applicable:

(1) A person who had active military service and who was discharged or released under conditions other than dishonorable.

(Authority: 38 U.S.C. 101(2))

(2) A person who died in active military service and whose death was not due to willful misconduct.

(Authority: 38 U.S.C. 1101(1), 1301)

(3) For death pension purposes, a person who died in active military service under conditions that prevent payment of service-connected death benefits. The person must have completed at least 2 years of honorable military service, as certified by the Secretary concerned. See subpart F of this part for eligibility information.

(Authority: 38 U.S.C. 1541(h))

Willful misconduct, for purposes of this part, means an act involving deliberate or intentional wrongdoing with knowledge, or wanton and reckless disregard, of its probable consequences. Civil infractions (such as mere technical violation of police regulations or other ordinances) will not, by themselves, constitute willful misconduct.

§ 5.2 Terms and usage.

Unless otherwise provided, a singular noun in this part that refers to a person also includes the plural of that noun (for example, ''child'' includes ''children''). Nouns that follow this rule include, but are not limited to, the following:

(a) Veteran;
(b) Claimant;
(c) Beneficiary;
(d) Dependent;
(e) Spouse;
(f) Child;
(g) Parent; and
(h) Survivor.

§ 5.3 Standards of proof.

(a) *Applicability.* This section states the general standards of proof to prove a fact or resolve an issue material to deciding a claim and to rebut presumptions. These standards apply unless a statute or another section of this part specifically provides otherwise.

(b) *Proving a fact or issue*—(1) *Weight of the evidence. Weight of the evidence* means the persuasiveness of some evidence in comparison with other evidence.

(2) *Equipoise. Equipoise* means that there is an approximate balance between the weight of the evidence in support of and the weight of the evidence against a particular finding of fact or the resolution of a particular issue.

(3) *Benefit of the doubt rule.* When the evidence is in equipoise regarding a particular fact or issue, VA will give the benefit of the doubt to the claimant and the fact or issue will be resolved in the claimant's favor. A fact or issue that would tend to disprove a claim must be established by a preponderance of the evidence. The benefit of the doubt rule applies even in the absence of official records. For example, in applying the standard, VA will consider that no official records may have been kept in cases where an alleged incident arose under combat or similarly strenuous conditions if the incident is consistent with the probable results of such known hardships.

(4) *Preponderance of evidence.* A fact or issue is established by a ''preponderance of evidence'' when the weight of the evidence in support of that fact or issue is greater than the weight of the evidence against it.

(5) *Weighing the evidence.* In determining whether the evidence is in equipoise, VA will consider whether evidence favoring the existence, or nonexistence, of a relevant fact or issue is supported or contradicted by the evidence as a whole and by known facts. Objectively unsupported personal speculation, suspicion, or doubt on the part of a person adjudicating a claim is not a sufficient basis for concluding that the evidence is not in equipoise.

(6) *Reopening claims.* The standards of proof otherwise provided in this section do not apply when determining if evidence is new and material, but do apply after the claim has been reopened. In determining whether to reopen a claim based on new and material evidence, the evidence need not be in equipoise. VA will reopen a claim when the new and material evidence merely raises a reasonable possibility of substantiating the claim. See § 5.55.

(c) *Rebuttal of a presumption.* A presumption is rebutted if the preponderance of evidence is contrary to the presumed fact. In rebutting a presumption under § 5.260(c), *affirmative evidence* means evidence supporting the existence of certain facts.

(d) *Quality of evidence to be considered.* VA does not simply count the pieces of evidence for or against the existence, or nonexistence, of a relevant fact or issue when it is determining whether the applicable standard of proof has been met. VA will assess the credibility and probative value of each piece of evidence and then weigh all the relevant evidence for and against the fact or issue. Not all pieces of evidence will carry equal weight.

(e) *Absence of evidence may be evidence.* VA may consider the weight of an absence of evidence in support of, or against, a particular fact or issue.

(Authority: 38 U.S.C. 501(a), 5107(b))

§ 5.4 Claims adjudication policies.

(a) *Ex parte proceedings and assistance.* VA conducts its proceedings ex parte, which means that VA is not an adversary of the claimant. VA will assist a claimant or beneficiary in developing his or her claim as provided in § 5.90.

(b) *VA decision-making.* VA will base its decisions on a review of the entire record, including material pertaining to the claimant or decedent in a death benefit claim. It is VA's defined and consistently applied policy to administer the law under a broad interpretation, consistent with the facts shown in every case. VA will make decisions that grant every benefit that the law supports while at the same time protecting the interests of the Government.

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

§ 5.5 Delegations of authority.

(a) *Entitlement to benefits.* Authority to make findings and decisions under the applicable laws, regulations, precedents, and instructions, as to entitlement to benefits under this part 5 is delegated to the Under Secretary for Benefits, and to supervisory or adjudicative personnel within the

Veterans Benefits Administration who are designated by the Under Secretary for Benefits.

(b) *Forfeiture.* Authority to determine whether a claimant or payee has forfeited the right to benefits or to remit a forfeiture under 38 U.S.C. 6103 or 6104 is delegated to the Director, Compensation Service, the Director, Pension and Fiduciary Service, and to personnel designated by the Directors. See § 5.679.

(Authority: 38 U.S.C. 512(a))

§ 5.6–5.19 [Reserved]

Subpart B—Service Requirements for Veterans

Periods of War and Types of Military Service

§ 5.20 Dates of periods of war.

This section explains what periods of service VA recognizes as wartime service, beginning with World War I. See 38 U.S.C. 101 for information concerning earlier periods of war. A veteran who served during one of these periods had wartime service.

Period	Dates	Exceptions/Special Rules	Authority
(a) World War I	April 6, 1917, through November 11, 1918	(1) April 6, 1917, through April 1, 1920, for U.S. Armed Forces serving in Russia. (2) April 6, 1917, through July 1, 1921, for a veteran who served in the active military service after April 5, 1917, and before November 12, 1918. This extension is limited to matters concerning benefits under 38 U.S.C. chapter 11 (disability compensation and death compensation) and benefits under 38 U.S.C. chapter 15 (''Pension for Non-Service-Connected Disability or Death or for Service'').	38 U.S.C. 101(7), 1101(2)(A), 1501(2).
(b) World War II	December 7, 1941, through December 31, 1946.	World War II service also includes any period of continuous service after December 31, 1946, and before July 26, 1947, if that period of service began before January 1, 1947. This extension is limited to matters concerning benefits under 38 U.S.C. chapter 11 (disability compensation and death compensation).	38 U.S.C. 101(8), 1101(2)(B).
(c) Korean Conflict	June 27, 1950, through January 31, 1955	None	38 U.S.C. 101(9).
(d) Vietnam Era	August 5, 1964, through May 7, 1975	The Vietnam Era also includes February 28, 1961, through August 4, 1964, in the case of a veteran who served in the Republic of Vietnam during that period.	38 U.S.C. 101(29).
(e) Persian Gulf War	August 2, 1990, through a date to be prescribed by Presidential proclamation or by law.		38 U.S.C. 101(33).
(f) Future periods of war.	Beginning on the date of any future declaration of war by the Congress and ending on a date prescribed by Presidential proclamation or concurrent resolution of the Congress.		38 U.S.C. 101(11).

§ 5.21 Service VA recognizes as active military service.

(a) *Definition.* Active military service includes any of the following kinds of service:

(1) Active duty: See § 5.22.

(2) The service of a person certified by the Secretary of Defense as serving on active military service. See § 5.27.

(3) The service of a group listed in § 5.28.

(4) Active duty for training during which the person was disabled or died from an injury or disease incurred or aggravated in the line of duty.

(5) Inactive duty training during which the person was disabled or died from an injury incurred or aggravated in the line of duty or from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident.

(6) Active or Reserve duty for a person who was injured or died while assigned to the Postmaster General for the aerial transportation of mail from February 10, 1934, through March 26, 1935.

(Authority: Pub. L. 73–140, 48 Stat. 508)

(b) *Determination of period of active military service.* In determining the period of active military service for service-connected or nonservice-connected benefits, VA will not count:

(1) Time spent on industrial, agricultural, or indefinite furlough;

(2) Time lost when absent without leave and without pay;

(3) Time while under arrest without a subsequent acquittal or dismissal of charges;

(4) Time during desertion; or

(5) Subject to 10 U.S.C. 875 (concerning the restoration of rights, privileges, and property affected by certain court-marital sentences that are set aside or disapproved), time while serving a sentence of confinement imposed by a court-martial.

(Authority: 38 U.S.C. 101(24), 501(a).

Cross Reference: § 5.1(ee), for the definition of ''reserve''.

§ 5.22 Service VA recognizes as active duty.

(a) *Definition. Active duty* means:

(1) Full-time duty in the Armed Forces, other than active duty for training.

(2) Certain duty performed by:

(i) Reserve and National Guard members. See § 5.23.

(ii) Armed Services Academy cadets, midshipmen, attendees at the preparatory schools of the Armed

Services Academies, and Senior Reserve Officers' Training Corps members. See § 5.24.

(iii) Commissioned officers of the Public Health Service, Coast and Geodetic Survey and its successor agencies, and temporary members of the Coast Guard Reserves. See § 5.25.

(3) Certain service of persons ordered to service but who did not serve. See § 5.26.

(b) *Termination of active duty.* Active duty continues until midnight of the date of discharge or release from active duty.

(c) *Certain travel periods.* Active duty includes certain travel as provided in § 5.29.

(Authority: 38 U.S.C. 101(21))

Cross Reference: § 5.1, for the definition of ''reserve''.

§ 5.23 How VA classifies Reserve and National Guard duty.

(a) *Reserve duty*—(1) *Active duty.* Full-time duty in the Armed Forces performed by a Reservist, other than active duty for training, is active duty.

(2) *Active duty for training.* Full-time duty in the Armed Forces performed by a Reservist for training purposes is active duty for training.

(3) *Inactive duty training.* Duty that is not full-time duty and that the Secretary concerned prescribes for a Reservist to participate in as a regular period of instruction or appropriate duty is inactive duty training. See 37 U.S.C. 206, ''Reserves; members of National Guard: inactive-duty training''. Special additional duties authorized for a Reservist by an authority designated by the Secretary concerned and performed on a voluntary basis in connection with prescribed training maintenance activities of the unit to which the Reservist is assigned is also inactive duty training.

(b) *National Guard*—(1) *Active duty.* Full-time duty in the Armed Forces performed by a member of the National Guard serving under title 10, United States Code, other than active duty for training, is active duty.

(2) *Active duty for training.* Full-time duty performed by a member of the National Guard of any State under any of the following six circumstances is active duty for training:

(i) When detailed as a rifle instructor for civilians (see 32 U.S.C. 316);

(ii) During required drills and field exercises (see 32 U.S.C. 502);

(iii) While participating in field exercises as directed by the Secretary of the Army or the Secretary of the Air Force (see 32 U.S.C. 503);

(iv) While attending schools or small arms competitions as prescribed by the Secretary of the Army or the Secretary of the Air Force (see 32 U.S.C. 504);

(v) While attending any service school (except the U.S. Military Academy or the U.S. Air Force Academy), or attached to an organization of the Army or the Air Force for routine practical instruction during field training or other outdoor exercise (see 32 U.S.C. 505); or

(vi) When performed under prior provisions of law that correspond to 32 U.S.C. 316, 502, 503, 504, or 505, for each of paragraphs (b)(2)(i) through (v) of this section.

(3) *Inactive duty training.* Duty, other than full-time duty, performed by a member of the National Guard of any State under any of the following six circumstances is inactive duty training:

(i) When detailed as a rifle instructor for civilians (see 32 U.S.C. 316);

(ii) During required drills and field exercises (see 32 U.S.C. 502);

(iii) While participating in field exercises as directed by the Secretary of the Army or the Secretary of the Air Force (see 32 U.S.C. 503);

(iv) While attending schools or small arms competitions as prescribed by the Secretary of the Army or the Secretary of the Air Force (see 32 U.S.C. 504);

(v) While attending any service school (except the U.S. Military Academy or the U.S. Air Force Academy), or attached to an organization of the Army or the Air Force for routine practical instruction during field training or other outdoor exercise (see 32 U.S.C. 505); or

(vi) When performed under prior provisions of law that correspond to 32 U.S.C. 316, 502, 503, 504, or 505, for each of paragraphs (b)(3)(i) through (v) of this section.

(4) *Exception.* Inactive duty training does not include work or study performed in connection with correspondence courses, or attendance at an educational institution in an inactive status.

(c) *Certain travel periods.* For issues involving travel of a reservist or member of the National Guard, see § 5.29.

(Authority: 38 U.S.C. 101(21)–(23), 106, 501(a))

Cross Reference: § 5.1, for the definition of ''reserve''.

§ 5.24 How VA classifies duty performed by Armed Services Academy cadets and midshipmen, attendees at the preparatory schools of the Armed Services Academies, and Senior Reserve Officers' Training Corps members.

(a) *Service as a cadet or midshipman.* Service as a cadet at the U.S. Air Force Academy, U.S. Military Academy, or U.S. Coast Guard Academy, or as a midshipman at the U.S. Naval Academy qualifies as active duty. The period of such duty continues until midnight of the date of discharge or release from the respective service academy.

(b) *Preparatory school attendance*—(1) *Active duty.* Attendance at the preparatory schools of the U.S. Air Force Academy, the U.S. Military Academy, or the U.S. Naval Academy is considered active duty if:

(i) The person was an enlisted active-duty member who was reassigned to a preparatory school without a release from active duty; or

(ii) The person has a commitment to perform active duty in the Armed Forces that would be binding upon disenrollment from the preparatory school.

(2) *Active duty for training.* Except as provided in paragraph (b)(1)(ii) of this section, attendance at the preparatory schools of the U.S. Air Force Academy, the U.S. Military Academy, or the U.S. Naval Academy by a person who enters the preparatory school directly from the Reserves, National Guard, or civilian life is active duty for training.

(c) *Senior Reserve Officers' Training Corps*—(1) *Active duty for training.* Duty performed by a member of a Senior Reserve Officers' Training Corps program when ordered to duty for purpose of training or a practice cruise under statutes and regulations governing the Armed Forces conduct of the Senior Reserve Officers' Training Corps is active duty for training.

(Authority: 10 U.S.C. chapter 103)

(i) Paragraph (c)(1) of this section is effective October 1, 1982, for death or disability resulting from injury or disease incurred or aggravated after September 30, 1982.

(ii) Paragraph (c)(1) of this section is effective October 1, 1983, for death or disability resulting from injury or disease incurred or aggravated before October 1, 1982.

(iii) For duty after September 30, 1988, the duty must be a prerequisite to the member being commissioned and must be for at least 4 continuous weeks.

(2) *Inactive duty training.* Training by a member of, or an applicant for membership (a student enrolled, during a semester or other enrollment term, in a course that is part of Reserve Officers' Training Corps instruction at an educational institution) in, the Senior Reserve Officers' Training Corps prescribed under 10 U.S.C. Chapter 103, ''Senior Reserve Officers' Training Corps'', is inactive duty training.

(3) *Drills.* Time spent by a member of the Senior Reserve Officers' Training Corps in drills as part of his or her activities as a member of the corps is not active military service.

(d) *Travel.* For issues involving travel under this section, see § 5.29.

(Authority: 38 U.S.C. 101, 106, 501(a))

Cross Reference: § 5.1, for the definition of ''reserve''.

§ 5.25 How VA classifies service in the Public Health Service, in the Coast and Geodetic Survey and its successor agencies, and of temporary members of the Coast Guard Reserve.

(a) *Public Health Service*—(1) *Active duty.* (i) Full-time duty, other than for training purposes, as a commissioned officer of the Regular or Reserve Corps of the Public Health Service is active duty if performed:

(A) After July 28, 1945;

(B) Before July 29, 1945, under circumstances affording entitlement to full military benefits; or

(C) At any time, for purposes of dependency and indemnity compensation (DIC).

(ii) Such active duty continues until midnight of the date of discharge or release from active duty.

(2) *Active duty for training.* Full-time duty for training purposes performed as a commissioned officer of the Reserve Corps of the Public Health Service is active duty for training if performed:

(i) After July 28, 1945;

(ii) Before July 29, 1945, under circumstances affording entitlement to full military benefits, as determined by the Secretary of the Department of Defense; or

(iii) At any time, for purposes of DIC.

(3) *Inactive duty training.* Either of the following kinds of service is inactive duty training:

(i) Duty, other than full-time duty, prescribed for a commissioned officer of the Reserve Corps of the Public Health Service by the Secretary of Health and Human Services under 37 U.S.C. 206, ''Reserves; members of National Guard: inactive-duty training'', or any other provision of law; or

(ii) Special additional duties authorized for a commissioned officer of the Reserve Corps of the Public Health Service by an authority designated by the Secretary of Health and Human Services and performed by him or her on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which he or she is assigned.

(b) *Coast and Geodetic Survey and successor agencies*—(1) *Active duty.* Full-time duty as a commissioned officer in the Coast and Geodetic Survey and its successor agencies, the Environmental Science Services Administration and the National Oceanic and Atmospheric Administration, is active duty if performed:

(i) After July 28, 1945;

(ii) Before July 29, 1945, while on transfer to one of the Armed Forces;

(iii) Before July 29, 1945, in time of war or National emergency declared by the President, while assigned to duty on a project for one of the Armed Forces in an area that the Secretary of Defense has determined to be of immediate military hazard;

(iv) In the Philippine Islands on December 7, 1941, and continuously in such islands thereafter until July 29, 1945; or

(v) At any time, for purposes of DIC.

(2) Such active duty continues until midnight of the date of discharge or release from active duty.

(c) *Temporary member of the Coast Guard Reserve.* Duty performed as a temporary member of the Coast Guard Reserve is not active duty for training or inactive duty training.

(d) *Travel.* For issues involving travel by a member of the Public Health Service, a member of the Coast and Geodetic Survey and its successor agencies, or a reservist under this section, see § 5.29.

(Authority: 38 U.S.C. 101, 106, 501(a))

Cross Reference: § 5.1, for the definitions of ''reserve'' and ''reservist''.

§ 5.26 Circumstances where a person ordered to service, but who did not serve, is considered to have performed active duty.

(a) *Persons included.* The persons described in paragraph (a) of this section who meet the requirements of paragraphs (a) and (b) of this section will be considered to have performed active duty for purpose of entitlement to benefits.

(1) *Volunteers.* Volunteers are included, provided they have applied for enlistment or enrollment in the active military service and have been provisionally accepted and directed or ordered to report to a place for final acceptance into the service.

(2) *Draftees.* Persons selected or drafted for enrollment in the active military service are included if they report, before being rejected for service, according to a call from their local draft board.

(3) *National Guard.* Members of the National Guard are included when they have been called into Federal active service, but have not yet been enrolled in such service, and when reporting to a designated rendezvous.

(b) *Injury or disease.* This section applies only if a person described in paragraph (a) of this section suffers an injury or contracts a disease in the line of duty while going to, coming from, or at a place designated for final acceptance or entry upon active duty. This applies to a draftee or selectee when reporting for preinduction examination or for final induction into active duty. This section does not apply to an injury or disease suffered during a period of inactive duty status or period of waiting after a final physical examination and prior to beginning the trip to report for induction. The injury or disease must be due to some factor relating to compliance with proper orders.

(Authority: 38 U.S.C. 106(b))

§ 5.27 Individuals and Groups that Qualify as Having Performed Active Military Service for purposes of VA Benefits Based on Designation by the Secretary of Defense.

(a) *Designation by the Secretary of Defense.* Service performed by certain persons and groups for the Armed Forces of the U.S. in a capacity considered civilian employment or contractual service when the service was performed is active military service for purpose of VA benefits, if the Secretary of Defense, or his or her designee, certifies it as active military service and issues a discharge under honorable conditions.

(b) *Individuals and groups included.* The Secretary of Defense, or his or her designee, has certified as active military service the service of the following individuals and groups:

(1) American Merchant Marine in Oceangoing Service any time during the period December 7, 1941, to August 15, 1945. Recognized effective January 19, 1988.

(2) The approximately 50 Chamorro and Carolinian former native policemen who received military training in the Donnal area of central Saipan and were placed under the command of Lt. Casino of the 6th Provisional Military Police Battalion to accompany U.S. Marines on active, combat-patrol activity any time during the period August 19, 1945 to September 2, 1945. Recognized effective September 30, 1999.

(3) Civilian Crewmen of the U.S. Coast and Geodetic Survey (U.S.C.GS) vessels, who performed their service in areas of immediate military hazard while conducting cooperative operations with and for the U.S. Armed Forces any time during the period December 7, 1941, to August 15, 1945. Qualifying U.S.C.GS vessels specified by the Secretary of Defense, or his or her designee, are the Derickson, Explorer, Gilbert, Hilgard, E. Lester Jones, Lydonia, Patton, Surveyor, Wainwright,

Westdahl, Oceanographer, Hydrographer, and Pathfinder. Recognized effective April 8, 1991.

(4) Civilian employees of Pacific Naval Air Bases who actively participated in Defense of Wake Island during World War II. Recognized effective January 22, 1981.

(5) Civilian Navy Identification Friend or Foe (IFF) Technicians, who served in the Combat Areas of the Pacific any time during the period December 7, 1941, to August 15, 1945. Recognized effective August 2, 1988.

(6) Civilian personnel assigned to the Secret Intelligence Element of the Office of Strategic Services (OSS). Recognized effective December 27, 1982.

(7) Engineer Field Clerks (WWI). Recognized effective August 31, 1979.

(8) Guam Combat Patrol. Recognized effective May 10, 1983.

(9) Honorably discharged members of the American Volunteer Group (Flying Tigers), who served any time during the period December 7, 1941, to July 18, 1942. Recognized effective May 3, 1991.

(10) Honorably discharged members of the American Volunteer Guard, Eritrea Service Command, who served any time during the period June 21, 1942, to March 31, 1943. Recognized effective June 29, 1992.

(11) Male Civilian Ferry Pilots. Recognized effective July 17, 1981.

(12) The Operational Analysis Group of the Office of Scientific Research and Development, Office of Emergency Management, which served overseas with the U.S. Army Air Corps any time during the period December 7, 1941, to August 15, 1945. Recognized effective August 27,1999.

(13) Quartermaster Corps Female Clerical Employees serving with the AEF (American Expeditionary Forces) in World War I. Recognized effective January 22, 1981.

(14) Quartermaster Corps Keswick Crew on Corregidor (WWII). Recognized effective February 7, 1984.

(15) Reconstruction Aides and Dietitians in World War I. Recognized effective July 6, 1981.

(16) Signal Corps Female Telephone Operators Unit of World War I. Recognized effective May 15, 1979.

(17) Three scouts/guides, Miguel Tenorio, Penedicto Taisacan, and Cristino Dela Cruz, who assisted the U.S. Marines in the offensive operations against the Japanese on the Northern Mariana Islands from June 19, 1944, through September 2, 1945. Recognized effective September 30, 1999.

(18) U.S. civilian employees of American Airlines, who served overseas as a result of American Airlines' contract with the Air Transport Command any time during the period December 14, 1941, to August 14, 1945. Recognized effective October 5, 1990.

(19) U.S. civilian female employees of the U.S. Army Nurse Corps while serving in the defense of Bataan and Corregidor any time during the period January 2, 1942, to February 3, 1945. Recognized effective December 13, 1993.

(20) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Braniff Airways, who served overseas in the North Atlantic or under the jurisdiction of the North Atlantic Wing, Air Transport Command (ATC), as a result of a contract with the ATC any time during the period February 26, 1942, to August 14, 1945. Recognized effective June 2, 1997.

(21) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Consolidated Vultree Aircraft Corporation (Consairway Division), who served overseas as a result of a contract with the Air Transport Command any time during the period December 14, 1941, to August 14, 1945. Recognized effective June 29, 1992.

(22) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Northeast Airlines Atlantic Division, who served overseas as a result of Northeast Airlines' Contract with the Air Transport Command any time during the period December 7, 1941, to August 14, 1945. Recognized effective June 2, 1997.

(23) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Northwest Airlines, who served overseas as a result of Northwest Airline's contract with the Air Transport Command any time during the period December 14, 1941, to August 14, 1945. Recognized effective December 13, 1993.

(24) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Pan American World Airways and Its Subsidiaries and Affiliates, who served overseas as a result of Pan American's Contract with the Air Transport Command and Naval Air Transport Service any time during the period December 14, 1941, to August 14, 1945. Recognized effective July 16, 1992.

(25) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Transcontinental and Western Air (TWA), Inc., who served overseas as a result of TWA's contract with the Air Transport Command any time during the period December 14, 1941, to August 14, 1945. The ''Flight Crew'' includes pursers. Recognized effective May 13, 1992.

(26) U.S. Civilian Flight Crew and Aviation Ground Support Employees of United Air Lines (UAL), who served overseas as a result of UAL's contract with the Air Transport Command any time during the period December 14, 1941, to August 14, 1945. Recognized effective May 13, 1992.

(27) U.S. civilian volunteers, who actively participated in the Defense of Bataan. Recognized effective February 7, 1984.

(28) U.S. civilians of the American Field Service (AFS), who served overseas operationally in World War I any time during the period August 31, 1917, to January 1, 1918. Recognized effective August 30, 1990.

(29) U.S. civilians of the American Field Service (AFS), who served overseas under U.S. Armies and U.S. Army Groups in World War II any time during the period December 7, 1941, to May 8, 1945. Recognized effective August 30, 1990.

(30) U.S. Merchant Seamen who served on blockships in support of Operation Mulberry. Recognized effective October 18, 1985.

(31) Wake Island Defenders from Guam. Recognized effective April 7, 1982.

(32) Women's Air Forces Service Pilots (WASP). Recognized effective November 23, 1977.

(33) Women's Army Auxiliary Corps (WAAC). Recognized effective March 18, 1980.

(c) *Effective dates of awards*—(1) *Scope.* This paragraph (c) establishes the effective date of an award of any of the following benefits based on service in a group listed in this section:

(i) Pension;

(ii) Disability compensation;

(iii) Dependency and indemnity compensation; and

(iv) Monetary allowances for a child of:

(A) A Vietnam veteran under § 5.589;

(B) A Vietnam veteran under § 5.590; or

(C) A veteran of covered service in Korea under 38 U.S.C. 1821, ''Benefits for a child of certain Korea service veterans born with spina bifida''.

(2) *Claim received 1 year or less after the effective date of recognition.* If VA receives the claim no later than 1 year after the effective date of recognition, then the effective date of the award is the later of:

(i) The date entitlement arose, as defined in § 5.150; or

(ii) The effective date of recognition.

(3) *Claim received more than 1 year after the effective date of recognition.* If VA receives the claim more than 1 year after the effective date of recognition, the effective date of the award or increase is the later of:

(i) The date entitlement arose, as defined in § 5.150; or

(ii) One (1) year prior to the date of receipt of the claim.

(4) *Effective dates of awards based on a review on VA's initiative 1 year or less after the effective date of recognition.* If VA awards benefits no later than 1 year after the effective date of recognition, the effective date of the award is the later of:

(i) The date entitlement arose, as defined in § 5.150; or

(ii) The effective date of recognition.

(5) *Effective dates of awards based on a review on VA's initiative more than 1 year after the effective date of the change.* If VA awards benefits more than 1 year after the effective date of recognition, the effective date of the award is the later of:

(i) The date entitlement arose, as defined in § 5.150; or

(ii) One (1) year before the date of the VA rating decision awarding the benefit, or if no rating decision is required, 1 year before the date VA otherwise determines that the claimant is entitled to the benefit.

(Authority: 38 U.S.C. 501(a), 1832(b)(2), 5110(g); Sec. 401, Pub. L. 95–202, 91 Stat. 1449–50)

§ 5.28 Other groups designated as having performed active military service.

The following groups are considered to have performed active military service:

(a) *Alaska Territorial Guard during World War II.* (1) Service in the Alaska Territorial Guard during World War II, for any person who the Secretary of Defense determines was honorably discharged, is included.

(2) Benefits cannot be paid for this service for any period prior to August 9, 2000.

(b) *Army field clerks.* Army field clerks are included as enlisted personnel.

(c) *Army Nurse Corps, Navy Nurse Corps, and female dietetic and physical therapy personnel.* Army Nurse Corps, Navy Nurse Corps, and female dietetic and physical therapy personnel are included, as follows:

(1) *Nurse Corps.* Female Army and Navy nurses on active service under order of the service department; or

(2) *Female dietetic and physical therapy personnel.* Female dietetic and physical therapy personnel, excluding students and apprentices, appointed with relative rank after December 21, 1942, or commissioned after June 21, 1944.

(d) *Aviation camps.* Students who were enlisted men in Aviation camps during World War I are included.

(e) *Coast Guard.* Active service in the Coast Guard after January 27, 1915, while under the jurisdiction of the Treasury Department, the Navy Department, the Department of Transportation, or the Department of Homeland Security is included. This does not include temporary members of the Coast Guard Reserves.

(f) *Contract surgeons.* Contract surgeons are included for disability compensation and dependency and indemnity compensation, if the disability or death was the result of injury or disease contracted in the line of duty during a period of war while actually performing the duties of assistant surgeon or acting assistant surgeon with any military force in the field, or in transit, or in a hospital.

(g) *Field clerks, Quartermaster Corps.* Field clerks of the Quartermaster Corps are included as enlisted personnel.

(h) *Lighthouse service personnel.* Lighthouse service personnel who were transferred to the service and jurisdiction of the War or Navy Departments by Executive order under the Act of August 29, 1916, are included. Effective July 1, 1939, service was consolidated with the Coast Guard.

(i) *Male nurses.* Male nurses who were enlisted in a Medical Corps are included.

(j) *Persons previously having a pensionable or compensable status.* Persons having a pensionable or compensable status before January 1, 1959, are included.

(k) *Insular Forces*—(1) *Philippine forces.* Service in certain Philippine forces constitutes active military service for purposes of certain benefits as specified in § 5.610.

(2) *Other insular forces.* Service in the Insular Force of the Navy, Samoan Native Guard, or Samoan Native Band of the Navy constitutes active military service for purposes of entitlement to pension, disability compensation, dependency and indemnity compensation, and burial benefits at the full-dollar rate.

(l) *Revenue Cutter Service.* The Revenue Cutter Service is included while serving under direction of the Secretary of the Navy in cooperation with the Navy. Effective January 28, 1915, the Revenue Cutter Service was merged into the Coast Guard.

(m) *Russian Railway Service Corps.* Service during World War I in the Russian Railway Service Corps as certified by the Secretary of the Army is included.

(n) *Training camps.* Members of training camps authorized by section 54 of the National Defense Act (Pub. L. 64–85, 39 Stat. 166), are included, except for members of Student Army Training Corps Camps at the Presidio of San Francisco; Plattsburg, New York; Fort Sheridan, Illinois; Howard University, Washington, DC; Camp Perry, Ohio; and Camp Hancock, Georgia, from July 18, 1918 to September 16, 1918.

(o) *Women's Army Corps (WAC).* Service in the WAC after June 30, 1943, is included.

(p) *Women's Reserve of Navy, Marine Corps, and Coast Guard.* Service in the Women's Reserve of the Navy, Marine Corps, and Coast Guard is included and provides the same benefits as members of the Officers Reserve Corps or enlisted men of the U.S. Navy, Marine Corps, or Coast Guard.

(Authority: 38 U.S.C. 101, 106, 107, 501(a), 1152, 1504)

Cross Reference: § 5.1, for the definition of ''reserve''.

§ 5.29 Circumstances under which certain travel periods may be classified as military service.

(a) *Active duty*—(1) *Travel time to and from active duty.* Travel to or from any period of active duty is active duty if the travel is authorized by the Secretary concerned.

(2) *Travel on discharge or release.* Travel time consisting of the period between the date of discharge or release and arrival at the person's residence by the most direct route is active duty.

(3) *Persons ordered to service but who did not serve.* For information about the travel of certain persons ordered to service who did not serve, see § 5.26(b).

(b) *Active duty for training or inactive duty training*—(1) *Travel time for active duty for training or inactive duty training.* Any person proceeding directly to, or returning directly from, a period of active duty for training or inactive duty training will be considered to be on active duty for training or inactive duty training if the person was:

(i) Authorized or required by competent authority designated by the Secretary concerned to perform such duty; and

(ii) Disabled or died from an injury, an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident incurred during that travel.

(2) *Determination of status.* VA will determine whether such a person was authorized or required to perform such duty and whether the person was disabled or died from an injury, an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident incurred during that travel. In making these determinations, VA will take into consideration:

(i) The hour at which the person began to proceed to or return from the duty;

(ii) The hour at which the person was scheduled to arrive for, or at which the person ceased to perform, such duty;

(iii) The method of travel employed;

(iv) The itinerary;

(v) The manner in which the travel was performed; and

(vi) The immediate cause of disability or death.

(3) *Burden of proof.* Whenever any claim is filed alleging that the claimant is entitled to benefits because of travel for active duty for training or inactive duty training, the burden of proof will be on the claimant.

(Authority: 38 U.S.C. 101(21) and (22), 106(c) and (d))

§ 5.30 How VA determines if service qualifies for benefits.

(a) *Purpose.* Except for a servicemember who died in service, a requirement for veteran status is discharge or release under other than dishonorable conditions. See § 5.1 (defining ''veteran''). This section sets out how VA determines whether the servicemember's discharge or release was under other than dishonorable conditions.

(b) *Limitation to period of service concerned*—(1) *General rule.* A determination under this section that a servicemember was discharged or released under dishonorable conditions applies only to the period of service to which the discharge or release applies. It does not preclude veteran status with respect to other periods of service from which the servicemember was discharged or released under other than dishonorable conditions. See also § 5.37 (concerning certain cases where a servicemember was not discharged or released at the end of the period of time for which he or she was obligated to serve when entering a period of service because of a change in his or her military status during that period of service).

(2) *Forfeiture not precluded.* The provisions of paragraph (b)(1) of this section do not preclude forfeiture of benefits under 38 U.S.C. 6103, ''Forfeiture for fraud''; under 38 U.S.C. 6104, ''Forfeiture for treason''; under 38 U.S.C. 6105, ''Forfeiture for subversive activities''; or under similar statutes governing forfeiture of benefits.

(c) *Discharges and releases VA recognizes as being under other than dishonorable conditions.* For purposes of making determinations concerning character of discharge for VA purposes, a military discharge that is characterized by the service department as being either honorable or under honorable conditions is binding on VA. Subject to § 5.36 any of the following is a discharge or release under other than dishonorable conditions for VA purposes:

(1) An honorable discharge;

(2) A general discharge under honorable conditions; or

(3) An uncharacterized administrative entry level separation in the case of separation of enlisted personnel based on administrative proceedings begun after September 30, 1982.

(d) *Discharges VA recognizes as being under dishonorable conditions.* For VA purposes, a dishonorable discharge is a discharge under dishonorable conditions, except as provided in § 5.33.

(e) *Discharges and releases for which VA will make the character of discharge determination.* Subject to § 5.36, VA will determine whether the following types of discharges are discharges under other than dishonorable conditions for VA purposes, based on the facts and circumstances surrounding separation:

(1) An other than honorable discharge (formerly an ''undesirable'' discharge);

(2) A bad conduct discharge; or

(3) In the case of separation of enlisted personnel based on administrative proceedings begun after September 30, 1982, uncharacterized administrative separations for:

(i) A void enlistment or induction; or

(ii) Dropped from the rolls (that is, administrative discontinuance of military status and pay).

(f) *Offenses or events leading to discharge or release being recognized as a discharge under dishonorable conditions.* For purposes of VA's character of discharge determination under paragraph (e) of this section, a discharge or release because of one or more of the offenses or events specified in this paragraph (f) is a discharge or release under dishonorable conditions for VA purposes:

(1) Acceptance of an other than honorable discharge (formerly an ''undesirable'' discharge) to avoid trial by general court-martial.

(2) Mutiny or spying.

(3) Commission of one or more offenses involving moral turpitude. For purposes of this section, an offense involves ''moral turpitude'' if it is unlawful, it is willful, it is committed without justification or legal excuse, and it is an offense which a reasonable person would expect to cause harm or loss to person or property. This includes, generally, conviction of a felony.

(4) Engaging in willful and persistent misconduct during military service. A discharge because of a minor offense will not be considered willful and persistent misconduct if service was otherwise honest, faithful, and meritorious. If the misconduct includes absences without leave, see also § 5.32.

(5) Sexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of sexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, prostitution, sexual acts or conduct accompanied by assault or coercion, and sexual acts or conduct taking place between servicemembers of disparate rank, grade, or status when the servicemember has taken advantage of his or her superior rank, grade, or status.

(Authority: 38 U.S.C. 101(2), 501(a), 1301)

Cross Reference: § 5.1, for the definition of ''willful misconduct''.

Bars to Benefits

§ 5.31 Statutory bars to benefits.

(a) *Purpose.* By Federal statute, commission of certain acts leading to discharge or dismissal from the Armed Forces bars the grant of benefits (statutory bars). This section describes those acts and exceptions to the statutory bars.

(b) *Limitation to period of service concerned*—(1) *General rule.* A determination under this section that veterans benefits are statutorily barred applies only to the period of service to which the relevant discharge or dismissal applies. It does not preclude the grant of benefits based upon other periods of service. See also § 5.37 (concerning certain cases in which a servicemember was not discharged or released at the end of a period of his or her service obligation because of a change in his or her military status during that period of service).

(2) *Forfeiture not precluded.* The provisions of paragraph (b)(1) of this section do not preclude forfeiture of benefits under 38 U.S.C. 6103, ''Forfeiture for fraud''; under 38 U.S.C. 6104, ''Forfeiture for treason''; under 38 U.S.C. 6105, ''Forfeiture for subversive activities''; or under similar statutes governing forfeiture of benefits.

(c) *Acts barring benefits.* Benefits are not payable based upon a period of service from which the servicemember was discharged or dismissed from the Armed Forces under one or more of the following conditions:

(1) *Court-martial.* By reason of the sentence of a general court-martial. Substitution of an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial under 10 U.S.C. 874(b) (granting the authority for

such substitutions) does not remove this bar to benefits.

(2) *Conscientious objector.* As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities.

(3) *Deserter.* As a deserter.

(4) *Absence without leave (AWOL).* By reason of AWOL for a continuous period of at least 180 days. This bar is subject to § 5.32 and to paragraph (f) of this section (concerning limitations on the creation of overpayments). It applies to any person so discharged who was awarded a discharge under other than honorable conditions and who:

(i) Was awarded an honorable or general discharge under one of the programs listed in § 5.36(a) (concerning certain special 1970s-era discharge upgrades) prior to October 8, 1977; or

(ii) Had not otherwise established basic eligibility to receive VA benefits prior to October 8, 1977. For purposes of this paragraph (c)(4)(ii), the term *established basic eligibility to receive VA benefits* means either a VA determination that the service department issued an other than honorable discharge under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in § 5.36. However, if the service department discharged or released a person by reason of the sentence of a general court-martial, only a finding of insanity (see § 5.33), or a decision of a board of correction of records established under 10 U.S.C. 1552 (see § 5.34) can establish basic eligibility to receive VA benefits.

(5) *Resignation.* By reason of resignation by an officer for the good of the service.

(6) *Discharge due to alienage.* At the request of a servicemember, by reason of discharge due to alienage during a period of hostilities. However, VA will not bar benefits in the absence of affirmative evidence establishing such a request.

(d) *Bars inapplicable to certain insurance.* This section does not apply to war-risk insurance, Government (converted) insurance, or National Service Life Insurance policies.

(e) *Discontinuance of awards.* Subject to the provisions of § 5.177, any award contrary to the provisions of paragraph (c) of this section will be discontinued.

(f) *Limitation on creation of overpayments when veteran was separated for AWOL.* Awards made after October 8, 1977, in cases in which the bar in paragraph (c)(4) of this section applies, will be discontinued effective the first day of the month after the month for which VA last paid benefits.

(Authority: 38 U.S.C. 501(a), 5303; Pub. L. 95–126, 91 Stat. 1106, as amended by Pub. L. 102–40, 105 Stat. 239)

Cross Reference: § 5.1, for the definition of ''alien'' and § 5.1, for the definition of ''insanity''.

§ 5.32 Consideration of compelling circumstances when veteran was separated for AWOL.

(a) *Compelling circumstances considered.* Separation for absence without leave (AWOL) will not preclude veteran status under § 5.30, and will not bar benefit entitlement under § 5.31(c)(4) (concerning AWOL as a statutory bar to benefits) if VA determines that there were compelling circumstances to warrant unauthorized absence(s).

(b) *Factors considered.* VA will evaluate all of the relevant evidence of record to determine whether there were compelling circumstances to warrant unauthorized absence(s), including, but not limited to, the following factors:

(1) *Length of absence without leave and character of service.* VA will consider the length of the period(s) of AWOL in comparison to the length and character of service exclusive of the period(s) of AWOL. Service exclusive of the period(s) of AWOL should have been of such quality and length that it can be characterized as honest, faithful, meritorious, and of benefit to the nation.

(2) *Examples of circumstances VA will consider.* Reasons offered for being AWOL that VA will consider include family emergencies, compelling family obligations, or similar types of compelling obligations or duties owed to third parties. In evaluating the reasons for being AWOL, VA will consider how the situation appeared to the servicemember in light of the servicemember's age, cultural background, educational level, and judgmental maturity. VA will also consider evidence showing that hardship or suffering during overseas service, combat wounds or other service-incurred or aggravated disability, adversely affected the servicemember's state of mind at the time AWOL began.

(3) *Valid legal defense.* VA may find that compelling circumstances existed if the absence could not have been validly charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice.

(Authority: 38 U.S.C. 501(a), 5303(a))

§ 5.33 Insanity as a defense to acts leading to a discharge or dismissal from the service that might be disqualifying for benefits.

If VA determines that a servicemember was insane at the time of the commission of an act, or acts, leading to separation from the service, the commission of such act(s) will not be a basis for denying status as a veteran under § 5.30, or for barring the payment of benefits under § 5.31.

(Authority: 38 U.S.C. 501(a), 5303(b))

Cross Reference: § 5.1, for the definition of ''insanity''.

Military Discharges and Related Matters

§ 5.34 Effect of discharge upgrades by Armed Forces boards for the correction of military records (10 U.S.C. 1552) on eligibility for VA benefits.

(a) *Purpose.* This section describes the effect of a discharge upgrade by a board established under 10 U.S.C. 1552, ''Correction of military records: claims incident thereto'' on a VA determination that a servicemember's discharge or dismissal was under dishonorable conditions or that the servicemember is statutorily barred from receiving VA benefits.

(b) *Definitions.* For purposes of this section, *any applicable new determination* means a determination under § 5.30 or § 5.31. *Applicable previous VA discharge findings* means findings by VA, based upon a previous discharge issued for the same period of service, that a servicemember's discharge or dismissal was under dishonorable conditions or that the servicemember is statutorily barred from receiving benefits.

(c) *Effect of discharge upgrades.* An honorable discharge, or discharge under honorable conditions, issued through a board for correction of military records is final and conclusive and is binding on VA as to characterization based on the period covered by such service. Such a discharge supersedes a previous discharge issued for the same period of service. It will be the basis for making any applicable new determination and sets aside any applicable previous VA discharge findings.

(d) *Effective date.* If entitlement to benefits is established because of the change, modification, or correction of a discharge or dismissal by a board for the correction of military records, the award of such benefits will be effective from the latest of these dates:

(1) The date of filing with the service department of the request for change, modification, or correction of the discharge or dismissal in the case of either an original claim filed with VA or

a previously denied claim filed with VA;

(2) The date VA received a previously denied claim; or

(3) One (1) year prior to the date of reopening of the previously denied VA claim.

(Authority: 10 U.S.C. 1552(a)(4); 38 U.S.C. 501(a), 5110(i))

§ 5.35 Effect of discharge upgrades by Armed Forces discharge review boards (10 U.S.C. 1553) on eligibility for VA benefits.

(a) *Purpose.* This section describes the effect of a discharge upgrade by a board established under 10 U.S.C. 1553, ''Review of discharge or dismissal'' on a VA determination that a servicemember's discharge or dismissal was under dishonorable conditions or that the servicemember is statutorily barred from receiving VA benefits.

(b) *Upgrades issued before October 8, 1977.* This paragraph (b) concerns the effect of an honorable or general discharge (upgraded discharge) issued by a discharge review board before October 8, 1977.

(1) *General rule.* The upgraded discharge will be the basis for making any new determination under § 5.30 or § 5.31. The upgraded discharge will also set aside any VA finding that a servicemember's discharge or dismissal was under dishonorable conditions, or that he or she is statutorily barred from receiving benefits, if the upgraded discharge concerned the same period of service.

(2) *Exception.* The rule in paragraph (b)(1) of this section does not apply if:

(i) The previous discharge was executed by reason of the sentence of a general court-martial, or

(ii) The discharge review board was acting under the authority of one of the programs specified in § 5.36.

(c) *Upgrades issued after October 7, 1977—effect on statutory bars.* VA will make any new determinations under § 5.31 without regard to an honorable or general discharge (upgraded discharge) that a discharge review board issued after October 7, 1977. The upgraded discharge will not set aside any VA findings, based upon a previous discharge issued for the same period of service, that a servicemember is statutorily barred from receiving VA benefits.

(d) *Upgrades issued after October 7, 1977—effect on character of discharge determinations*—(1) *General rule.* Any new determinations VA makes under § 5.30 will be made without regard to an honorable or general discharge (upgraded discharge) issued by a discharge review board after October 7, 1977. The upgraded discharge will not set aside any VA findings, based upon a previous discharge issued for the same period of service, that a servicemember's discharge or dismissal was under dishonorable conditions.

(2) *Exceptions.* The rule in paragraph (d)(1) of this section does not apply if all of the following conditions are met:

(i) The discharge was upgraded as a result of an individual case review;

(ii) The discharge was upgraded under uniform published standards and procedures that generally apply to all persons administratively discharged or released from active military service under conditions other than honorable; and

(iii) Such published standards are consistent with standards for determining honorable service historically used by the service department concerned and do not contain any provision for automatically granting or denying an upgraded discharge. VA will accept a report of the service department concerned that the discharge review board proceeding met these conditions.

(e) *Effective date.* If entitlement to benefits is established because of the change, modification, or correction of a discharge or dismissal by a discharge review board, the award of such benefits will be effective from the latest of these dates:

(1) The date of filing with the service department of the request for change, modification, or correction of the discharge or dismissal in the case of either an original claim filed with VA or a previously denied claim filed with VA;

(2) The date VA received a previously denied claim; or

(3) One (1) year before the date of reopening of the previously denied VA claim.

(Authority: 38 U.S.C. 501(a), 5110(i), 5303(e))

§ 5.36 Effect of certain special discharge upgrade programs on eligibility for VA benefits.

(a) *Programs involved.* Except as provided in § 5.35(d)(2), an honorable or general discharge awarded by a discharge review board under one of the following programs does not remove any bar to benefits imposed under § 5.30 or § 5.31:

(1) The President's directive of January 19, 1977, implementing Presidential Proclamation 4313 of September 16, 1974;

(2) The Department of Defense's special discharge review program effective April 5, 1977; or

(3) Any discharge review program implemented after April 5, 1977, that does not apply to all persons administratively discharged or released from active military service under other than honorable conditions.

(b) *Discontinuance of awards.* Subject to the provisions of § 5.177, any award of benefits made contrary to paragraph (a) of this section will be discontinued.

(c) *No overpayments to be created.* No overpayments will be created as a result of payments made after October 8, 1977, based on an upgraded honorable or general discharge issued under one of the programs listed in paragraph (a) of this section which would not be awarded under the standards set forth in § 5.35(d)(2). Such payments will be discontinued effective the first day of the month after the month for which VA last paid benefits.

(Authority: 38 U.S.C. 5303(e); Pub. L. 95–126, 91 Stat. 1106)

§ 5.37 Effect of extension of service obligation due to change in military status on eligibility for VA benefits.

(a) *Purpose.* Except for persons who die in military service, status as a veteran requires that a servicemember be discharged or released from active military service under conditions other than dishonorable. See § 5.1, defining ''veteran''. This section describes how VA will determine whether a servicemember has met this requirement when, because of a change in his or her military status, he or she was not discharged or released at the end of the period of time for which he or she was initially obligated to serve.

(b) *Definitions*—(1) *Change in military status.* For purposes of this section, a *change in military status* means a change in status that extends the period that a servicemember is obligated to serve. Examples of such a change in military status include, but are not limited to:

(i) A discharge for acceptance of an appointment as a commissioned officer or warrant officer;

(ii) Change from a Reserve commission to a Regular commission;

(iii) Change from a Regular commission to a Reserve commission;

(iv) Reenlistment; or

(v) Voluntary or involuntary extensions of a period of obligated service.

(2) *Combined periods of service.* For purposes of this section, *combined periods of service* means the period of service immediately prior to the change in military status combined with the period of service immediately following the change in military status.

(c) *Combined periods of service ending under conditions other than dishonorable.* If the combined periods of service ended with discharge or release

under conditions other than dishonorable, then VA will consider the entire period of service as other than dishonorable.

(d) *Combined periods of service ending under dishonorable conditions.* When a servicemember's combined period of service ended under dishonorable conditions and he or she was not discharged or released at the end of the period that he or she was initially obligated to serve, he or she is eligible to receive VA benefits based on that period of service if that servicemember:

(1) Completed active military service for the period he or she was initially obligated to serve; and

(2) Due to an intervening change in military status was not discharged or released at the end of the initial period but would have been eligible for a discharge or release under conditions other than dishonorable at the end of the initial period if not for the intervening change in military status.

(Authority: 38 U.S.C. 101(18))

Cross Reference: § 5.1, for the definition of ''reserve''.

§ 5.38 Effect of a voided enlistment on eligibility for VA benefits.

(a) *Purpose.* This section describes whether a claimant is eligible for VA benefits if the service department has voided the servicemember's enlistment.

(b) *Service considered valid for establishing eligibility for benefits.* A servicemember's enlistment that is voided by the service department for reasons other than those stated in paragraph (c) of this section is valid from the date of entry upon active duty to the date of voidance by the service department. In the case of an enlistment voided for concealment of age or misrepresentation of age, service is valid from the date of entry upon active duty to the date of discharge.

(c) *Service considered not valid for establishing eligibility for benefits.* A servicemember's enlistment that is voided by the service department for any of the reasons specified in this paragraph (c) is void from the date of entry. A servicemember is not eligible for VA benefits based on this period of service, if enlistment was voided for any of the following reasons:

(1) Lack of legal capacity to contract, other than on the basis of minority, such as a lack of mental capacity to contract; or

(2) A statutory prohibition to enlistment, including, but not limited to:

(i) Desertion; or

(ii) Conviction of a felony.

(Authority: 10 U.S.C. 501(a), 505; 38 U.S.C. 101(2), 501(a))

Minimum Service and Evidence of Service

§ 5.39 Minimum active duty service requirement for VA benefits.

(a) *Requirement.* Any person listed in paragraph (b) of this section will not be eligible for VA benefits based on a particular period of active duty service unless that period of service met the requirement for a minimum period of active duty described in paragraph (c) of this section, or the person qualifies for an exclusion under paragraph (d) of this section.

(b) *Applicability.* The minimum active duty service requirement applies to:

(1) Any person who originally enlisted in a regular component of the Armed Forces and entered on active duty after September 7, 1980 (time spent during temporary assignment to a reserve component awaiting entrance on active duty because of a delayed entry enlistment contract does not count; this section applies if the actual date of entry on active duty is after September 7, 1980); and

(2) Any other person (enlisted or officer) who entered on active duty after October 16, 1981, who had not previously completed a continuous period of active duty of at least 24 months.

(c) *Minimum active duty service requirement.* (1) Except for persons excluded in paragraph (d) of this section, a person must have served the shorter of:

(i) Twenty-four (24) months of continuous active duty; or

(ii) The full period of service for which the person was called or ordered to active duty.

(2) If it appears that a person has not met the length of service requirement, VA will request service department records to determine if any of the exclusions described in paragraph (d) of this section apply.

(d) *Exclusions.* The minimum active duty service requirement of this section does not apply to:

(1) Any person who was discharged under an early out program described in 10 U.S.C. 1171.

(2) Any person who was discharged because of a hardship as described in 10 U.S.C. 1173.

(3) Any person who was discharged or released from active duty because of a disability incurred or aggravated in the line of duty:

(i) That, at the time of discharge or release, was determined to be service connected without presumptive provisions of law; or

(ii) That, at the time of discharge, was documented in official service records and, in VA's medical judgment, would have justified a discharge.

(4) Any person who has any disability that is currently compensable under 38 U.S.C. chapter 11 because:

(i) VA evaluates the disability as 10 percent or more disabling according to the Schedule for Rating Disabilities in part 4 of this chapter;

(ii) Special monthly compensation is payable for the disability; or

(iii) The disability, together with one or more other disabilities, is compensable under § 5.282 for paired organs and extremities, of this chapter.

(5) The provision of a benefit for or in connection with a service-connected disability, condition, or death.

(6) Insurance benefits under 38 U.S.C. chapter 19.

(7) Any person who performed active military service under the provisions of § 5.21(a)(4) or (5), VA recognizes as active military service.

(e) *Temporary breaks in service.* Temporary breaks in active duty service for any of the reasons listed below will not be considered to have interrupted the ''continuous service'' requirement of paragraph (c)(1)(i) of this section; however, time lost due to these breaks must be subtracted from the total service time because these times do not count towards the minimum active duty service requirement:

(1) Time lost due to an industrial, agricultural, or indefinite furlough;

(2) Time lost while absent without leave and without pay;

(3) Time lost while under arrest (without acquittal or a dismissal of charges);

(4) Time lost while a deserter; or

(5) Subject to 10 U.S.C. 875(a) (concerning the restoration under certain circumstances of ''all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved''), time lost while serving a court-martial sentence.

(f) *Effect on eligibility for benefits for survivors and dependents*—(1) *General rule.* If a person is ineligible for VA benefits because he or she did not meet the minimum active duty service requirement, the person's dependents and survivors are ineligible for benefits based on that service.

(2) *Exceptions.* Paragraph (f)(1) of this section does not bar entitlement to any of the following VA benefits to which a dependent or survivor may otherwise be entitled:

(i) Insurance benefits under 38 U.S.C. chapter 19;

(ii) Housing or small business loans under 38 U.S.C. chapter 37;

(iii) Benefits described in paragraph (d)(5) of this section; or

(iv) Dependency and indemnity compensation based on the person's death in service.

(Authority: 38 U.S.C. 5303A)

Cross Reference: § 5.1, for the definition of ''reserve component''.

§ 5.40 Service records as evidence of service and character of discharge that qualify for VA benefits.

(a) *Acceptable evidence of service.* To establish entitlement to pension, disability compensation, dependency and indemnity compensation, or burial benefits, VA must have evidence of qualifying service and character of discharge from the service department concerned. Documents VA will accept as evidence of service and character of discharge include, but are not limited to, the following documents:

(1) A DD Form 214; or

(2) A Certificate of Release or Discharge from Active Duty.

(b) *Content of documents.* The document establishing service must contain information which demonstrates:

(1) The length of service;

(2) The dates of service; and

(3) The character of discharge or release.

(c) *When service department verification is not required.* VA will accept one or more documents issued by a U.S. service department as evidence of service and character of discharge without verifying their authenticity, provided that VA determines that the document is genuine and accurate. The document can be a copy of an original document if the copy:

(1) Was issued by a service department;

(2) Is certified by a public custodian of records as a true and exact copy of a document in the custodian's possession; or

(3) Is certified by an accredited agent, attorney, or service organization representative as a true and exact copy of either an original document or of a copy issued by the service department or a public custodian of records. This accredited agent, attorney, or service organization representative must have successfully completed VA-prescribed training on military records.

(d) *When service department verification is required.* VA will request verification of service from the appropriate service department if:

(1) The record does not include satisfactory evidence showing the information described in paragraph (b) of this section;

(2) The evidence of record does not meet the requirements of paragraph (c) of this section; or

(3) There is a material discrepancy in the evidence of record.

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

§§ 5.41–5.49 [Reserved]

Subpart C—Adjudicative Process, General

VA Benefit Claims

§ 5.50 Applications VA furnishes.

(a) *VA will furnish an application upon request.* Upon request, VA will furnish the appropriate application to a person claiming, or expressing intent to claim, benefits under the laws administered by VA.

(b) *VA will furnish an application to a survivor upon the death of a veteran.* Upon the receipt of information of the death of a veteran, VA will furnish the appropriate application to any survivor with apparent entitlement to death pension or dependency and indemnity compensation (DIC). If the available evidence does not indicate that any person has apparent entitlement to death pension or DIC, but an accrued benefit is payable, VA will furnish the appropriate application to the preferred survivor. The letter accompanying the application will state that the claimant has 1 year after the date of the veteran's death to file a claim for accrued benefits, in accordance with § 5.552.

(c) *Claims under 38 U.S.C. 1151.* A claimant may apply in any written form for disability or death benefits due to hospital treatment, medical or surgical treatment, examination, or training under the provisions of 38 U.S.C. 1151. VA does not have an application for such a claim. See § 5.53 for the requirements for filing a claim pursuant to 38 U.S.C. 1151.

(Authority: 38 U.S.C. 501(a), 5101, 5102)

§ 5.51 Filing a claim for disability benefits.

(a) *Requirements for claims for disability benefits.* A person must file a specific claim that is in the form prescribed by the Secretary for VA to grant a claim for disability benefits. If an individual has not attained the age of 18 years, is mentally incompetent, or is physically unable to sign a form, a form filed for the individual may be signed by a court-appointed representative, a person who is responsible for the care of the individual, including a spouse or other relative, or an attorney in fact or agent authorized to act on behalf of the individual under a durable power of attorney. If the individual is in the care of an institution, the manager or principal officer of the institution may sign the form. For purposes of this section, the term mentally incompetent means that the individual lacks the mental capacity to provide substantially accurate information needed to complete a form or to certify that the statements made on a form are true and complete.

(b) *Effect of claims for disability compensation or pension.* VA may consider a claim for disability compensation as a claim for pension, and VA may consider a claim for pension as a claim for disability compensation. VA will award the greater benefit, unless the claimant specifically elects the lesser benefit.

(Authority: 38 U.S.C. 501(a), 5101(a))

Cross Reference: §§ 5.1, for the definition of ''claim''; 5.54, ''Informal claims''.

§ 5.52 Filing a claim for death benefits.

(a) *Requirements for claims for death benefits.* A person must file a specific claim for death benefits by completing and filing the application prescribed by the Secretary (or jointly with the Commissioner of Social Security, as prescribed by § 5.131(a)), or on any document indicating an intent to apply for survivor benefits, for VA to grant death benefits. See §§ 5.431 and 5.538.

(Authority: 38 U.S.C. 501(a), 5101(a))

(b) *Effects of claims for death benefits.* A surviving spouse's or a child's claim:

(1) For DIC is also a claim for death pension; and

(2) For death pension is also a claim for DIC.

(Authority: 38 U.S.C. 501(a), 5101(b)(1))

(c) *Claims for death benefits filed by or for a child*—(1) *Child turns 18 years old.* If a child's entitlement to DIC arises because the child turns 18 years old, the child must file a claim for DIC unless the child is included on the surviving spouse's DIC award. VA will consider a child included on the surviving spouse's DIC award to have filed a DIC claim on his or her 18th birthday. See § 5.696.

(2) *Discontinuance of a surviving spouse's right to DIC or to death pension.* Except as otherwise provided in paragraph (c) of this section, if VA discontinues an award of DIC or death pension to a surviving spouse, a child may file a claim in his or her own right. If VA discontinues an award to a surviving spouse because he or she remarries or dies, VA will consider any child included on the surviving spouse's award to have filed a claim for such benefit in his or her own right on

the date VA discontinued the award to the surviving spouse.

(3) *If a surviving spouse is not entitled to DIC or death pension.* If VA denies a surviving spouse's claim for DIC or death pension, VA will consider the claim to be a claim for a child in the surviving spouse's custody, if the child was named as a dependent in the surviving spouse's application. If VA grants death benefits to the child, the award will be effective as though the child had filed the surviving spouse's denied claim. See §§ 5.431 and 5.538.

(Authority: 38 U.S.C. 501(a), 5110(e))

§ 5.53 Claims for benefits under 38 U.S.C. 1151 for disability or death due to VA treatment or vocational rehabilitation.

VA will consider any communication in writing indicating an intent to file a claim for disability compensation or dependency and indemnity compensation for disability or death due to VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program to be a claim for benefits under 38 U.S.C. 1151 and § 5.350.

(Authority: 38 U.S.C. 1151)

Cross Reference: §§ 5.350–5.353.

§ 5.54 Informal claims.

(a) *Definition. Informal claim* means any written communication VA receives that seeks an identified benefit and that is not on an application.

(b) *Who may file an informal claim.* An informal claim may be filed by:

(1) The claimant;

(2) The claimant's accredited or authorized representative, if appointed before VA received the informal claim (see §§ 14.630 and 14.631 of this chapter for criteria for authorization of representatives);

(3) A Member of Congress; or

(4) A person acting as next friend of the claimant if the claimant does not have the capacity to manage his or her affairs.

(c) *Effect of filing informal claim*—(1) *No application filed previously.* If the claimant has not previously filed an application for the benefit sought, VA will furnish an appropriate application to a person who files an informal claim. If the claimant files the completed application no later than 1 year after VA provided it, VA will treat it as if filed on the date VA received the informal claim. VA will take no action on the informal claim until the claimant files the completed application. If VA does not require an application for the benefit sought, VA may accept the informal claim as sufficient without regard to the procedures in this paragraph (c). See, for example, § 5.53.

(2) *Application filed previously*—(i) *Disability benefits.* If a claimant previously filed an application for disability benefits that met the requirements of § 5.51, VA will accept an informal claim to increase or to reopen a claim for disability benefits without requiring another application, except as provided in § 5.56.

(ii) *Death benefits.* If a claimant previously filed an application for death benefits that met the requirements of § 5.52, VA will accept an informal claim to increase or to reopen a claim for death benefits without requiring any other application, except as provided in § 5.588.

(Authority: 38 U.S.C. 501(a), 5102(a))

§ 5.55 Claims based on new and material evidence.

(a) *Reopening a claim.* A claimant may reopen a claim if VA has made a final decision denying the claim. See § 5.1 for the definition of ''final decision''.

(b) *New and material evidence.* To reopen a claim, the claimant must present or VA must secure new and material evidence. If VA receives a claim to reopen, it will determine whether evidence presented or secured to reopen the claim is new and material.

(c) *Merits of a claim.* If the claimant has presented or VA has secured new and material evidence, VA will reopen and decide the claim on its merits.

(d) *Definitions.* New and material evidence meets the following criteria:

(1) *New evidence* is:

(i) Evidence the claimant presented or VA secured since VA last made a final decision denying the claim the claimant seeks to reopen; and

(ii) Not cumulative or redundant of evidence of record at that time.

(2) For purposes of paragraph (d)(1)(i) of this section, evidence that was submitted with, but not considered by, the Board of Veterans' Appeals (the Board) under the circumstances described in § 20.1304(b)(1) of this chapter will be treated as evidence received after VA last made a final decision on the claim.

(3) *Material evidence* is evidence that, by itself or when considered with evidence of record when VA made the final decision,

(i) Relates to an unestablished fact necessary to substantiate the claim; and

(ii) Raises a reasonable possibility of substantiating the claim.

(e) *Effective date.* Except as otherwise provided in this chapter, if VA reopens a claim based on new and material evidence and grants the benefit sought, the award is effective on the date entitlement arose or the date that VA received the claim to reopen, whichever is later.

(Authority: 38 U.S.C. 501(a), 5103A(f), 5108, 5110(a))

Cross Reference: § 20.1304(b)(1)(i) of this chapter for the rule on effective date assigned when evidence is submitted to the Board during a pending appeal.

§ 5.56 Report of examination, treatment, or hospitalization as a claim.

(a) *Scope.* This section describes situations in which VA will accept certain medical evidence as a claim for benefits that meets the requirement that a claimant file a claim.

(b) *Claims excluded.* VA's receipt of a report of examination, treatment, or hospitalization is a claim under this section only under the circumstances described in paragraph (c) of this section. VA will not accept a report of examination, treatment, or hospitalization as a claim for service connection.

(c) *Claims included.* For purposes of this section, VA's receipt of evidence as described in paragraph (d) of this section is a claim under any of the following circumstances:

(1) *Veteran previously granted service connection.* If VA previously granted service connection in a final decision, even if a 0 percent rating was assigned, VA's receipt of evidence will be considered a claim for increased compensation if the evidence relates to the service-connected condition(s).

(2) *VA previously granted pension.* If VA previously granted a claim for pension, VA's receipt of evidence will be considered a claim for increased pension.

(3) *VA previously granted a claim for service connection but the veteran elected retired pay, or VA denied a claim for pension because the veteran was receiving retired pay.* If VA previously granted service connection but the veteran elected retired pay, or VA previously denied a claim for pension because of the veteran's receipt of retired pay, VA's receipt of evidence will be considered a claim for pension or compensation.

(4) *VA previously denied a claim for pension because the veteran was not permanently and totally disabled.* If VA previously denied a claim for pension in a final decision because the veteran was not permanently and totally disabled, VA's receipt of evidence will be considered a claim for pension.

(d) *Evidence*—(1) *Report of examination, treatment, or hospitalization at a VA or uniformed*

services facility, or at any other facility at VA expense.

(i) *General rule.* VA will consider an examination, treatment, or hospitalization report at a VA or uniformed services medical facility, or at any other medical facility where the veteran was maintained at VA expense, to be a claim under the circumstances described in paragraph (c) of this section.

(ii) *Date of claim.* The date of receipt of a claim under paragraph (c) of this section is:

(A) The date of a veteran's examination, treatment, or hospitalization at a VA or uniformed services medical facility;

(B) The date of pre-authorized admission to a non-VA hospital at VA expense;

(C) The date of a uniformed service examination that is the basis for granting severance pay to a former member of the Armed Forces on the temporary disability retired list; or

(D) The date VA received notice of admission to a non-VA hospital, if VA authorized the admission at VA expense after the date of admission.

(2) *Evidence from a private physician or lay person*—(i) *General rule.* VA will consider evidence from a private physician or lay person to be a claim under paragraph (c) of this section if the evidence is within the competence of the physician or lay person and it shows a reasonable probability of entitlement to benefits.

(ii) *Date of claim.* The date VA receives the evidence from a private physician or lay person will be the date of the claim.

(3) *Evidence from State and other institutions*—(i) *General rule.* VA will consider examination reports, clinical records, or transcripts of records from State, county, municipal, or recognized private institutions, or other Government hospitals to be a claim for benefits under paragraph (c) of this section, except those described in paragraph (d)(1) of this section. An appropriate official of the institution must authenticate these records. VA will grant benefits if the records are adequate for rating purposes and demonstrate entitlement to an increased rating, to pension, or to special monthly pension; otherwise findings must be verified by VA examination. The VA Under Secretary for Health or his or her physician designee must certify reports received from private institutions not listed by the American Hospital Association.

(ii) *Date of claim.* If filed by or for the veteran, the date VA receives such evidence will be the date of the claim.

(e) *Liberalizing law or VA issue.* The provisions of § 5.152 apply to claims accepted under this section in the same manner as they apply to other formal and informal claims.

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

§ 5.57 Claims definitions.

The following definitions apply to claims for disability benefits, death benefits, and monetary allowance under 38 U.S.C. chapter 18.

(a) *Informal claim.* See § 5.54.

(b) *Original claim* means the first claim VA receives from a person for disability benefits, for death benefits, or for monetary allowance under 38 U.S.C. chapter 18. See §§ 5.51, 5.52, 5.589, and 5.590.

(c) *Pending claim* means a claim in which VA has not made a final decision. See § 5.1 for the definition of ''final decision.''

(d) *Claim for increase* means any claim for an increase in the rate of a benefit VA is paying under a current award, or for resumption of payments previously discontinued.

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

§§ 5.58–5.79 [Reserved]

Rights of Claimants and Beneficiaries

§ 5.80 Right to representation.

Subject to the provisions of §§ 14.626 through 14.637 of this chapter, a claimant or beneficiary is entitled to the representation of his or her choice at every stage in the claims process. When VA initially contacts a claimant or beneficiary by mail, VA will also include written notice of his or her right to representation.

(Authority: 38 U.S.C. 501(a), 5901–5904)

Cross Reference: § 19.25 of this chapter, ''Notification by agency of original jurisdiction of right to appeal,'' which includes notification of the right to representation.

§ 5.81 Submission of information, evidence, or argument.

VA will include in the evidence of record any document, testimony, argument, or other information in any form that a claimant provides VA in support of a claim or of an issue raised in the claim.

(Authority: 38 U.S.C. 501(a), 5107(b))

§ 5.82 Right to a hearing.

(a) *General.* This section pertains only to hearings in matters under the jurisdiction of a VA agency of original jurisdiction. See §§ 20.700 and 20.1304 of this chapter for the provisions concerning a claimant's or beneficiary's right to a hearing with the Board of Veterans' Appeals. See § 14.633 of this chapter for the provisions concerning an accredited representative's right to request a hearing.

(1) *The one-hearing rule.* Except as provided in paragraph (f) of this section, upon request, a claimant or beneficiary is entitled to one hearing before the agency of original jurisdiction at any time on any issue or issues involved in a pending matter. When VA sends written notice of a decision to a claimant or of a proposed reduction, discontinuance, or other adverse action under § 5.83 to a beneficiary, VA will also include notice of the right to a hearing. Except as provided in paragraph (a)(2) of this section, a claimant or beneficiary who had a hearing before the Board of Veterans' Appeals (Board) reviewed the matter is not entitled to an additional hearing after that matter is remanded by the Board to the agency of original jurisdiction.

(2) *Exception to the one-hearing rule.* A claimant or beneficiary will be provided one additional hearing at the agency of original jurisdiction on any issue involved in a matter when the claimant or beneficiary asserts all of the following:

(i) He or she has discovered a new witness or new evidence to substantiate the claim;

(ii) He or she can present that witness or evidence only at an oral hearing; and

(iii) The witness or evidence could not have been presented at the original hearing.

(b) *Purpose of hearings.* The purpose of a hearing under this section is to provide the claimant or beneficiary with an opportunity to introduce into the record, in person, any available evidence or arguments that he or she considers important to the matter.

(c) *Where VA will conduct hearings.* VA will conduct the hearing in the VA office that has jurisdiction over the matter or in the VA office with adjudicative functions nearest the claimant's or beneficiary's residence. Subject to available resources and solely at the option of VA, VA may hold the hearing at any other VA facility or federal building with suitable facilities.

(d) *VA responsibilities in conjunction with hearings.* (1) VA will provide advance written notice to a claimant or beneficiary of the time and place of the hearing at least 10 days before the scheduled hearing date. The claimant or beneficiary may waive the 10-day advance notice requirement. If the hearing arises in the context of a proposed reduction, discontinuance, other adverse action, or in an appeal, a VA employee or employees having

decision-making authority and who did not previously participate in the case will conduct the hearing. The employee or employees will establish a record of the hearing and will issue a decision after the hearing.

(2) The VA employee or employees conducting the hearing will explain fully the issues and suggest the submission of evidence the claimant or beneficiary may have overlooked that would tend to prove the matter. To ensure clarity and completeness of the hearing record, questions directed to the claimant or beneficiary, or to witnesses, will be framed to explore fully the basis for entitlement rather than with intent to refute evidence or to discredit testimony. The employee, or employees, conducting the hearing will ensure that all testimony is given under oath or affirmation.

(3) If a hearing is conducted, VA will make a decision based upon evidence and testimony presented during the hearing in addition to all other evidence of record.

(e) *Claimant's and beneficiary's rights and responsibilities in conjunction with hearings.* (1) The claimant or beneficiary is entitled to have witnesses testify. The claimant or beneficiary, and witnesses, must appear at the hearing, in person or by videoconferencing. Normally, VA will not schedule a hearing for the sole purpose of receiving argument from a representative, but VA may grant a request for such a hearing if good cause is shown.

(2) All expenses incurred by the claimant or beneficiary in conjunction with the hearing are the responsibility of the claimant or beneficiary.

(3) If a claimant or beneficiary is unable to attend a scheduled hearing, he or she may contact VA in advance to reschedule the hearing for a date and time which is acceptable to both parties.

(4) If a claimant or beneficiary fails to report for a scheduled hearing

(i) Without good cause, VA will decide the claim based on the evidence of record without a hearing.

(ii) With good cause, VA will reschedule the hearing after the claimant or beneficiary informs VA that the cause of the failure to report has resolved and requests that VA reschedule the hearing. Examples of good cause include, but are not limited to, illness or hospitalization of the claimant or beneficiary, or death of an immediate family member.

(f) *Additional requirements for hearings before proposed adverse actions.* Except as otherwise provided in § 5.83(c), VA will provide written notice of the right to a hearing before VA reduces, discontinues, or otherwise adversely affects benefits. VA will conduct a hearing before the adverse action only if VA receives a request for one no later than 30 days after the date of the notice of the proposed action.

(1) If the beneficiary does not timely request a hearing, or fails without good cause to report for a scheduled hearing, VA will make the decision on the proposed action based on the evidence of record.

(2) If VA receives a request for a hearing no later than 30 days after the date of the notice of the proposed action, VA will send the beneficiary written notice of the time and place for the hearing.

(3) VA will send the written notice of the time and place of the hearing at least 10 days before the scheduled hearing date. The beneficiary may waive the 10-day advance notice requirement.

(4) If a beneficiary timely requests a hearing, VA will not make the decision reducing, discontinuing, or otherwise adversely affecting benefits before the scheduled date of the hearing.

(5) If a hearing is conducted, VA will make the decision based upon evidence and testimony presented during the hearing in addition to all other evidence of record.

Cross Reference: See §§ 5.162, 5.163, 5.175, 5.83(a), and 5.177 for the procedures VA follows when revising decisions and the effective date of these decisions.

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

§ 5.83 Right to notice of decisions and proposed adverse actions.

(a) *VA will send an advance notice of a proposed adverse action.* (1) Except as provided in paragraph (c) of this section, VA will send written notice of a proposed adverse action to a beneficiary at least 60 days before it reduces or discontinues benefits, severs service connection, or otherwise adversely affects the beneficiary's receipt of benefits. The notice will include:

(i) Detailed reasons for the proposed adverse action and a statement of the material facts;

(ii) The right to a hearing on the proposed adverse action as provided in § 5.82(f); and

(iii) Notification that the beneficiary has 60 days to submit evidence or argument to show why VA should not take the proposed adverse action.

(2) If VA receives no additional evidence or argument within the 60-day period, or the evidence or argument received does not demonstrate that the proposed adverse action should not be taken, then VA will take the action and provide notice to the beneficiary in accordance with paragraph (b) of this section.

(b) *VA will send a notice of a decision.* VA will send to a claimant or beneficiary written notice of any decision that affects the payment of benefits or the granting of relief to that claimant or beneficiary. The notice will explain:

(1) If a claim is not fully granted, the reason for the decision and a summary of the evidence considered;

(2) The effective date of the decision;

(3) The right to a hearing on any issue involved in the claim, in accordance with § 5.82;

(4) The right to representation in accordance with § 5.80; and

(5) The right to appeal, including how and when to exercise this right to appeal. (Appellate procedures are found in part 20 of this chapter.)

Cross Reference: See §§ 5.162, 5.163, 5.175, 5.83(a), and 5.177 for procedures applicable to the type of action VA is taking.

(c) *When VA will send a contemporaneous notice of reduction, discontinuance, or other adverse action.* VA will send a written notice to a beneficiary at the same time it reduces, discontinues, or otherwise takes an adverse action under any of the circumstances described in paragraphs (c)(1) through (6) of this section.

(1)(i) The adverse action results solely from information or statements, provided orally or in writing to VA by the beneficiary or the fiduciary, as to income, net worth, dependency, or marital status;

(ii) The information or statements are factual and unambiguous; and

(iii) The beneficiary or fiduciary has knowledge or notice that such information or statements may be used to calculate benefit amounts. See § 5.130 for procedures governing the submission by a beneficiary or by his or her fiduciary of oral or written information or statements.

(2) The adverse action results from the beneficiary's or fiduciary's failure to return an eligibility verification report as required by § 5.708.

(3) VA receives credible evidence indicating that a beneficiary has died. However, VA is not required to send a notice of discontinuance of benefits (contemporaneous or otherwise) if VA receives:

(i) A death certificate;

(ii) A terminal hospital report verifying the death of a beneficiary;

(iii) A claim for VA burial benefits;

(iv) An ''Application for United States Flag for Burial Purposes''; or

(v) A ''Record of Interment'' from the National Cemetery Administration.

(4) The adverse action results from a beneficiary's written and signed statement renouncing benefits (see § 5.683 on renouncement).

(5) The adverse action results from a veteran's written and signed statement that he or she has returned to active military service. The statement must include each of the following:

(i) The branch of service;

(ii) The date of reentry into service;

(iii) The veteran's acknowledgement that receipt of active military service pay precludes receipt for the same period of VA disability compensation or pension. See § 5.746 regarding active service pay.

(6) The adverse action results from a garnishment order issued under 42 U.S.C. 659(a), allowing the U.S. to consent to garnishment or withholding of pay for members of the Armed Forces and, in certain circumstances, disability compensation, to enforce child support and alimony obligations. See 42 U.S.C. 659(h)(1)(A)(ii)(V) for the limited circumstance of garnishing certain disability pay.

(Authority: 38 U.S.C. 501(a), 5104)

§ 5.84 Restoration of benefits following adverse action.

(a) (1) If VA reduces or discontinues benefits, or takes other action adverse to a beneficiary, based upon written information or an oral statement provided by the beneficiary or fiduciary, VA will retroactively restore such benefits if the beneficiary or fiduciary asserts, no later than 30 days after the date of the VA notice of adverse action, either of the following:

(i) The written information or oral statement is inaccurate.

(ii) The written information or oral statement was not provided by the beneficiary or his or her fiduciary.

(2) This paragraph (a) does not limit the right of a beneficiary to have benefits retroactively restored based on evidence submitted within the 1-year appeal period under § 5.153.

(b) Restoration of benefits under this section does not preclude VA from later taking action that adversely affects the beneficiary's receipt of benefits based on the written information or oral statements referred to in paragraph (a) of this section.

(Authority: 38 U.S.C. 501(a), 5103(b)(3), 5104)

§§ 5.85–5.89 [Reserved]

Duties of VA

§ 5.90 VA assistance in developing claims.

(a) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Substantially complete application* means an application containing the following:

(i) The claimant's name; his or her relationship to the veteran, if applicable;

(ii) Sufficient service information for VA to verify the claimed service, if applicable;

(iii) The benefit claimed and any medical condition(s) on which it is based;

(iv) The claimant's signature; and

(v) In claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income.

(2) For purposes of paragraph (c)(4)(i) of this section, *event* means one or more incidents associated with places, types, and circumstances of service giving rise to a disability or disabilities.

(3) Information means non-evidentiary facts, including, but not limited to the following:

(i) The claimant's Social Security number or address;

(ii) The name and military unit of a person who served with the veteran; or

(iii) The name and address of a medical care provider who may have evidence pertinent to the claim.

(b) *VA's duty to send notice to claimants of necessary information or evidence.* (1)(i) When VA receives an application for benefits, it will send the claimant written notice of any information and medical or lay evidence that is necessary to substantiate the claim. In the notice, VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. The claimant must provide the information and evidence requested by VA no later than 1 year after the date of the notice. If VA has not received the information and evidence by 30 days after the notice, then VA may decide the claim prior to the expiration of the 1-year period. VA will decide the claim based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA does so, and the claimant subsequently provides the information and evidence no later than 1 year after the date of the notice, then VA must readjudicate the claim.

(Authority: 38 U.S.C. 5103)

(ii) The provisions of this paragraph (b) apply to all applications for benefits under part 5 of this chapter unless VA awards the claimant the maximum benefit without providing notice of any information and evidence that is necessary to substantiate the claim. (For purposes of this section, the term ''maximum benefit'' means the highest evaluation assignable in accordance with the evidence of record, as long as such evidence is adequate for rating purposes and sufficient to grant the earliest possible effective date in accordance with 38 U.S.C. 5110.) If substantiating evidence is required with respect to the veracity of a witness or the authenticity of documentary evidence timely filed, there will be allowed for the submission of such evidence 1 year after the date of the request therefor. However, any evidence to enlarge the proofs and evidence originally submitted is not considered substantiating evidence.

(2) If VA receives an incomplete application for benefits, it will send written notice to the claimant of the information necessary to complete the application and will defer assistance to substantiate the claim until the claimant submits this information.

(3) If the information VA requests under paragraph (b)(1) or (2) of this section, or the evidence requested under paragraph (b)(1) of this section, is not received by 1 year after the date of the notice, pension, compensation, or dependency and indemnity compensation may not be paid by reason of that application. If a claimant submits information or evidence concerning his or her mailing address, that is not considered information or evidence under this paragraph (b).

(Authority: 38 U.S.C. 5102(b), 5103(a), 5103A(3))

(4) No duty to provide the notice described in paragraph (b)(1) of this section arises:

(i) Upon receipt of a Notice of Disagreement; or

(ii) When, as a matter of law, entitlement to the benefit claimed cannot be established.

(Authority: 38 U.S.C. 5103(a), 5103A(a)(2))

(c) *VA's duty to assist a claimant in obtaining evidence.* Upon receipt of a substantially complete application for benefits, VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. In addition, VA will give the assistance described in paragraphs (c)(1) through (3) of this section to an individual attempting to reopen a finally decided claim. VA will not pay any fees charged by a custodian to provide records requested.

(1) *Obtaining records not in the custody of a Federal department or agency.* VA will make reasonable efforts

to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records.

(Authority: 38 U.S.C. 5103A(b))

(2) *Obtaining records in the custody of a Federal department or agency.* VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service treatment records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records.

(Authority: 38 U.S.C. 5103A(b))

(3) *Obtaining records in disability compensation claims.* In a claim for disability compensation, VA will make efforts to obtain the claimant's service treatment records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment at non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(Authority: 38 U.S.C. 5103A(c))

(4) *Providing medical examinations or obtaining medical opinions.* (i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in §§ 5.261 through 5.268 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (c)(4)(i)(C) of this section could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(iii) This paragraph (c)(4) applies to a claim to reopen a finally adjudicated claim only if new and material evidence is presented or secured.

(Authority: 38 U.S.C. 5103A(d))

(d) *Circumstances where VA will refrain from or discontinue providing assistance.* VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

(1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) Claims that are inherently incredible or clearly lack merit; and

(3) An application requesting a benefit to which the claimant is not entitled as a matter of law.

(Authority: 38 U.S.C. 5103A(a)(2))

(e) *Duty to inform claimant of inability to obtain records.* (1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. In either case, the notice must contain the following information:

(i) The identity of the records VA was unable to obtain;

(ii) An explanation of the efforts VA made to obtain the records;

(iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(iv) A notice that the claimant is ultimately responsible for providing the evidence.

(2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will send notice to the claimant of the records and request that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will request that the claimant obtain the records and provide them to VA.

(Authority: 38 U.S.C. 5103A(b)(2))

(f) *Notice.* For purpose of the notice requirements in paragraphs (b) and (e) of this section, *notice to the claimant* means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any.

(Authority: 38 U.S.C. 5102(b), 5103(a))

(g) *Secretary's Discretion.* The authority recognized in subsection (g) of 38 U.S.C. 5103A is reserved to the sole discretion of the Secretary and will be implemented, when deemed appropriate by the Secretary, through the promulgation of regulations.

(Authority: 38 U.S.C. 5103A(g))

§ 5.91 Medical evidence for disability claims.

(a) *Medical evidence rendering VA examination unnecessary.* VA may adjudicate a claim without providing a VA examination or period of hospital observation if any private or government examination or hospital report of record is adequate to adjudicate the claim.

(b) *Rating injuries and conditions obviously incurred in service.* VA may assign a rating for combat injuries or other conditions that obviously were incurred in service as soon as sufficient evidence to rate the severity of the condition is available, even if VA has not yet received the claimant's enlistment examination and other service records.

(Authority: 38 U.S.C. 1154, 5103A, 5125)

§ 5.92 Independent medical opinions.

(a) *General.* When warranted by the medical complexity or controversy involved in a pending claim, an advisory medical opinion may be obtained from one or more medical experts who are not employees of VA. Opinions will be obtained from recognized medical schools, universities, clinics or medical institutions with which arrangements for such opinions have been made, and an appropriate official of the institution will select the individual expert(s) to render an opinion.

(b) *Requests.* A request for an independent medical opinion in conjunction with a claim pending at the regional office level may be initiated by the office having jurisdiction over the claim, by the claimant, or by his or her representative. The request must be submitted in writing and must set forth in detail the reasons why the opinion is necessary. All such requests will be submitted through the Veterans Service Center Manager or the Pension Management Center Manager of the office having jurisdiction over the claim, and those requests which in the judgment of that official merit consideration will be referred to the Compensation Service or Pension and Fiduciary Service for approval.

(c) *Approval.* Approval will be granted only upon a determination by the Compensation Service that the issue under consideration poses a medical problem of such complexity, or has generated such controversy in the medical community at large, as to justify solicitation of an independent medical opinion. When approval has been granted, the Compensation Service will obtain the opinion. A determination that an independent medical opinion is not warranted may be contested only as part of an appeal on the merits of the decision rendered on the primary issue by the agency of original jurisdiction.

(d) *Notification.* The Compensation Service will send written notice to the claimant when the request for an independent medical opinion has been approved with regard to his or her claim and will furnish the claimant with a copy of the opinion when it is received. If, in the judgment of the Secretary, disclosure of the independent medical opinion would be harmful to the physical or mental health of the claimant, disclosure will be subject to the special procedures set forth in § 1.577 of this chapter.

(Authority: 5 U.S.C. 552a(f)(3); 38 U.S.C. 5109, 5701(b)(1))

§ 5.93 Service records which are lost, destroyed, or otherwise unavailable.

(a) *Records in the custody of the Department of Defense.* When records that are potentially relevant to a claim for benefits and that were in the custody of the Department of Defense have been lost or destroyed, or otherwise have become unavailable, VA will not deny the claim without attempting to obtain potentially relevant evidence from alternative sources. (Examples of evidence from alternative sources are listed in paragraph (c) of this section.)

(b) *Destruction due to fire at the National Personnel Records Center.* On July 12, 1973, there was a fire at the National Archives and Records Administration's National Personnel Records Center (NPRC). When the NPRC reports that it does not have the claimant's records because they were destroyed by this fire, VA will not deny the claim without attempting to obtain potentially relevant evidence from alternative sources. (Examples of evidence from alternative sources are listed in paragraph (c) of this section). The following are the two main groups of records destroyed by the NPRC fire:

(1) *Army.* Records for certain Army veterans who served between November 1, 1912, and January 1, 1960. Records of Army retirees who were alive on July 12, 1973, were not destroyed by the fire because they were stored at a different location.

(2) *Air Force.* Records for certain Air Force veterans with surnames ''Hubbard'' through Z who were discharged between September 25, 1947, and January 1, 1964, and had no retired or Reserve status.

(c) *Evidence from alternative sources.* Depending on the facts of the case, sources of potentially relevant evidence from alternative sources for records described in paragraphs (a) or (b) of this section include the following:

(1) A claimant's personal copies of discharge papers, service treatment records, or other evidence of military service;

(2) State Adjutant Generals' offices or State historical commissions;

(3) The Office of Personnel Management (if the veteran was employed by a Federal or State agency), a private employer, or the Railroad Retirement Board (if the veteran was employed by a railroad);

(4) The Social Security Administration;

(5) VA or military files or records relating to an earlier claim filed with VA;

(6) Service medical personnel or people who knew the veteran during his or her service;

(7) State or local accident and police reports from the time and place the veteran served;

(8) Employment physical examinations or insurance examinations;

(9) Hospitals, clinics, or private physicians who treated a veteran, especially soon after separation, or pharmacies that filled prescriptions;

(10) Letters written during service or photographs taken during service.

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

§§ 5.94–5.98 [Reserved]

Responsibilities of Claimants and Beneficiaries

§ 5.99 Extensions of certain time limits.

(a) *Requests for extension.* A time limit specified in this part for providing information or evidence necessary to substantiate a claim or for challenging a decision by an agency of original jurisdiction may be extended for good cause.

(b) *Form and filing of request.* The request for extension of time must be in writing and state why more time is needed. It must be filed with the VA office that made the decision or required the information or evidence, unless VA has sent notice to the claimant that his or her VA file has been transferred to another VA office.

(c) *Late Requests.* If the claimant requests an extension after the expiration of the applicable time limit, the claimant must complete the action required in paragraph (a) of this section prior to or concurrently with filing the request for the extension. The request for the extension must state why the required action could not have been taken during the applicable time limit and could not have been taken sooner than it was. VA will grant the extension if good cause is shown, but no extension will be granted if VA has made a decision on the claim to which the required information or evidence relates and the time to appeal that decision has expired. See § 20.304 of this chapter.

(d) *Appeals of denial of a request for extension.* Denial of an extension under this section is a separately appealable issue.

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

§ 5.100 Time limits for claimant or beneficiary responses.

(a) In computing the time limit for any action required of a claimant or beneficiary, including the filing of claims or evidence requested by VA, the first day of the specified period will be excluded and the last day included. This rule is applicable in cases in which the time limit expires on a workday. Where the time limit would expire on a Saturday, Sunday, or Federal holiday, the next succeeding workday will be included in the computation.

(b) The first day of the specified period referred to in paragraph (a) of this section will be the date of mailing of notice to the claimant or beneficiary of the action required and the time limit therefor. The date of the letter of notice will be considered the date of mailing for purposes of computing time limits. Regarding appeals, see §§ 20.302 and 20.305 of this chapter.

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

§ 5.101 Requirement to provide Social Security numbers.

(a) *General requirement to provide Social Security number or Taxpayer Identification Number.* If requested to do so by VA, each claimant for, or beneficiary of, disability compensation, pension, dependency and indemnity compensation, or a monetary benefit under 38 U.S.C. chapter 18 must provide to VA his or her Social Security number, or Taxpayer Identification Number (TIN) if that person is not an individual, as well as the Social Security number of any dependent or other person to or for whom benefits are sought or received. Anyone who signs a form on behalf of such an individual must also provide his or her Social Security number or TIN if requested to do so by VA.

(b) *Individuals receiving VA benefits.* If, within 60 days after VA's request, a beneficiary fails to provide a Social Security number or to show that no Social Security number or TIN was assigned, then VA will take the following action:

(1) If the beneficiary fails to provide his or her own Social Security number or TIN, then VA will discontinue benefits.

(2) If the beneficiary fails to provide the Social Security number or TIN of any dependent to or for whom benefits are being paid, then VA will reduce the benefits payable by the amount payable to or for such dependent. However, VA may still consider that dependent's income for purposes of determining entitlement to income-based benefits.

(c) *Effective date of reduction or discontinuance.* If VA has not received the requested Social Security number or TIN 60 days after VA's request, then VA will discontinue or reduce benefits under paragraph (b) of this section effective the first day of the month after the 60-day period expires.

(d) *Effective date of resumed payments.* If a beneficiary provides VA with the requested Social Security number or TIN, VA will resume payment of benefits at the prior rate, effective on the date VA received the Social Security number, provided that payment of benefits at that rate is otherwise in order.

(e) *Claimant's application for VA benefits.* If, within 30 days after VA's request, the claimant fails to provide the requested Social Security number or TIN, or to show that no Social Security number or TIN was assigned, then VA will deny the claim. If a claimant fails to provide the Social Security number or TIN of a dependent, then VA will deny benefits for the dependent. If VA denies the claim or denies benefits for the dependent, and the claimant subsequently provides the Social Security number or TIN no later than 1 year after the notice of that decision, then VA must readjudicate the claim.

(f) *When a Social Security number or TIN is not required.* A claimant or beneficiary is not required to provide a Social Security number or TIN for any person to whom a Social Security number or TIN has not been assigned.

(Authority: 38 U.S.C. 501(a), 1832, 5101(c))

§ 5.102 Reexamination requirements.

(a) *General.* VA may reexamine a beneficiary, or require a period or periods of hospital observation, at any time to ensure that the beneficiary's disability rating is accurate. For example, VA may reexamine a beneficiary if evidence indicates that the disability for which VA is making payments may no longer exist or may have improved to such a degree that a reduced rating might be appropriate; or if reexamination is otherwise necessary to ensure that the disability is accurately evaluated. Paragraphs (c) and (d) of this section provide general guidelines for scheduling reexaminations, but do not limit VA's authority to schedule reexaminations or periods of hospital observation at any time in order to ensure that a disability is accurately rated.

(b) *Beneficiaries are required to report for scheduled reexaminations.* A beneficiary must report for a VA-scheduled reexamination. If he or she does not report, VA will take the steps described in § 5.103.

(c) *Scheduling reexaminations in disability compensation cases.* The following rules apply to disability compensation cases:

(1) *General rule.* As a general rule, if periodic future reexaminations are warranted, VA may schedule such reexaminations to occur between 2 and 5 years after the date on which VA last examined the beneficiary, unless some other law or regulation specifies another time period.

(2) *When VA will not schedule periodic reexaminations.* VA will not schedule periodic future reexaminations under the following circumstances:

(i) The disability is static;

(ii) Medical examinations or hospital reports show that the symptoms and findings of the disability have persisted without significant improvement for at least 5 years;

(iii) The beneficiary has reached age 55, except in unusual circumstances;

(iv) The disability in question is rated at a prescribed mandatory minimum level under the Schedule for Rating Disabilities in part 4 of this chapter; or

(v) The combined disability rating would not decrease even if a reexamination for the specific disability at issue would result in a decreased rating for that disability; however, if a reexamination potentially would reduce an award of special monthly compensation, reexamination may be warranted even if the combined disability rating would not be reduced. See § 4.25 of this chapter for information on ''combined ratings'' and how they are calculated.

(3) *Discharge from service with unstabilized disability.* If a person is discharged from military service with a disability that has not yet become stable or with a disability caused by a wound or injury that has not yet completely healed, VA may, pursuant to § 4.28 of this chapter, temporarily assign a prestabilization disability rating of either 100 percent or 50 percent to the disability. If VA assigns a prestabilization rating under § 4.28 of this chapter, VA will schedule a reexamination to occur 6 to 12 months after the date the person separates from service, to determine the appropriate schedular rating under the Schedule for Rating Disabilities in part 4 of this chapter.

(d) *Pension cases.* The following rules apply to pension cases:

(1) If the beneficiary has reached age 55, VA will schedule a reexamination only in unusual circumstances.

(2) VA generally will not schedule a reexamination if it is obvious that the disability is unlikely to improve over the long term or the medical history has confirmed the presence of a permanent and total nonservice-connected disability. In other cases, VA will reexamine only in unusual circumstances.

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

§ 5.103 Failure to report for VA examination or reexamination.

(a) *General.* VA will schedule a VA examination when needed to establish entitlement to a benefit or to an increased disability rating. VA will schedule a VA reexamination when needed to confirm continued entitlement to a benefit or continued entitlement to a particular disability rating. If a claimant or beneficiary, with good cause, fails to report for a VA examination or reexamination, VA will reschedule the examination or reexamination. Examples of good cause are listed in paragraph (f) of this section.

(b) *Failure without good cause to report for a scheduled examination: Claimants.* If a claimant, without good cause, fails to report for a VA examination, VA will decide the claim as follows:

(1) For an original disability compensation claim, VA will make a decision based on the evidence of record.

(2) For any other original claim, reopened claim, or a claim for increase, VA will deny the claim.

(c) *Failure without good cause to report for a scheduled reexamination: Beneficiary.* (1) *Continuing entitlement to a benefit.* If a beneficiary fails, without good cause, to report for a VA reexamination and continuing entitlement to the benefit cannot be confirmed without a VA reexamination, VA will propose to discontinue the benefit.

(2) *Continuing entitlement to a particular rating.* If a beneficiary fails, without good cause, to report for a VA reexamination and continuing entitlement to a particular disability rating for one or more of the beneficiary's disabilities cannot be confirmed without a VA reexamination, VA will propose to reduce the rating for the disability or disabilities at issue to one of the following, as applicable:

(i) The highest disability rating assigned to that disability that is protected under § 5.170(a).

(ii) The rating specified as the minimum rating permitted for that disability under the Schedule for Rating Disabilities in part 4 of this chapter.

(iii) Zero percent, unless the rating is protected under the provisions of § 5.170 or the Schedule for Rating Disabilities in part 4 of this chapter prescribes a minimum rating for the disability or disabilities.

Cross Reference: See § 5.170, ''Calculation of 5-year, 10-year, and 20-year protection periods''.

(d) *Advance notice of proposed discontinuance or reduction.* (1) Notice. If VA proposes to discontinue or reduce payment under paragraph (b) or (c) of this section, VA will send written notice to the beneficiary of its intended action. The notice must include the date on which the proposed discontinuance or reduction will be effective, and the beneficiary's procedural rights as listed in § 5.83(a)(1) through (4).

(2) *Time period during which the beneficiary must respond.* VA must receive either notification that the beneficiary will report for reexamination or evidence showing that VA should not discontinue or reduce payments no later than 60 days after the date of VA's notice. If VA receives notification that the beneficiary will report for reexamination, it will schedule a reexamination. If VA receives evidence showing that VA should not discontinue or reduce payments, it will not do so.

(3) *No response or inadequate response.* If VA does not receive the notification or evidence required by paragraph (d)(2) of this section, VA will take the action described in the notice referred to in paragraph (d)(1) of this section. The action will be effective on the date identified in the notice or the first day of the month after the month for which VA last paid benefits to the beneficiary, whichever is later.

(4) *Hearing.* The beneficiary may request a hearing to challenge VA's proposed adverse action as provided in § 5.82(f). If, 30 days after the notice, VA has not received the beneficiary's request for a hearing, then VA will discontinue or reduce payments effective on the date the notice specified or the first day of the month after the month for which VA last paid benefits, whichever is later, unless evidence is presented that warrants a different determination.

(5) *Rescheduled reexamination.* The beneficiary may ask VA to schedule another date for reexamination, either instead of or in addition to asking for a hearing. If VA receives the request to reschedule before the payments are discontinued or reduced, VA will halt its action to discontinue or reduce payments and will schedule a new reexamination date. VA will send written notice to the beneficiary that if he or she fails to report for the rescheduled reexamination, then VA will immediately discontinue or reduce the payments as of the first day of the month after the month for which VA last paid benefits.

(e) *Resumption of payments.* If VA discontinues or reduces payments for failure to report for a reexamination, VA will issue a new decision after the beneficiary reports for a VA reexamination. VA will send written notice to the beneficiary of any period of time for which it could not pay benefits at the previous level and the reason(s) why, and identify the period of time for which it has resumed paying such benefits.

(f) *Examples of good cause.* Examples of good cause for failure to report for a VA examination or reexamination include a claimant's or beneficiary's

illness or hospitalization, and the death of an immediate family member. VA will determine on a case-by-case basis whether good cause is established.

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

§ 5.104 Certifying continuing eligibility to receive benefits.

Except as otherwise provided, the following rules govern the certification of continuing eligibility.

(a) *Responsibility to certify continuing eligibility upon request.* Each beneficiary, if requested to do so by VA, must certify whether the factual basis that established entitlement to benefits still exists. The requested certification may concern marital status, income, number of dependents, or any other fact affecting entitlement to a benefit or the amount of benefits payable. VA must receive the beneficiary's certification, including any requested information, no later than 60 days after the date of VA's request.

(b) *If VA does not receive the certification in 60 days.* If VA has not received the requested certification 60 days after the date of VA's request, VA will assume that the fact(s) about which the certification was requested ceased to exist as of the end of the month in which VA received the last evidence of record establishing or confirming the fact(s).

(c) *Additional 60 days provided.* If VA has not received the requested certification 60 days after the date of VA's request, VA will send written notice to the beneficiary that VA proposes to reduce or discontinue the benefits and will allow the beneficiary 60 days in which to provide VA with the required certification. The notice must include the effective date of the proposed reduction or discontinuance. If the beneficiary does not provide the required certification after the additional 60 days, VA will reduce or discontinue the benefit, according to the appropriate effective date provisions in effect on the date the eligibility factor(s) is considered to have ceased to exist.

(d) *VA action when the evidence is received.* When the certification requested is provided, VA will adjust the benefits, if necessary, according to the information provided and the other evidence of record.

(Authority: 38 U.S.C. 501(a), 1315, 1506)

§§ 5.105—5.129 [Reserved]

General Evidence Requirements

§ 5.130 Submission of statements, evidence, or information affecting entitlement to benefits.

(a) *Claimants*—(1) *VA policy concerning submission of written statements, evidence, or information by claimants.* It is VA's general policy to allow submission of statements, evidence, or information by regular mail, hand delivery, facsimile (fax) machine, or other electronic means that the Secretary prescribes, unless a VA regulation, application, or directive expressly requires a different method of submission (for example, where an application directs a claimant to file certain documents by regular mail or hand delivery).

(2) *Content of submissions.* Paragraph (a)(1) of this section concerns the method by which written statements, evidence, or information is filed with VA. Requirements regarding the content of the submission must still be met.

(3) *VA action following submission of written statements, evidence, or information.* Except as otherwise provided, after a claimant or his or her fiduciary or authorized representative provides VA with a written statement, evidence, or information regarding entitlement to benefits, VA will take appropriate action in response to the statement, evidence, or information.

(b) *Beneficiaries*—(1) *VA policy concerning submission of statements, evidence, or information by a beneficiary.* It is VA's general policy to allow submission of statements, evidence, or information by regular mail, hand delivery, email, facsimile (fax) machine, oral statements, or other electronic means that the Secretary prescribes, unless a VA regulation, application, or directive expressly requires a different method of submission. This policy only applies to submissions regarding entitlement to benefits already awarded.

(2) *Content of submissions.* Paragraph (b)(1) of this section concerns the method by which written statements, evidence, or information is filed with VA. Requirements regarding the content of the submission must still be met.

(3) *VA action following submission of statements, evidence, or information.* Except as otherwise provided, after a beneficiary or his or her fiduciary or authorized representative provides VA with a statement, evidence, or information regarding entitlement to benefits, VA will take appropriate action in response to the statement, evidence, or information.

(4) *Notice and documentation of oral statements.* Except as provided in paragraph (c) of this section, VA will not take action based on oral statements unless, during the conversation in which the beneficiary, representative, or fiduciary provides the statement, the VA employee receiving the information does the following:

(i) Identifies himself or herself as a VA employee who is authorized to receive the statement, which means the VA employee must be authorized to take actions under § 2.3 of this chapter or § 5.5;

(ii) Verifies the identity of the provider as the beneficiary or his or her fiduciary or authorized representative by obtaining specific information about the beneficiary that is contained in the beneficiary's VA records, such as Social Security number, date of birth, branch of military service, dates of military service, or other information;

(iii) Informs the provider that VA will use the statement to determine entitlement and to calculate benefit amounts; and

(iv) During or following the conversation in which the beneficiary, representative, or fiduciary provides the statement, the VA employee documents in the beneficiary's VA record all of the following elements:

(A) The specific statement provided;

(B) The date such statement was provided;

(C) The identity of the provider;

(D) The steps taken to verify the identity of the provider as the beneficiary or his or her fiduciary or authorized representative; and

(E) The employee's statement that he or she informed the provider that VA will use the statement to determine entitlement and to calculate benefit amounts.

(c) *Exceptions to paragraph (b)(4) notice and documentation requirements.* Paragraph (b)(4) of this section does not apply to oral statements:

(1) Made at a VA hearing; or

(2) Recorded by VA personnel in reports of medical treatment or examination.

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

§ 5.131 Applications, claims, and exchange of evidence with Social Security Administration—death benefits.

(a) *Dual-purpose Social Security Administration and VA applications.* VA considers a claim for death benefits submitted to the Social Security Administration (SSA) on an application jointly prescribed by VA and the SSA to be a claim for dependency and indemnity compensation, death pension, and accrued benefits. VA will consider the claim to have been received by VA on the same date that the SSA received it.

(b) *Evidence submitted to the Social Security Administration.* VA considers evidence submitted to the SSA in conjunction with a claim under paragraph (a) of this section to have

been received by VA on the same date that the SSA received it.

(c) *Social Security Administration request for copies or certifications of evidence submitted to VA.* At the SSA's request, VA will furnish copies or certifications of evidence that a claimant has filed with VA in support of a claim for VA death benefits, provided that the release of this evidence fully complies with all requirements in any applicable laws and regulations that protect the confidentiality of VA records.

(Authority: 38 U.S.C. 501(a), 5101(b)(1), 5105)

§ 5.132 Claims, statements, evidence, or information filed abroad; authentication of documents from foreign countries.

(a) *Claims and evidence submitted abroad.* A claim, or a statement, information, or evidence in support of a claim, may be submitted to a Department of State representative in a foreign country. Any claim, statement, information, or evidence submitted in a foreign country will be considered received by VA on the same date that it was received by the Department of State representative in that foreign country. Diplomatic and consular officers of the Department of State are authorized to act as agents of VA.

(b) *Authentication of foreign documents.* Foreign documents listed in paragraph (c) of this section do not require authentication. All other foreign documents must be authenticated as specified in paragraph (d) of this section.

(1) *Foreign documents* means documents that are signed under oath or affirmation in the presence of an official in a foreign country. Examples of foreign documents include affidavits, marriage certificates, and birth certificates that have been created, executed, or validated by a foreign government.

(2) *Authentication* means that an official listed in paragraph (d) of this section verifies that the foreign document, including each signature, stamp, and seal appearing on it, is genuine and has not been altered.

(c) *Authentication of certain foreign documents not required.* VA does not require authentication of the following types of foreign documents:

(1) Documents approved by the Deputy Minister of Veterans Affairs for the Department of Veterans Affairs, Ottawa, Canada;

(2) Documents bearing the signature and seal of an officer authorized to administer oaths for general purposes;

(3) Documents signed before a VA employee authorized to administer oaths under § 2.3 of this chapter;

(4) Affidavits prepared in the Republic of the Philippines that are certified by a VA representative who is located there and who has the authority to administer oaths; and

(5) Copies of public, church, or other religious-context records from any foreign country used to establish birth, adoption, marriage, annulment, divorce, or death, provided that the documents have the signature and seal of the custodian of these records and there is no contrary evidence of record that tends to cast doubt on the correctness of the documents.

(d) *Authentication of foreign documents required.* Foreign documents not listed in paragraph (c) of this section must be authenticated by:

(1) An officer of the Department of State authorized to authenticate documents; or

(2) The Consul of a friendly government whose signature and seal is verified by the Department of State.

(e) *Photocopies of foreign documents.* VA will accept photocopies of any of the foreign documents described in paragraphs (c) and (d) of this section if VA determines that the photocopies satisfy the requirements of § 5.181.

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

§ 5.133 Information VA may request from financial institutions.

(a) *Names and addresses.* If VA needs to verify a person's correct name or address, VA may request this information from a financial institution, such as a bank, savings and loan association, trust company, or credit union. In its request, VA must certify that the name or address is necessary in order to properly administer its benefit programs and that VA cannot locate the information by a reasonable search of its records.

(b) *Financial information.* VA may ask a financial institution to provide financial records of a current or former claimant or a current or former beneficiary if such evidence is necessary to determine whether such person has failed to comply with a statute, regulation, rule, or order. VA must request the financial records through a subpoena. A ''subpoena'' is a legal document commanding a person or organization to provide specified evidence to the issuer of the subpoena. See § 2.2 of this chapter for information on VA's authority to issue subpoenas. Before the date VA serves a subpoena on a financial institution, VA must serve or mail a copy of the subpoena, a written explanation of its purpose, and the procedure for challenging the subpoena to the claimant or beneficiary. See 12 U.S.C. 3405.

(c) *Limitations on use of information.* Unless permitted under the Right to Financial Privacy Act, 12 U.S.C. 3401, *et seq.,* VA may not:

(1) Use information obtained from a financial institution for any purpose other than the administration of benefits programs; or

(2) Share this information with any other person, group, or government entity.

(Authority: 12 U.S.C. 3401, 3405, 3412, 3413; 38 U.S.C. 501(a), 5319, 5711)

§ 5.134 VA acceptance of signature by mark or thumbprint.

VA will accept a signature by mark or thumbprint if it is:

(a) Witnessed by two people who sign their names and give their addresses;

(b) Witnessed by an accredited agent, attorney, or service organization representative;

(c) Certified by a notary public or any other person having the authority to administer oaths for general purposes; or

(d) Certified by a VA employee who has been delegated authority by the Secretary under 38 CFR 2.3.

(Authority: 38 U.S.C. 5101)

§ 5.135 Statements certified or under oath or affirmation.

(a) *Oral testimony.* All oral testimony presented at a hearing by a claimant, or by a witness on his or her behalf, will be under oath or affirmation. See § 5.82(d)(2).

(b) *Documentary evidence or written assertion of fact.* Any documentary evidence or written assertion of fact filed by the claimant or on his or her behalf for purpose of establishing a claim must be certified or under oath or affirmation. However, VA may decide that certification or oath or affirmation is not necessary to establish the reliability of a document and therefore not required. Documentary evidence includes, but is not limited to, records, examination reports, and transcripts that VA receives from State, county, or municipal governments, recognized private institutions, or contract hospitals.

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

Cross Reference: § 5.1, for the definition of ''certified statement'' and § 5.1 for the definition of ''State''.

§ 5.136 Abandoned claims.

Except as provided in § 5.104(a), Certifying continuing eligibility to receive benefits, if a claimant does not furnish evidence in connection with a claim within 1 year after the date VA requests it, the claim will be considered

abandoned. Once a claim is abandoned, the claimant must file a new claim for VA to take further action. If the claimant subsequently submits evidence that establishes a right to benefits, the effective date will not be earlier than the date of receipt of the new claim.

(Authority: 38 U.S.C. 501(a), 5103)

Cross Reference: § 5.150 General effective dates of awards or increased benefits.

§§ 5.137–5.139 [Reserved]

Evidence Requirements for Former Prisoners of War (POWs)

§ 5.140 Determining former prisoner of war status.

(a) *Procedure for VA determinations of former prisoner of war (POW) status*—(1) *Service department findings.* VA will accept the appropriate service department's finding that a veteran was a POW during a period of war unless a reasonable basis exists for questioning that finding, in which case, VA will make its own determination of former POW status.

(2) *VA determinations.* In addition to the basis stated under paragraph (a)(1) of this section, VA will make its own determination of former POW status if:

(i) The service department determined that the veteran was not a POW;

(ii) The service department did not make a determination regarding POW status; or

(iii) The detention or internment of the veteran occurred during a period other than a period of war.

(3) *Role of the Director of the Compensation Service.* The Director of the Compensation Service must approve all agency of original jurisdiction (AOJ) determinations of former POW status except when the AOJ accepted service department findings under paragraph (a)(1) of this section.

(b) *Criteria for VA determinations of former POW status*—(1) *Definition of ''former POW''. Former POW* means a veteran who, while serving in the active military service, was forcibly detained or interned in the line of duty by an entity described in paragraph (b)(1)(i) or (ii) of this section:

(i) An enemy, the agents of an enemy, or a hostile force, during a period of war; or

(ii) A foreign government or its agents, or a hostile force, under circumstances comparable to the circumstances under which a veteran generally has been forcibly detained or interned by enemy governments during periods of war. Such circumstances include, but are not limited to, physical hardships or abuse, psychological hardships or abuse, malnutrition, and unsanitary conditions. In the absence of evidence to the contrary, VA will consider that each individual member of a particular group of detainees or internees experienced the same circumstances as those the group experienced generally.

(iii) *Hostile force* means any entity other than an enemy or foreign government or the agents of either whose acts further or enhance anti-American military, political, or economic objectives or views, or attempt to embarrass the U.S.

(2) *Reason for detention or internment.* For purposes of determining former POW status, VA will not consider the reason a veteran was detained or interned, except where allegations exist that the veteran violated the laws of a foreign government. A period of detention or internment by a foreign government for an alleged violation of its laws cannot be used to establish former POW status, unless the charges were a sham intended to make it appear that the detention or internment was proper.

(3) *Line of duty.* VA will consider that a forcible detention or internment was in the line of duty unless the evidence of record discloses that it was the proximate result of the veteran's willful misconduct. See §§ 5.660 and 5.661.

(Authority: 38 U.S.C. 101(32))

Cross Reference: § 5.1, for the definition of ''agency of original jurisdiction'', and § 5.1 for the definition of ''willful misconduct''. § 5.611, Philippine service: Determination of periods of active military service, including, but not limited to, periods of active military service while in prisoner of war status.

§ 5.141 Medical evidence for former prisoner of war disability compensation claims.

(a) *Injuries and other conditions of a former prisoner of war (POW).* As soon as sufficient evidence for a rating is available, VA will rate injuries or other conditions of a former POW that obviously were incurred in service, without awaiting receipt of the claimant's service treatment and other service records.

(b) *Statements by a former POW.* VA will presume as true a statement by a former POW that an injury or disease was incurred or aggravated during, or immediately before, detention or internment if the statement is consistent with the circumstances, conditions, or hardships of such service. This presumption may be rebutted by clear and convincing evidence to the contrary. See § 5.250(b)(2).

(c) *Evidence from fellow servicemembers.* A claimant may use evidence from a fellow servicemember to support an allegation of incurrence or aggravation of an injury or disease during detention or internment. In evaluating evidence from a fellow servicemember that relates to a former POW's claim for disability compensation, VA will take into account the fellow servicemember's statements, including, but not limited to, statements regarding any of the following factors:

(1) The former POW's physical condition before capture;

(2) The circumstances during the former POW's detention or internment;

(3) The changes in the former POW's physical condition following release from detention or internment; or

(4) The existence of signs and symptoms consistent with a claimed disability following the former POW's release from detention or internment.

(d) *Absence of clinical records.* If a former POW claims entitlement to disability compensation, VA will not consider the lack of history or findings in clinical records made upon the claimant's return to U.S. control as determinative.

(e) *Disabilities first reported after discharge.* If any disability is first reported after discharge, especially if the claimed disability is poorly defined and not obviously of intercurrent origin, VA will determine whether the claimed disability is etiologically related to the POW experience. VA will consider the circumstances of the claimant's detention or internment, the duration of detention or internment, and the pertinent medical principles.

(f) *Examination requirement.* If service connection for disabilities claimed by a former POW cannot be established otherwise, VA will provide the claimant a complete medical examination.

Cross References: § 5.140(b), concerning definition of ''former POW''; § 5.264(b) and (c), concerning diseases VA presumes are service connected in former prisoners of war.

(Authority: 38 U.S.C. 1154)

§§ 5.142–5.149 [Reserved]

General Effective Dates for Awards

§ 5.150 General effective dates of awards or increased benefits.

(a) *General rule.* Except as otherwise provided, the effective date of an award of pension, disability compensation, dependency and indemnity compensation, or monetary allowance under 38 U.S.C. chapter 18 for a person who is a child of a Vietnam or Korea

veteran, based on an original claim, a claim reopened after final denial, or a claim for increase, will be the later of:

(1) The date of receipt of the claim for the benefit; or

(2) The date entitlement arose. For purposes of this part, *date entitlement arose* means the date that the claimant first met the requirements for the benefit as shown by the evidence. VA will assume that entitlement arose before the date of receipt of the claim unless the evidence shows that entitlement arose after that date.

(b) *Retroactive increase.* VA will not award a retroactive increase or an additional benefit after discontinuing basic entitlement to a benefit, such as by severance of service connection.

(c) *Location of other part 5 effective-date provisions for awards or increased benefits.* The following table is to assist the reader in locating various other effective-date provisions for awards or increased benefits in this part. It is provided for informational use only. This table does not confer any substantive rights.

Effective date provision	Part 5 location
SUBPART B—SERVICE REQUIREMENTS FOR VETERANS	
Individuals and groups designated by the Secretary of Defense as having performed active military service	§ 5.27(c).
Effect of discharge upgrades by Armed Forces boards for the correction of military records (10 U.S.C. 1552) on eligibility for VA benefits.	§ 5.34(d).
Effect of discharge upgrades by Armed Forces discharge review boards (10 U.S.C. 1553) on eligibility for VA benefits	§ 5.35(e).
SUBPART C—ADJUDICATIVE PROCESS, GENERAL	
Filing a claim for death benefits	§ 5.52(c).
Claims based on new and material evidence	§ 5.55(e).
Requirement to provide Social Security numbers	§ 5.101(d).
Abandoned claims	§ 5.136.
Effective dates based on change of law or VA issue	§ 5.152(c).
Effective date of awards based on receipt of evidence prior to end of appeal period or before a final decision	§ 5.153.
Revision of agency of original jurisdiction decisions based on clear and unmistakable error	§ 5.162(f).
Service department records as new and material evidence	§ 5.165(c), (d).
Effective dates for revision of decisions based on difference of opinion	§ 5.166.
SUBPART D—DEPENDENTS AND SURVIVORS	
Effective date of awards of benefits for a dependent	§ 5.183.
Effective date of resumption of benefits to a surviving spouse due to termination of a remarriage	§ 5.205.
Effective date of award of pension or dependency and indemnity compensation to or for a child born after the veteran's death.	§ 5.230.
Effective date of an award of benefits due to termination of a child's marriage	§ 5.235(b).
SUBPART E—CLAIMS FOR SERVICE CONNECTION AND DISABILITY COMPENSATION	
Effective dates—award of disability compensation	§ 5.311.
Effective dates—increased disability compensation	§ 5.312(b).
Effective dates—discontinuance of compensation for a total disability rating based on individual unemployability	§ 5.313.
Effective dates—discontinuance of additional disability compensation based on parental dependency	§ 5.314.
Effective dates—additional disability compensation based on decrease in the net worth of dependent parents	§ 5.315(b).
Effective dates—special monthly compensation under §§ 5.332 and 5.333	§ 5.335.
Effective dates—additional compensation for regular aid and attendance payable for a veteran's spouse under § 5.321	§ 5.336(a).
Tuberculosis and compensation under 38 U.S.C. 1114(q) and 1156	§ 5.346(b)(1)(ii).
Effective dates of awards of benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.	§ 5.351.
SUBPART F—NONSERVICE–CONNECTED DISABILITY PENSIONS AND DEATH PENSIONS	
Disability requirements for Improved Disability Pension	§ 5.380.
Effective dates of awards of Improved Disability Pension	§ 5.383.
Effective dates of awards of special monthly pension	§ 5.392.
Automatic adjustment of maximum annual pension rates	§ 5.401(a).
Effective dates of changes in Improved Pension benefits based on changes in net worth	§ 5.415(b).
Effective dates of changes to annual Improved Pension payment amounts due to a change in income	§ 5.422.
Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income.	§ 5.424(b), (c).
Effective dates of Improved Death Pension	§ 5.431.
Effective dates of Improved Pension elections	§ 5.463.
Annual income limits and rates for Old-Law Pension and Section 306 Pension	§ 5.471(b).
Time limit to establish continuing entitlement to Old-Law Pension or Section 306 Pension	§ 5.478(b).
SUBPART G—DEPENDENCY AND INDEMNITY COMPENSATION, ACCRUED BENEFITS, AND SPECIAL RULES APPLICABLE UPON DEATH OF A BENEFICIARY	
Awards of dependency and indemnity compensation benefits to children when there is a retroactive award to a schoolchild	§ 5.524.
Awards of dependency and indemnity compensation when not all dependents apply	§ 5.525.
When VA counts a parent's income for parent's dependency and indemnity compensation	§ 5.534.
A parent's dependency and indemnity compensation rates	§ 5.536(b).

Effective date provision	Part 5 location
Effective date of an award or an increased rate based on decreased income: parents' dependency and indemnity compensation.	§ 5.542.
SUBPART H—SPECIAL AND ANCILLARY BENEFITS FOR VETERANS, DEPENDENTS, AND SURVIVORS	
Medal of Honor pension	§ 5.580(b).
Awards of benefits based on special acts or private laws	§ 5.581(d).
Minimum income annuity and gratuitous annuity	§ 5.587(b).
Special allowance payable under section 156 of Public Law 97–377	§ 5.588(b), (f).
Monetary allowance for a Vietnam veteran or a veteran with covered service in Korea whose child was born with spina bifida.	§ 5.589(e).
Monetary allowance for a female Vietnam veteran's child with certain birth defects	§ 5.590(i).
Effective dates of awards for a disabled child of a Vietnam or Korea veteran	§ 5.591(a).
Clothing allowance	§ 5.606(e).
SUBPART I—BENEFITS FOR CERTAIN FILIPINO VETERANS AND SURVIVORS	
Payment at the full-dollar rate of disability compensation or dependency and indemnity compensation at the full dollar rate for certain Filipino veterans or their survivors residing in the U.S.	§ 5.613(d).
Effective dates of benefits at the full-dollar rate for a Filipino veteran and his or her survivor	§ 5.614.
SUBPART K—MATTERS AFFECTING THE RECEIPT OF BENEFITS	
Revocation of forfeiture	§ 5.680(c)(2).
Effective dates: Forfeiture	§ 5.681.
Presidential pardon for offenses causing forfeiture	§ 5.682(b).
SUBPART L—PAYMENTS AND ADJUSTMENTS TO PAYMENTS	
Beginning date for certain benefit payments	§ 5.693(b).
Payments to or for a child pursuing a course of instruction at an approved educational institution	§ 5.696(b)–(f).
Eligibility verification reports	§ 5.708(f), (g).
Payment to dependents due to the disappearance of a veteran for 90 days or more	§ 5.711(b)(2), (c)(2), (d)(1).
Resumption of special monthly compensation based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.	§ 5.721.
Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.	§ 5.725.
Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance during a veteran's temporary absence from hospital, domiciliary, or nursing home care or after released from such care.	§ 5.729.
Resumption of Old-Law Pension and Old-Law Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.	§ 5.730.
General effective dates for awarding, reducing, or discontinuing VA benefits because of an election	§ 5.743(a).
Entitlement to concurrent receipt of military retired pay and VA disability compensation	§ 5.745(e).
Prohibition against receipt of active military service pay and VA benefits for the same period	§ 5.746(d)(1).
Procedures for elections between VA benefits and compensation under the Federal Employees' Compensation Act	§ 5.752(b).
SUBPART M—APPORTIONMENTS TO DEPENDENTS AND PAYMENTS TO FIDUCIARIES AND INCARCERATED BENEFICIARIES	
Effective date of apportionment grant or increase	§ 5.782.
Determinations of incompetency and competency	§ 5.790(f).
General fiduciary payments	§ 5.791(e).
Institutional awards	§ 5.792(e).
Limitation on payments for a child	§ 5.793.
Apportionment when a primary beneficiary is incarcerated	§ 5.814(e).
Resumption of disability compensation or dependency and indemnity compensation upon a beneficiary's release from incarceration.	§ 5.815.
Resumption of pension upon a beneficiary's release from incarceration	§ 5.816(a), (b).

(Authority: 38 U.S.C. 501(a), 5110(a))

§ 5.151 Date of receipt.

(a) *General rule.* The date of receipt of a document, claim, information, or evidence is the date on which VA received it, except as provided in the following:

(1) Paragraph (b) of this section;

(2) Provisions for claims or evidence received in a foreign country by a Department of State representative (§ 5.132(a));

(3) Provisions for applications, claims, and exchange of evidence with the Social Security Administration (§ 5.131(a) or (b)); or

(4) Provisions of the Department of Defense relating to initial claims filed at or before separation.

(b) *Exception to date-of-receipt rule.* If VA determines that a natural or man-made event causes extended delay or otherwise interferes with the normal receipt of correspondence in one or more VA regional office, it may establish an exception to paragraph (a) of this section for the office or offices involved by publishing notice of the exception in the **Federal Register**. The delay or other interference must affect the receipt of documents, claims, information, or evidence to an extent that, if not addressed, would adversely affect claimants through no fault of their

own. If VA establishes an exception, it may use factors such as the postmark or the date the claimant signed the correspondence as the date of its receipt.

(Authority: 38 U.S.C. 501(a), 512(a), 5110)

§ 5.152 Effective dates based on change of law or VA issue.

(a) *Liberalizing law or VA issue.* Paragraphs (b) and (c) of this section apply when pension, disability compensation, dependency and indemnity compensation, or a monetary allowance under 38 U.S.C. chapter 18 for a person who is a child of a Vietnam or Korea veteran, is awarded or increased pursuant to a liberalizing law or a liberalizing VA issue approved by the Secretary or at the Secretary's direction. The provisions of paragraphs (b) and (c) of this section apply to original claims, reopened claims, and claims for increase.

(b) *Eligibility for retroactive benefits.* For a claimant to be eligible for retroactive benefits based on the liberalizing law or VA issue, the evidence must show that:

(1) The claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue; and

(2) Such eligibility existed continuously from that date to the date of the administrative determination of entitlement or of the claimant's request for review.

(c) *Effective date of award.* (1) *General.* The effective date of an award or increase based on a liberalizing law or VA issue will be the later of:

(i) The effective date of the liberalizing law or VA issue; or

(ii) The date entitlement arose.

(2) *Review no later than 1 year after effective date.* If VA reviews a claim on its initiative, or receives a claimant's request to review a claim, no later than 1 year after the effective date of the law or VA issue, then VA may authorize benefits from that effective date.

(3) *Review on VA initiative more than 1 year after effective date.* If VA reviews a claim on its initiative more than 1 year after the effective date of the law or VA issue, it may authorize benefits for a period of 1 year before the date of administrative determination of entitlement.

(4) *Review at the claimant's request that VA received more than 1 year after effective date.* If VA reviews a claim at the claimant's request that VA received more than 1 year after the effective date of the law or VA issue, VA may authorize benefits for a period of 1 year prior to the date of receipt of such request.

(Authority: 38 U.S.C. 1822, 5110(g))

(d) *Reduction or discontinuance of benefits.* If VA reduces or discontinues pension, disability compensation, dependency and indemnity compensation, or a monetary allowance under 38 U.S.C. chapter 18 for a person who is a child of a Vietnam or Korea veteran pursuant to a change in law or a VA issue, or because of a change in interpretation of a law or VA issue, the following provisions apply.

(1) *Notice.* VA will send written notice of the proposed action to the beneficiary and furnish detailed reasons for the proposed reduction or discontinuance. The beneficiary will have 60 days after the date of the notice to present additional evidence.

(2) *Effective date of award.* If VA receives no additional evidence within the 60-day notice period in paragraph (d)(1) of this section, or if the evidence received does not demonstrate that the proposed action should not be taken, VA will pay a reduced rate or discontinue the benefit effective the first day of the month after the end of the notice period.

(Authority: 38 U.S.C. 5112(b)(6))

§ 5.153 Effective date of awards based on receipt of evidence prior to end of appeal period or before a final Board decision.

VA will consider information or evidence received before the expiration of the period for initiating or perfecting an appeal to the Board of Veterans' Appeals (the Board), or before the Board renders a decision (if a timely appeal was filed), without regard to whether the information or evidence is ''new and material''. The effective date of an award based on such evidence will be as though the former decision had not been rendered.

Cross Reference: § 5.150, General effective dates of awards or increased benefits. For information on how to appeal to the Board, see 38 CFR parts 19 and 20.

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

§§ 5.154–5.159 [Reserved]

General Rules on Revision of Decisions

§ 5.160 Binding effect of VA decisions.

(a) *General rule.* A decision of a duly constituted rating agency or other agency of original jurisdiction will be binding on all field offices of the Department of Veterans Affairs as to conclusions based on the evidence of record at the time VA issues notice of the decision in accordance with 38 U.S.C. 5104. A binding agency decision will not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in §§ 5.161,5.162, and 5.163.

(b) *Particular issues.* A Veterans Service Center's decision on any one of the issues listed below is binding on the VA Insurance Center, and vice versa, unless the decision was based on clear and unmistakable error. Absent clear and unmistakable error, neither a Veterans Service Center nor the VA Insurance Center may change a decision of the other if doing so would involve applying the same criteria and be based on the same facts. The issues to which this paragraph (b) applies are:

(1) Line of duty;

(2) Character of discharge;

(3) Relationship;

(4) Dependency;

(5) Domestic relations issues such as marriage, divorce, adoption, and child custody and support;

(6) Homicide; and

(7) Findings of fact of death or presumption of death.

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

Cross Reference: § 5.1, for the definition of ''agency of original jurisdiction''.

§ 5.161 Review of benefit claims decisions.

(a) *Timely Notice of Disagreement.* A claimant who has filed a timely Notice of Disagreement (NOD) with a decision of an agency of original jurisdiction (AOJ) on a benefit claim has a right under this section to a review of that decision. The review will be conducted by a Veterans Service Center Manager or Decision Review Officer, at VA's discretion. A person who did not participate in the decision will conduct the review. Only a decision that has not yet become final (by appellate decision or failure to timely appeal) may be reviewed. A review under this section will encompass only decisions with which the claimant has expressed disagreement in the NOD. The reviewer will consider all evidence of record and applicable law, and will give the prior decision no deference.

(b) *Time to request a review.* Upon receipt of an NOD, VA will send written notice to the claimant of his or her right to a review under this section, unless the NOD already includes a request for review of the decision under this section. To obtain such a review, the claimant must request it no later than 60 days after the date VA mails the notice. This 60-day limit may not be extended. If the claimant fails to request a review under this section no later than 60 days after the date VA send the notice, VA will proceed with the traditional appellate process by issuing a Statement

of the Case (SOC). A claimant may not have more than one review under this section of the same decision.

(c) *Action by reviewer.* The reviewer may conduct whatever development he or she considers necessary to resolve any disagreements in the NOD, consistent with applicable law. This may include an attempt to obtain additional evidence or the holding of an informal conference with the claimant. In an informal conference, the reviewer will explain fully the issues and suggest the submission of evidence the claimant may have overlooked that would tend to prove the claim. Upon the request of the claimant, the reviewer will conduct a hearing under § 5.82.

(d) *Decision of reviewer.* The reviewer may grant a benefit sought in the claim notwithstanding § 5.163, but he or she may not revise the decision in a manner that is less advantageous to the claimant than the decision under review, except as provided in paragraph (e) of this section. A review decision made under this section will include a summary of the evidence and of the reasons for the decision, a citation to pertinent laws, and a discussion of how those laws affect the decision.

(e) *Reversal or revision of a prior decision.* Notwithstanding any other provisions of this section, the reviewer may reverse or revise the AOJ decision being reviewed, or any prior decision that has become final due to failure to timely appeal, on the grounds of clear and unmistakable error, even if disadvantageous to the claimant. See § 5.162.

(f) *Appeal rights.* Review under this section does not limit the appeal rights of a claimant. Unless a claimant withdraws his or her NOD as a result of this review process, VA will proceed with the traditional appellate process by issuing an SOC.

(g) *Applicability.* This section applies to all claims in which an NOD is filed after June 1, 2001.

(Authority: 38 U.S.C. 5109A, 7105(d))

Cross Reference: § 5.1, for the definition of ''agency of original jurisdiction''.

§ 5.162 Revision of agency of original jurisdiction decisions based on clear and unmistakable error.

(a) *Scope.* The provisions of this section apply to decisions of an agency of original jurisdiction (AOJ) except:

(1) Where an award was based on an act of commission or omission by the payee, or with his or her knowledge, see §§ 5.164 and 5.175;

(2) Where there is a change in law or VA issue, or a change in interpretation of law or VA issue, see § 5.152;

(3) Where the evidence establishes that service connection was clearly illegal; or

(4) As otherwise provided in this part.

(b) *Review for clear and unmistakable error (CUE).* At any time after the AOJ makes a decision, the claimant may request, or VA may initiate, AOJ review of the decision to determine if there was CUE in the decision. The AOJ will base the review only on the evidence of record and the law in effect when the AOJ made the decision. If the review establishes CUE, the AOJ will reverse or revise the decision.

(c) *Binding decisions and final decisions.* (1) To be reviewable under (b) of this section, the decision must be binding as defined in § 5.160.

(2) To be reviewable under paragraph (b) of this section, the decision may, but need not, be final as defined in § 5.1.

(3) VA may reverse or revise a final decision only if there was CUE in that decision.

(d) *What constitutes CUE.* CUE is a very specific and rare kind of error. It is the kind of error of fact or of law that when called to the attention of later reviewers, compels the conclusion that the result would have been manifestly different if the error did not exist. The conclusion must be something about which reasonable minds cannot differ. Generally, either the correct facts, as they were known at the time, were not before the AOJ, or the statutory and regulatory provisions which existed at the time were incorrectly applied.

(e) *Reduction or discontinuance based on administrative error or error in judgment.* VA will reduce or discontinue a benefit resulting from an award based solely on a VA administrative error or error in judgment only if it was CUE. Administrative errors or errors in judgment include, but are not limited to:

(1) Overlooking facts;

(2) Clerical errors; or

(3) Failure to follow or properly apply VA regulations or statutes.

(f) *Effective date of reversal or revision.* For purpose of granting benefits, a new decision that constitutes a reversal or revision of a prior decision on the grounds of CUE has the same effect as if the new decision had been made on the date of the prior decision. In such cases, benefits are payable effective on the date from which benefits would have been payable if the corrected decision had been made on the date of the reversed decision. See § 5.167(c) for effective date of reduction or discontinuance based on VA administrative error or error in judgment.

(Authority: 38 U.S.C. 5109A)

Cross Reference: § 5.1, for the definition of ''agency of original jurisdiction''.

§ 5.163 Revision of decisions based on difference of opinion.

If the Veterans Service Center Manager (VSCM) within an agency of original jurisdiction (AOJ) believes that revision of a previous AOJ decision is warranted, the VSCM will recommend the revision to the Director of the Compensation Service of the Veterans Benefits Administration for a binding determination. This section only applies to the revision of an AOJ decision that is not final and has not been the subject of a substantive appeal. The revision must be based on the VSCM's difference of opinion with the previous decision, and must lead to a decision more favorable to the claimant than the previous decision.

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

Cross Reference: § 5.1, for the definition of ''agency of original jurisdiction''.

§ 5.164 Standard of proof for reducing or discontinuing a benefit payment or for severing service connection based on a beneficiary's act of commission or omission.

(a) *General rule.* VA will reduce or discontinue a benefit, or sever service connection, if a preponderance of the evidence shows that it resulted in whole or in part from an award based on an act of commission or omission by the beneficiary or an act of commission or omission done with the beneficiary's knowledge. The review will be based on the law in effect when the agency of original jurisdiction (AOJ) made the decision and on all evidence currently of record, regardless of whether it was of record at that time.

(b) *Examples of acts of commission or omission.* Acts of commission or omission include, but are not limited to:

(1) An erroneous statement by a veteran regarding income;

(2) Failure to notify VA of a changed circumstance (such as death or marriage of a dependent);

(3) Failure to notify VA of an increase in income; or

(4) Obtaining a benefit by fraud.

(Authority: 38 U.S.C. 501(a), 5112(b)(9))

Cross Reference: § 5.1, for the definition of ''agency of original jurisdiction'', and § 5.1, for the definition of ''fraud.''

§ 5.165 Service department records as new and material evidence.

(a) *Reconsideration.* Notwithstanding any other section in this part, at any

time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding § 5.55. Such records include, but are not limited to:

(1) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of this section are met;

(2) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and

(3) Declassified records that could not have been obtained because the records were classified when VA decided the claim.

(b) *Unobtainable records.* Paragraph (a) of this section does not apply to records that VA could not have obtained when it decided the claim because they did not exist, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the service department, the Joint Services Records Research Center, or any other official source.

(c) *Effective date.* An award made based all or in part on the records identified by paragraph (a) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

(d) *Retroactive disability rating.* A retroactive rating of a disability subsequently service connected based on new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive rating will be assigned accordingly, except as it may be affected by the filing date of the original claim.

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

§ 5.166 Effective dates for revision of decisions based on difference of opinion.

If VA revises a decision based on difference of opinion under § 5.163,,the effective date of the revision is the date the benefits would have been paid if the previous decision had been favorable.

(Authority: 38 U.S.C. 501(a), 5110)

§ 5.167 Effective dates for reducing or discontinuing a benefit payment, or for severing service connection, based on omission or commission, or based on administrative error or error in judgment.

(a) *Scope.* This section applies when determining the proper effective date to assign for the reduction or discontinuance of payment of a benefit, or the severance of service connection, based on error. This section does not apply to a payment amount not authorized by a rating decision, such as a payment of an incorrect amount or a duplicative payment. Such amounts are overpayments, subject to recoupment.

(b) *Effective date of reduction or discontinuance of a payment, or of severance of service connection, based on beneficiary's act of commission or omission.* If VA based an award of a benefit, including service connection, on an act of commission or omission by the beneficiary, or with the beneficiary's knowledge, including, but not limited to, an act based on fraud, VA will pay a reduced rate, discontinue a benefit, or sever service connection, effective the latest of the following dates:

(1) The effective date of the award;

(2) The day preceding the act of commission or omission; or

(3) The date entitlement to the benefit ceased.

(c) *Effective date of reduction or discontinuance of a payment, or of severance of service connection, based on VA administrative error or error in judgment.* Except as provided in § 5.177(d) and (f), if an award was based solely on VA administrative error or error in judgment, VA will pay a reduced rate or discontinue a benefit, or sever service connection,effective the first day of the month after the month for which VA last paid the benefit.

(Authority: 38 U.S.C. 5112(b)(9) and (10))

§§ 5.168–5.169 [Reserved]

General Rules on Protection or Reduction of Existing Ratings

§ 5.170 Calculation of 5-year, 10-year, and 20-year periods to qualify for protection.

(a) *Scope.* VA will apply the following principles in determining whether service connection has been ''in effect'' for the 10-year period in § 5.175 and whether a rating has been ''continuous'' for the 5-year period in § 5.171 or the 20-year period in § 5.172.

(b) A qualifying period for protection of service connection or of a disability rating begins on the date the award or grant of benefits is effective and ends, after due process has been provided, on the date that service connection would be severed or the rating would be reduced.

(c) *Veteran reenters active military service.* For purposes of §§ 5.171 and 5.172, a rating is not continuous if benefits based on that rating are discontinued or interrupted because the veteran reentered active military service.

Cross Reference: § 5.746, Prohibition against receipt of active military service pay and VA benefits for the same period.

(d) *Protected rating during nonreceipt of disability compensation.* A rating that is continuous for a period listed in paragraph (a) of this section is protected even if the beneficiary did not receive VA disability compensation based on that rating. This includes a beneficiary whose payments were adjusted by deduction, recoupment, apportionment, or reduction in disability compensation due to incarceration, or because the beneficiary elected to receive retirement pay.

(e) *Retroactive increase or award.* A retroactive increase in benefits or award of service connection, including one made under § 5.162, which results in a veteran being rated or awarded service connection for a period of 5, 10, or 20 years will be protected under §§ 5.171, 5.175, and 5.172, respectively. This paragraph (e) applies to any qualifying period for protection, even if it includes a period based on a retroactive award.

(Authority: 38 U.S.C. 110, 501(a), 1159)

§ 5.171 Protection of 5-year stabilized ratings.

(a) *Purpose.* VA will adjudicate cases affected by change of medical findings or diagnosis to produce the greatest degree of stability of disability ratings consistent with the laws and regulations governing disability compensation and pension.

(b) *Stabilized rating.* For purposes of this section, if VA has rated a disability at or above a specific level for 5 years or more, then VA will consider it to be stabilized at that level.

(c) *Material improvement.* VA will not reduce a stabilized rating unless there is evidence of material improvement. VA may reduce a stabilized rating if:

(1) An examination shows material improvement in the disability under the ordinary conditions of life, as explained in paragraph (d) of this section; and

(2) The evidence shows that it is reasonably certain that the material improvement will be maintained under the ordinary conditions of life.

(d) *How VA determines whether there has been material improvement.* VA will consider the following to determine whether a disability has materially improved:

(1) *Whether examination shows improvement.* To be a basis for reduction, a medical examination must be as complete as those on which payments were authorized or continued and must demonstrate improvement.

(2) *Whether a disease is subject to episodic improvement.* VA will not reduce the rating of a disease that is subject to temporary or episodic improvement on the basis of only one examination unless the evidence of record clearly demonstrates sustained improvement. Diseases subject to temporary or episodic improvement include, but are not limited to:

(i) Arteriosclerotic heart disease;

(ii) Bronchial asthma;

(iii) Epilepsy;

(iv) Gastric or duodenal ulcer;

(v) Bipolar disorders or other psychotic reaction;

(vi) Anxiety disorders; and

(vii) Many skin diseases.

(3) *Whether apparent improvement is due to bed rest.* VA will not reduce a stabilized rating of a disease that becomes comparatively symptom free (findings absent) after bed rest based on an examination that reflects the results of bed rest.

(4) *Whether evidence clearly demonstrates improvement.* VA will find material improvement only if the evidentiary record clearly demonstrates, after full compliance with the procedure outlined in paragraph (d) of this section, that the disability does not meet the requirements for the current disability rating.

(5) *Whether VA's review is based on a complete medical record.* A complete medical record includes all of the following elements, if such records exist:

(i) The entire case history;

(ii) Medical-industrial history;

(iii) Records related to treatment of intercurrent diseases and exacerbations, including, but not limited to, hospital reports, bedside examinations, examinations by designated physicians, and examinations that reflect the results of tests conducted by laboratory facilities and the cooperation of specialists in related lines;

(iv) Private and VA medical examination records; and

(v) Special examinations indicated as a result of general examination.

(6) *Whether there is a new or changed diagnosis.* Where there is evidence of a change in diagnosis, VA will follow 38 CFR 4.13 (Effect of change of diagnosis), as well as this section. VA will consider whether evidence of a change in diagnosis represents a progression of the previously diagnosed condition, an error in prior diagnosis, or a disease entity independent of the service-connected disability. When a new diagnosis reflects only a mental deficiency or personality disorder, VA will consider the possibility of temporary remission of a super-imposed psychiatric disease.

(e) *Reexamination following a change in diagnosis.* If VA cannot determine whether evidence of a change in diagnosis represents a progression of the previously diagnosed condition, an error in prior diagnosis, or a disease entity independent of the service-connected disability after considering the evidence as described in paragraphs (c) and (d) of this section, VA will continue the assigned rating. VA will cite the former diagnosis with the new diagnosis, if any, in parentheses, with a notation that the rating will be continued pending reexamination, to be conducted on a date to be determined on the basis of the facts of each individual case.

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

Cross Reference: § 5.102, concerning VA criteria for scheduling reexaminations.

§ 5.172 Protection of continuous 20-year ratings.

(a) *Disability compensation rating.* If VA has rated a disability at or above a specific level for 20 years, then VA may not reduce the rating below such level unless the rating was based on fraud.

(b) *Pension rating.* VA will not reduce a permanent total disability rating for pension purposes that VA has continuously provided for 20 or more years unless the rating was based on fraud.

(c) *Effect of election regarding receipt of disability compensation.* The provisions of paragraph (a) or (b) of this section apply regardless of whether the veteran elects to receive disability compensation or pension during all or any part of the 20-year period.

(Authority: 38 U.S.C. 110)

Cross Reference: §§ 5.1, for the definition of ''fraud''; 5.164, Standard of proof for reducing or discontinuing a benefit payment or for severing service connection based on a beneficiary's act of commission or omission.

§ 5.173 Protection against reduction of disability rating when VA revises the Schedule for Rating Disabilities.

VA will not apply a revision of the schedule for rating disabilities to reduce a disability rating existing on the effective date of the revision unless medical evidence establishes that the disability has actually improved.

(Authority: 38 U.S.C. 1155)

§ 5.174 Protection of entitlement to benefits established before 1959.

(a) *Persons in receipt of or entitled to receive benefits on December 31, 1958.* Any person receiving or entitled to receive benefits under any public law administered by VA on December 31, 1958, may continue to receive such benefits as long as the conditions warranting the payment under those laws continue, unless there was fraud, clear and unmistakable error of fact or law, or misrepresentation of material facts. VA will pay the greater benefit under the previous law or the corresponding current section of title 38 U.S.C. in the absence of an election to receive the lesser benefit.

(Authority: Pub. L. 85–857, 72 Stat. 1105)

(b) *Service connection established under prior laws.* Awards of service connection and the rate of disability compensation paid under prior laws repealed by Public Law 85–56 are protected, provided that the conditions warranting such status and rate continue and the award was not based on fraud, misrepresentation of facts, or clear and unmistakable error. With respect to such protected awards, VA may grant disability compensation and special monthly compensation under current law if such award would result in disability compensation payment at a rate equal to or higher than that payable on December 31, 1957. Where a changed physical condition warrants re-rating of service-connected disabilities, the amounts of disability compensation and special monthly compensation will be determined under 38 U.S.C. 1114.

(Authority: Pub. L. 85–86, 71 Stat. 277; Pub. L. 85–857, 72 Stat. 1105)

Cross Reference: § 5.1, for the definition of ''fraud''.

§ 5.175 Severance of service connection.

(a) *Protected service connection.* (1) VA may not sever service connection that has been in effect for 10 years or more unless evidence shows that:

(i) The original grant was obtained by fraud; or

(ii) It is clear from military records that the person identified as a veteran did not have the requisite qualifying military service or the veteran's discharge from service is of a type to preclude service connection as described in § 5.30.

(2) The protection afforded in this section applies to determinations of service connection that were the basis for grants of entitlement to dependency and indemnity compensation (DIC), and to disability compensation or DIC granted under 38 U.S.C. 1151.

(b) *Standard of proof to sever service connection—general rule.* (1) VA will sever service connection if evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon VA), except as provided in paragraph (c) of this section. Severance under this paragraph (b) is subject to §§ 5.152 and 5.83(a) (regarding due process procedures).

(2) A change in diagnosis may be accepted as a basis for severance of service connection if the examining physician or physicians or other proper medical authority certifies that, in the light of all accumulated evidence, the diagnosis that was the basis of the award of service connection is clearly erroneous. This certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion that the diagnosis is erroneous.

(c) *Standard of proof to sever service connection—fraud.* See § 5.164, for standard of proof to sever service connection for act of commission or omission; see § 5.83(a), for due process procedures for severing service connection.

(Authority: 38 U.S.C. 1159, 5104)

Cross Reference: § 5.1, for the definition of ''fraud''.

§ 5.176 [Reserved]

§ 5.177 Effective dates for reducing or discontinuing a benefit payment or for severing service connection.

(a) *Suspended awards.* If an award has been suspended and it is determined that no additional payments are in order, VA will discontinue the award effective the first day of the month after the month for which VA last paid benefits.

(b) *Running awards.* If an award is running, VA will discontinue the award effective as appropriate under paragraphs (c) through (h) of this section.

(c) *Severance of service connection.* Unless severance is based on the beneficiary's act of commission or omission that resulted in VA's grant of benefits, this paragraph applies if VA severs service connection. In such cases, two 60-day periods apply. After applying the 60-day notice period described in § 5.83, VA will apply a second 60-day period which begins on the day VA sends notice to the beneficiary of the final decision. VA will sever service connection effective the first day of the month after the second 60-day period. See § 5.167 for effective date of severance of service connection obtained by fraud.

(d) *Character of discharge or line of duty.* This paragraph (d) applies if VA discontinues benefits based on a determination as to character of discharge or line of duty. In such cases, two 60-day periods apply. After applying the 60-day notice period described in § 5.83(a), VA will apply a second 60-day period which begins on the day VA sends notice to the beneficiary of the final decision. VA will discontinue benefits effective the first day of the month after the second 60-day period.

(e) *Disability compensation.* This paragraph (e) applies if VA reduces or discontinues disability compensation because of a change in service-connected disability or employability status. In such cases, two 60-day periods apply. After applying the 60-day notice period described in § 5.83(a), VA will apply a second 60-day period which begins on the day VA sends notice to the beneficiary of the final decision. VA will pay a reduced rate or discontinue disability compensation effective the first day of the month after the second 60-day period.

(f) *Pension.* This paragraph (f) applies if VA reduces or discontinues pension payments because of a change in disability or employability status. In such cases, VA will reduce the rate or discontinue pension effective the first day of the month after notice to the beneficiary of the final decision.

(g) *Chapter 18 monetary allowance.* If, after providing the 60-day notice period described in § 5.83(a), VA reduces or discontinues chapter 18 monetary allowance, it will apply the effective date provision in § 5.591(b)(5).

(h) *Other.* The effective dates of reductions or discontinuances not listed in this section will be as stated in the sections listed in the table in § 5.705.

(i) *Exceptions.* This section does not apply if the reduction or discontinuance involves:

(1) A change in law or a VA administrative issue or a change in interpretation of law or VA issue; if so, apply § 5.152;

(2) An award that was erroneous due to an act of commission or omission by the beneficiary or with the beneficiary's knowledge; if so, apply § 5.167(b), regarding effective dates for reducing or discontinuing a benefit payment, or for severing service connection, based on commission or omission, or based on administrative error or error in judgment; or

(3) An award that was based solely on administrative error or an error in judgment by VA; if so, apply § 5.166. However, this paragraph (i)(3) does not apply to severance of service connection under paragraph (c) of this section or to reduction of disability compensation under paragraph (e) of this section.

(Authority: 38 U.S.C. 1110, 1131, 1117, 5112)

§§ 5.178–5.179 [Reserved]

Subpart D—Dependents and Survivors

General Dependency Provisions

§ 5.180 [Reserved]

§ 5.181 Evidence needed to establish a dependent.

(a) *Scope.* This section describes general types of evidence used to establish the existence of a dependent.

(b) *Using a statement to establish a dependent.* Except as provided in paragraph (c) of this section, VA will accept a claimant's or beneficiary's statement as sufficient proof of marriage, termination of marriage, or birth of a child. The statement must contain all of the following information, if applicable:

(1) The date (month, day, and year) and place (city and state, or country if outside of a state) of the:

(i) Marriage;

(ii) Marriage termination; or

(iii) Birth;

(2) The full name of the person whose dependency is asserted, and the person's relationship to the claimant;

(3) The Social Security number of the person whose dependency is asserted; and

(4) The name and address of the person who has custody of any child whose dependency is asserted, if the child does not reside with the claimant.

(c) *When a statement alone is not sufficient.* VA will require additional supporting evidence to establish a veteran's marital status or a parent/natural child relationship, as set forth in §§ 5.192(c), 5.193, 5.221, 5.229, and 5.500, if any of the following factors are true:

(1) The statement does not contain all of the applicable information required by paragraphs (b)(1) through (4) of this section;

(2) The claimant or beneficiary does not reside in a State;

(3) VA questions the accuracy of all or part of the statement;

(4) The statement conflicts with other evidence in the record; or

(5) There is a reasonable indication, either in the statement or in other evidence in the record, of fraud or misrepresentation of the relationship in question.

(d) *Photocopies accepted.* If VA is satisfied that photocopies are authentic and free from alteration, then VA will accept them to establish birth, death,

marriage, or relationship under this section, or to prove a change in dependency under § 5.182. Otherwise, VA may require certified copies of documents from the custodian of the documents, bearing the custodian's signature and official seal.

(Authority: 38 U.S.C. 501(a), 5124)

Cross Reference: § 5.1, for the definitions of ''custody of a child,'' ''fraud,'' and ''State.''

§ 5.182 Change in status of dependents.

(a) *Beneficiary's duty to report.* A beneficiary must provide VA a statement containing the details of any change in dependency that could lead to a reduction or discontinuance of benefits. The beneficiary must report the date (month, day, and year) and place (city and state, or country if outside of a state) of any of the following events:

(1) Marriage;

(2) Annulment of marriage;

(3) Divorce;

(4) Death of a dependent; or

(5) Change in status of a living child affecting his or her status as a dependent.

(b) *Evidence of changes.* VA will accept a beneficiary's statement of a change in the status of a dependent under this section as proof of the change if VA has no information contradicting the statement. Otherwise, VA will require additional proof regarding the matter as specified elsewhere in subpart D.

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

Cross Reference: § 5.104, ''Certifying continuing eligibility to receive benefits

§ 5.183 Effective date of award of benefits for a dependent.

(a) *General rule.* Except as provided in paragraph (b) of this section, the effective date of the award of benefits for a dependent is the date the claimant or beneficiary informs VA of the existence of the dependent, subject to the following conditions:

(1) *Additional evidence.* If VA requests additional evidence based on the information of the existence of the dependent, the claimant or beneficiary must provide such evidence no later than 1 year after VA's request. If the claimant or beneficiary provides the requested evidence more than 1 year after VA's request, the effective date of the establishment of a dependent on the claimant's or beneficiary's award will be the date VA receives such evidence.

(2) *Date of dependency.* No award will be effective before the date dependency arose.

(3) *Date of original claim.* No award will be effective before the date of an original claim for benefits or the date of a claim for increased benefits.

(b) *Specific applications and exceptions.* In the following circumstances, and subject to paragraphs (a)(1), (2), and (3) of this section, the effective date of an award for a dependent will be:

(1) *Marriage.* The date of marriage, if VA receives information about the marriage no later than 1 year after the event.

(2) *Birth.* The date of the birth of a child, if VA receives information about the birth no later than 1 year after the event.

(3) *Adoption.* For an adoption, the earliest of the following dates, as applicable, if VA receives information about the adoption no later than 1 year after the adoption:

(i) The date of the adoption placement agreement;

(ii) The date of the interlocutory (temporary) adoption decree; or

(iii) The date of the final adoption decree.

(4) *Date of qualifying disability rating.* The effective date of the qualifying disability rating, if VA receives information of the dependency no later than 1 year after the date VA sent notice of the rating action to the claimant or beneficiary.

(5) *Date of original award.* The same day as the effective date of the original award of benefits other than benefits for a dependent, if:

(i) Benefits for a dependent are claimed on the same benefit application used to file the claim for the original award of benefits; or

(ii) VA receives information to establish a dependent no later than 1 year after the effective date of the original award of benefits.

(Authority: 38 U.S.C. 5103(b), 5110(a), (f), (n))

Cross Reference: § 5.235, Effective date of an award of benefits due to termination of a child's marriage.

§ 5.184 Effective date of reduction or discontinuance based on changes in dependency status.

Except for Old-Law Pension or Section 306 Pension, the effective date of a reduction or discontinuance based on an event that changes the status of a dependent will be determined as follows:

(a) *Change in dependency due to death, divorce, or annulment.* VA will pay a reduced rate or discontinue benefits effective the first day of the month after the month in which the death occurred or in which the divorce or annulment became effective.

(b) *Change due to marriage, remarriage, or beginning of inferred marital relationship.* See §§ 5.197 and 5.203(b)(2).

(c) *Changes in status of child dependents.* The effective date of a reduction or discontinuance based on changes in child status will be determined as follows:

(1) Child reaches age 18 or 23. See § 5.231.

(2) Child no longer qualifies as adopted child. See § 5.232.

(3) Stepchild leaves veteran's household. See § 5.233.

(4) Child no longer permanently incapable of self support. See § 5.234.

(d) *Effective date of reduction or discontinuance based on change in status.* Notwithstanding any other section of this part, if VA cannot determine the month, day, and year of an event that changes the status of a dependent, then VA will reduce or discontinue benefits effective the first day of the month after the month VA last paid benefits.

(Authority: 38 U.S.C. 5112(b)(2))

Cross Reference: § 5.477, Effective dates of reductions and discontinuances of Old-Law Pension and Section 306 Pension.

§§ 5.185–5.190 [Reserved]

Marriage, Divorce, and Annulment

§ 5.191 Marriages VA recognizes as valid.

A valid marriage for VA purposes is one between persons of the opposite sex that was:

(a) Valid under the law of the place where the persons lived at the time of the marriage;

(b) Valid under the law of the place where the persons lived at the time entitlement to benefits arose; or

(c) Deemed valid under § 5.200, for claims involving a surviving spouse.

(Authority: 38 U.S.C. 101(31), 103(c))

§ 5.192 Evidence of marriage.

(a) *Scope.* This section describes the evidence of marriage VA will accept when supplementary evidence is required in addition to the statement described in § 5.181(b).

(b) *Evidence of a valid marriage.* VA will accept evidence as prescribed in paragraph (c) of this section as proof of a valid marriage under § 5.191, unless there is contrary evidence of record. If either party to the marriage was previously married, the claimant or beneficiary must provide VA with a certified statement of the date, place, and circumstances under which any prior marriage ended.

(c) *Acceptable evidence of marriage.* In order to prove a valid marriage, a

claimant must file a statement as prescribed in § 5.181. If the statement is insufficient under § 5.181(c), VA will accept as additional supporting evidence the first of the following items that is obtainable; VA will not accept a lower item unless it is established that the items listed above it are unobtainable:

(1) A copy or abstract of the public record of marriage, or a copy of the church or other religious-context record of marriage. The copy or abstract must include the names of the persons married, the date and place of the marriage, and the number of any prior marriages if shown on the official record.

(2) An official report from the service department if the veteran is a party to the marriage and the marriage took place during the veteran's military service.

(3) An affidavit from the official or clergyman who performed the ceremony.

(4) The original marriage certificate if VA is satisfied that it is genuine and free from alteration.

(5) The affidavits or certified statements of two or more eyewitnesses to the ceremony.

(6) For informal or common-law marriages in jurisdictions where marriages other than by ceremony are recognized:

(i) A copy of the State's acknowledgement of registration, if the State has a procedure for registering informal or common-law marriages; or

(ii) The affidavit or certified statement of one of the parties to the marriage, giving all the facts and circumstances concerning the marriage. This includes details of the agreement made by the parties at the time they began living together, the length of time in months and years they have lived together, the location of each residence and the dates the parties lived there, and whether a child was born of the relationship. Such affidavits or certified statements must be accompanied by affidavits or certified statements from two or more persons who know from personal observation the relationship that existed between the parties. The affidavits or statements of these persons must include when the parties lived together, the places of the parties' residence, whether they referred to themselves as married in the communities they lived in, and whether those communities generally accepted them as being married.

(7) Any other evidence that would reasonably allow a VA decisionmaker to conclude that a valid marriage did occur.

(Authority: 38 U.S.C. 103(c), 501(a))

Cross Reference: § 5.1, for the definition of ''certified statement,'' ''child born of the marriage,'' and ''State.'' § 5.200, Surviving spouse: requirement of valid marriage to veteran.

§ 5.193 Proof of marriage termination where evidence is in conflict or termination is contested.

If there is conflicting evidence of record regarding marriage termination, or the evidence of record is contested by an interested party, a claimant must file a statement under § 5.181. If the statement is insufficient under § 5.181(c), VA will accept as additional supporting evidence any of the following items:

(a) Proof of the former spouse's death;

(b) Proof of divorce as specified in § 5.194(b) or (c), as applicable; or

(c) A court-certified copy of the final decree of annulment or a court-certified abstract of such a decree.

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

§ 5.194 Acceptance of divorce decrees.

(a) *General rule.* (1) VA will accept as valid a divorce decree that is regular (proper) on its face unless its validity is challenged by either of the following persons:

(i) One of the parties named in the divorce decree; or

(ii) Any person whose entitlement to benefits would be affected if VA recognizes the decree as valid.

(2) In case of such a challenge, VA will make an independent decision about the validity of the divorce decree based on the criteria in paragraph (b) or (c) of this section, as applicable.

(b) *Challenged divorce decree—party to the divorce has not remarried.* If a person whose divorce decree is challenged has not remarried, VA will accept the divorce decree as valid if all the following conditions are met:

(1) The person who obtained the divorce had a permanent residence in the place where the divorce decree was issued;

(2) The person satisfied all the legal requirements for obtaining a divorce in the place in which the divorce decree was issued; and

(3) VA has the original divorce decree, a court-certified copy of the original decree, or a court-certified abstract of the original decree.

(c) *Challenged divorce decree—party to the divorce has remarried*—(1) *General rule.* Except as provided in paragraph (c)(2) of this section, if the issue is whether a remarried person is validly divorced from a prior spouse, then VA will accept the validity of the challenged divorce decree if either:

(i) The law of the place where the parties were living when they were married recognizes the validity of the divorce decree; or

(ii) The law of the place where the parties were living when the right to benefits arose recognizes the validity of the divorce decree.

(2) *Foreign decree granted to residents of a State.* If the issue is whether a remarried person's foreign divorce is valid, VA will accept the validity of the challenged divorce decree if both of the following conditions are met:

(i) The law of the State in which the persons lived at the time they obtained the divorce decree recognizes the decree as valid; and

(ii) No court of last resort has found the divorce decree invalid in the places where the persons lived when they were married or when the right to benefits arose.

(Authority: 38 U.S.C. 103(c), 501(a))

Cross Reference: § 5.1, for the definition of ''State.''

§ 5.195 [Reserved]

§ 5.196 Void or annulled marriages.

(a) *Void marriage.* (1) *General rule.* A marriage is void if at least one party to the marriage did not meet the legal requirements for entering into the marriage at the time the marriage took place. Examples of void marriages include marriages in which at least one party was already married and marriages in which at least one party did not meet the minimum age requirement for marriage. VA Regional Counsel will determine whether a marriage is void under the law of the place that governs the validity of the marriage's. See § 5.191.

(2) *Evidence.* To establish that a marriage was void, VA must receive a certified statement from the claimant or beneficiary describing the facts that made the marriage void. VA may require the claimant or beneficiary to file additional evidence as the individual circumstances may require. See § 5.1 for the definition of ''certified statement''.

(b) *Annulled marriage.* To establish that a marriage has been annulled, VA must receive a copy or abstract of the court's annulment decree. VA will accept the decree as valid unless one of the following conditions applies:

(1) The copy or abstract of the decree discloses irregularities;

(2) VA has reason to question the court's authority to issue the annulment decree; or

(3) There is evidence to show that the annulment might have been obtained by fraud of either party or by collusion of the parties.

(Authority: 38 U.S.C. 103(c), (d), (e), 501(a))

Cross Reference: § 5.1, for the definition of ''certified statement'', and § 5.1 for the definition of ''fraud''.

§ 5.197 Effective date of reduction or discontinuance of Improved Pension, disability compensation, or dependency and indemnity compensation due to marriage or remarriage.

When a reduction or discontinuance of Improved Pension, disability compensation, or dependency and indemnity compensation is required based on marriage or remarriage, VA will pay the reduced rate or discontinue benefits as follows:

(a) *Beneficiary or apportionee.* VA will pay the reduced rate or discontinue benefits effective the first day of the month in which the marriage or remarriage of a beneficiary or apportionee occurred.

(b) *Dependent of a beneficiary.* VA will pay the reduced rate or discontinue benefits effective the first day of the month after the month in which the marriage or remarriage of a dependent of a beneficiary occurred.

(Authority: 38 U.S.C. 5112(b)(1), 5112(b)(2))

Cross Reference: § 5.477, Effective dates of reductions and discontinuances of Old-Law Pension and Section 306 Pension.

§§5.198–5.199 [Reserved]

Surviving Spouse Status

§ 5.200 Surviving spouse: requirement of valid marriage to veteran.

(a) *Surviving-spouse status.* To qualify as a surviving spouse, a person must satisfy one or the other of the following sets of requirements:

(1) The requirements of § 5.191; or

(2) The requirements of paragraph (b) of this section

(b) *Marriages deemed valid.* For purposes of entitlement to death benefits, VA will deem valid an attempted marriage between a veteran and a person for or by whom surviving-spouse status is sought (''the person'') if all of the following criteria are met:

(1) *There must have been an attempt at legal marriage.* The person must have attempted to marry the veteran, and must have believed that a valid marriage resulted. The marriage must have endured continuously for at least 1 year immediately preceding, and including, the date of the veteran's death, unless a child was born of or before the marriage. If a child was born of or before the marriage, then the marriage may have been of any duration.

(2) *No knowledge of legal impediment.* VA will accept as true a signed statement from the person indicating that he or she had no knowledge of a legal impediment at the time of the attempted marriage. VA will accept the statement as true if the person files evidence of the attempted marriage acceptable under § 5.192(c) satisfies the other requirements in this section, and there is no contradictory evidence. VA will apply the following guidelines to determine whether a person had knowledge of a legal impediment:

(i) Only the person's knowledge at the time of the attempted marriage, but not knowledge acquired after the marriage, is relevant.

(ii) Legal impediments include, but are not limited to:

(A) One of the parties being underage;

(B) One of the parties lacking mental capacity to contract marriage;

(C) The parties being too closely related to marry under state law;

(D) Failing to comply with procedural prerequisites under State law, such as obtaining a blood test or marriage license, or fulfilling a length-of-residence requirement;

(E) One of the parties having a prior undissolved marriage at the time of the attempted marriage; or

(F) In a jurisdiction that does not recognize common-law marriages, the parties' failing to marry through a marriage ceremony.

(iii) If the person files a signed statement that he or she had no knowledge of the impediment to the marriage but there is evidence showing otherwise, VA will not deem the marriage valid.

(3) *Continuous cohabitation.* The person lived continuously with the veteran from the day of the marriage to the day of the veteran's death. See § 5.201(b).

(4) *No surviving spouse.* There is no surviving spouse, as defined in § 5.201, who has filed a claim for death benefits, and whom VA has determined is entitled to such benefits. However, a surviving spouse's entitlement to accrued benefits does not prevent another claimant from being considered the veteran's surviving spouse through a marriage deemed valid under this section.

(Authority: 38 U.S.C. 103(a), 501(a))

Cross Reference: § 5.1, for the definition of ''State''. § 5.432, Deemed valid marriages and contested claims for Improved Death Pension.

§ 5.201 Surviving spouse: requirements for relationship with the veteran.

(a) *Definition.* Except as provided in § 5.203, a *surviving spouse* is a person who meets all of the following requirements:

(1) The person was married to the veteran at the time of the veteran's death;

(2) The marriage was valid under § 5.191; and

(3) The person ''lived continuously'' with the veteran under paragraph (b) of this section, from the date of marriage to the date of the veteran's death.

(b) *Lived continuously.* The following considerations apply when determining whether a person lived continuously, also referred to in this part as continuous cohabitation, with a veteran:

(1) *Whether there was more than one marriage to the veteran.* If a surviving spouse has been legally married to the same veteran more than once, VA will use the date of the original marriage to decide whether the surviving spouse has met the marriage date requirements.

(2) *Whether the person was at fault in the separation*—(i) *Criteria.* Even if the veteran and the person separated during the marriage, the continuous cohabitation requirement of paragraph (a)(2) of this section is met if:

(A) The person was not at fault in causing the separation; and

(B) The veteran brought about the separation or the veteran's misconduct caused the separation.

(ii) *When misconduct occurred.* In determining who was at fault in causing the separation, VA will consider the veteran's and the other person's misconduct at the time of the separation, but not misconduct after the separation.

(3) *Whether a separation was by mutual consent.* VA will not consider a separation to have broken the continuity of cohabitation if the evidence shows it was by mutual consent for a purpose such as the convenience, health, or business of one or both persons in the marriage, and the person had no intent to desert the veteran or abandon the marriage.

(4) *Whether a separation with estrangement was temporary.* A separation with estrangement occurring during the course of the marriage, regardless of who is at fault, does not break the continuity of cohabitation if the parties are no longer estranged at the time of the veteran's death.

(5) *Whether evidence contradicts the statement.* VA will accept the person's statement explaining the reason for the separation from the veteran in the absence of contradictory evidence.

(6) *State law not controlling.* State laws do not control VA's determination whether separation has resulted from desertion. VA will, however, consider findings of fact made in court decisions

dealing with this issue that were made during the lifetime of the veteran.

(Authority: 38 U.S.C. 101(3), 103(d)(3), 501(a), 5110(a), 5112(b)(1))

Cross Reference: § 5.1, for the definition of ''State''.

§ 5.202 [Reserved]

§ 5.203 Effect of remarriage on a surviving spouse's benefits.

(a) *General rule.* VA will not recognize a person as the surviving spouse of a veteran if either of the following is true:

(1) The person has remarried. In determining eligibility for benefits, VA will accept the decision of a Federal court that a person has not remarried if the decision was in a case to which the U.S. Government was a party.

(2) The person has held himself or herself out to the public as the spouse of another person as described in paragraph (b) of this section.

(Authority: 38 U.S.C. 101(3))

(b) *Holding oneself out as a spouse*—(1) *General rule.* For purposes of this part, a person has held himself or herself out as the spouse of another person if, after September 19, 1962, and after the death of the veteran, the person:

(i) Lived with a person of the opposite sex; and

(ii) Held himself or herself out to the public, through a pattern or course of conduct, as the spouse of that person.

(2) *Effective date of discontinuance of benefits to a surviving spouse who holds himself or herself out as the spouse of another person.* If a surviving spouse holds himself or herself out as the spouse of another person, then VA will discontinue that surviving spouse's benefits effective the first day of the month that the inferred marital relationship began.

(3) *Effective date of resumption of dependency and indemnity compensation to a surviving spouse who stops holding himself or herself out as the spouse of another.* If a surviving spouse no longer holds himself or herself out as the spouse of another, and he or she files a claim for dependency and indemnity compensation (DIC), then VA will resume benefits effective the later of:

(i) The date the surviving spouse no longer held himself or herself out under paragraph (b)(1) of this section; or

(ii) The date VA receives a claim for benefits from the surviving spouse.

(c) *Remarriages that do not preclude status as a surviving spouse.* Remarriage will not prevent VA from recognizing a person as a surviving spouse if the remarriage was either:

(1) Void (see § 5.196); or

(2) Annulled by a court having authority to annul the marriage, unless VA determines that the annulment was obtained through fraud by either party or by collusion of the parties.

(Authority: 38 U.S.C. 103(d)(1))

(d) *Reinstatement of eligibility for benefits for a surviving spouse who, because of remarriage, may have been ineligible for benefits under laws in effect before January 1, 1971, and whose remarriage ended before November 1, 1990.* After December 31, 1970, none of the following elements will prevent a surviving spouse who may have been ineligible for benefits under laws in effect before January 1, 1971, because of remarriage, from receiving benefits:

(1) Remarriage that ended by death before November 1, 1990;

(2) Remarriage that ended by divorce provided that proceedings began before November 1, 1990, unless VA determines that the divorce was obtained through fraud by the surviving spouse or by collusion of the parties;

(3) Remarriage that was dissolved by a court with authority to render divorce decrees in legal proceedings begun by the surviving spouse before November 1, 1990, unless VA determines that the divorce was obtained through fraud by the surviving spouse or by collusion of the parties; or

(4) The surviving spouse has held himself or herself out as the spouse of another person, if competent, credible evidence shows that the surviving spouse stopped living with that person and holding himself or herself out as that person's spouse before November 1, 1990. Such evidence may consist of the surviving spouse's certified statement of the fact.

(Authority: 38 U.S.C. 501(a); Sec. 4, Pub. L. 91–376, 84 Stat. 789; Sec. 8004, Pub. L. 101–508, 104 Stat. 1388–343; Sec. 502, Pub. L. 102–86, 105 Stat. 424; Sec. 103, Pub. L. 102–568, 106 Stat. 4322)

(e) *Reinstatement of eligibility for DIC for a surviving spouse who, because of remarriage, may have been ineligible for DIC under laws in effect before June 9, 1998*—(1) *Termination of remarriage.* None of the following elements will prevent a surviving spouse who may have been ineligible for DIC under laws in effect before June 9, 1998, because of remarriage, from receiving benefits:

(i) Remarriage ended by death;

(ii) Remarriage ended by divorce, unless VA determines that the divorce was obtained through fraud by the surviving spouse or by collusion of the parties; or

(iii) The surviving spouse has held himself or herself out as the spouse of another person, if competent, credible evidence shows that the surviving spouse stopped living with that person and holding himself or herself out as that person's spouse. Such evidence may consist of the surviving spouse's certified statement of the fact.

(2) *Limitation.* No payment may be made under this paragraph (e) for any period before October 1, 1998.

(Authority: 38 U.S.C. 103(d)(2); Sec. 8207, Pub. L. 105–178, 112 Stat. 495)

(f) *Remarriages after age 57.* (1) A surviving spouse's remarriage after reaching age 57 will not prevent the surviving spouse from receiving DIC if the surviving spouse remarried after December 15, 2003.

(2) No payment may be made under this paragraph (f) for any period before January 1, 2004.

(Authority: 38 U.S.C. 103(d)(2)(B); Sec. 101, Pub. L. 108–183, 117 Stat. 2652)

Cross Reference: § 5.1, for the definition of ''competent evidence'' and § 5.1, for the definition of ''fraud''.

§ 5.204 [Reserved]

§ 5.205 Effective date of resumption of benefits to a surviving spouse due to termination of a remarriage.

(a) *Void remarriage.* The effective date of an award resumed because a surviving spouse's remarriage is void is the later of the following dates:

(1) The date the surviving spouse and the other person stopped living together; or

(2) The date VA receives a claim from the surviving spouse for resumption of benefits.

(b) *Annulment.* The effective date of an award resumed because a surviving spouse's remarriage is annulled is:

(1) The date the annulment became effective, if the surviving spouse files a claim for resumption of benefits no later than 1 year after that date; or

(2) The date VA receives a claim for resumption of benefits, if the surviving spouse files a claim for resumption of benefits more than 1 year after the date the annulment became effective.

(c) *Divorce.* The effective date of an award resumed because a surviving spouse's remarriage ends in divorce, provided the surviving spouse meets the requirements for reinstatement of § 5.203(d) or (e) is:

(1) The date the divorce became effective if the surviving spouse files a claim for resumption of benefits no later than 1 year after that date; or

(2) The date VA receives a claim for resumption of benefits, if the surviving spouse files a claim for resumption of benefits more than 1 year after the date the divorce became effective.

(d) *Death.* The effective date of an award resumed because a surviving spouse's remarriage ends due to a death, provided the surviving spouse meets the requirements of § 5.203(c) or (d) is:

(1) The date of death, if the surviving spouse files a claim for resumption of benefits no later than 1 year after that date; or

(2) The date VA receives a claim for resumption of benefits, if the surviving spouse files a claim for resumption of benefits more than 1 year after the date of death.

(Authority: 38 U.S.C. 5110(a), (k), (*l*))

§§ 5.206–5.219 [Reserved]

Child Status

§ 5.220 Status as a child for benefit purposes.

A person must meet the following criteria to be recognized as a child of the veteran for benefit purposes:

(a) *Marital status.* The person must be unmarried, except as provided in § 5.228.

(b) *Age.* The person must be under 18 years of age, unless either of the following is true:

(1) The person, before reaching 18 years of age, became permanently incapable of self-support because of physical or mental disability (see § 5.227); or

(2) The person is under 23 years of age and is pursuing a course of instruction at an educational institution approved by VA. For purposes of this section, the term *educational institution* means a permanent organization that offers courses of instruction to a group of students who meet its enrollment criteria. The term includes schools, colleges, academies, seminaries, technical institutes, and universities. The term also includes home schools that operate in compliance with the compulsory attendance laws of the States in which they are located, whether treated as private schools or home schools under State law. The term *home schools* is limited to courses of instruction for grades kindergarten through 12.

(c) *Relationship.* The person must bear one of the following relationships to the veteran:

(1) *Natural child.* A natural child.

(2) *Stepchild.* A stepchild who became a stepchild under circumstances described in § 5.226.

(3) *Adopted child.* A person who was adopted by:

(i) The veteran's surviving spouse after the veteran's death under circumstances described in § 5.223;

(ii) The veteran before the person reached 18 years of age;

(iii) The veteran and became permanently incapable of self-support before reaching 18 years of age and was a member of the veteran's household at the time he or she became 18 years of age; or

(iv) The veteran before the person reached 23 years of age, and who is pursuing a course of instruction as described in paragraph (b)(2) of this section.

(d) *Child enters active duty.* A person who is a child of the veteran under paragraphs (a) through (c) of this section will not lose that status because the person enters active duty.

(Authority: 38 U.S.C. 101(4)(A), 104, 501(a))

Cross Reference: § 5.1, for the definition of ''State''. § 5.222, Evidence to establish an adopted child relationship.

§ 5.221 Evidence to establish a parent/natural child relationship.

(a) *Parents married at date of child's birth.* If additional evidence of relationship is required under § 5.181 and the parents were married to each other at the time of the child's birth, a claimant or beneficiary may prove a parent/natural child relationship as follows:

(1) *Mother.* Any of the evidence described in § 5.229 that shows a mother/natural child relationship may be used to establish such a relationship.

(2) *Father.* Any of the evidence described in § 5.229 that shows a father/natural child relationship may be used to establish such a relationship. If the evidence does not show that the man married to the child's mother when the child was born is the child's father, or shows a different man may be the child's father, then VA will evaluate the facts, request any necessary evidence and information, and then make a determination concerning the child's paternity.

(b) *Parents unmarried at date of child's birth.* If additional evidence of relationship is required under § 5.181, and the parents were not married to each other at the time of the child's birth, a claimant or beneficiary may prove a parent/natural child relationship as follows:

(1) *Mother.* Any of the evidence described in § 5.229 that shows a mother/natural child relationship may be used to establish such a relationship.

(2) *Father.* In order to prove a father/natural child relationship, a claimant must file a statement under § 5.181. If the statement is insufficient under § 5.181(c), VA will accept as additional supporting evidence the first of the following items that is obtainable; VA will not accept a lower item unless it is established that the items listed above it are unobtainable:

(i) A man's statement in writing and signed by him acknowledging himself as the natural father of the child;

(ii) Evidence showing that a specific man has been identified as the child's father by judicial decree; or

(iii) Other competent evidence showing that a child is the natural child of a specific man, including any of the following evidence:

(A) A copy of the public record of birth or a religious-context record documenting the birth of the child (such as a church record of baptism), showing that a specific man was the informant and was named as the father of the child;

(B) Statements from persons who know that a specific man accepted the child as his own; or

(C) Service department records or public records, such as records from schools or welfare agencies, showing that, with his knowledge, a specific man was named as the child's father.

(Authority: 38 U.S.C. 101(4), 501(a))

Cross Reference: § 5.1, for the definition of ''competent evidence''.

§ 5.222 Evidence to establish an adopted child relationship.

This section states how to establish an adopted child relationship. A claimant or beneficiary cannot establish an adopted child relationship with a statement alone. See also § 5.220(c)(3). VA will require the first type of evidence listed in this section as proof of this status, if obtainable. If this type of evidence is unobtainable, then the relationship may still be proven by the next type of obtainable evidence listed.

(a) A final adoption decree.

(b) A revised birth certificate showing the child as the child of the adopting parent in cases where release of adoption documents or information is prohibited or requires petition to a court, such as records sealed by a court.

(c) An interlocutory adoption decree, provided that the decree has not been rescinded or superseded and the child remains in the custody of the adopting parent during the interlocutory period.

(d) An adoption placement agreement between the adopting parent and an agency authorized by law to arrange adoptions. VA will recognize such an agreement for the duration of its term, provided that the adopting parent maintains custody of the child.

(Authority: 38 U.S.C. 101(4))

Cross Reference: § 5.1, for the definition of ''custody of a child''.

§ 5.223 Child adopted after a veteran's death.

(a) *Evidence.* This section states how to establish that a surviving spouse adopted a child after a veteran's death. This section states the requirements to establish that a child a veteran's surviving spouse adopted after the veteran's death is the veteran's child. A surviving spouse cannot establish a veteran/adopted child relationship with a statement alone. In the absence of evidence to the contrary, VA will accept as true the statement of the surviving spouse or the custodian of the child that the requirements described in paragraphs (b)(2) and (3) of this section have been met.

(b) *Circumstances under which adoption will be recognized.* VA will recognize a person adopted by a veteran's surviving spouse as the veteran's child if the adoption met all of the following conditions:

(1) The adoption took place under a decree issued no later than 2 years after the date of the veteran's death;

(2) The person adopted was a member of the veteran's household at the time of the veteran's death; and

(3) At the time of the veteran's death the person adopted was not receiving regular contributions from any public or private welfare organization that furnishes services or assistance for children or from a person other than the veteran or the veteran's spouse that were sufficient to provide for the major portion of the child's support.

(Authority: 38 U.S.C. 101(4))

Cross Reference: § 5.1, for the definition of ''custody of a child''.

§ 5.224 Child status despite adoption out of the veteran's family.

(a) *Retention of eligibility for benefits.* The adoption of a veteran's child out of the veteran's family, whether before or after the veteran's death, does not terminate that child's status as the veteran's child for purposes of eligibility for benefits.

(b) *Evidence.* Section 5.181(b) does not apply to establishing status as a child under this section.

(1) *Establishing that a child was adopted out of the veteran's family where release of adoption records is restricted or prohibited.* If the jurisdiction in which a child was adopted out of the veteran's family will release adoption documents only upon petition to a court, or the jurisdiction prohibits release of the documents or information, VA will accept the evidence listed in paragraph (b)(1)(i) of this section to establish the child's status as the child of the veteran. If this evidence is unobtainable, then the relationship may still be proven by the evidence listed in (b)(1)(ii) of this section.

(i) A statement over the signature of the judge or the clerk of the court setting forth the child's former name and the date of adoption;

(ii) A certified statement by the veteran, the veteran's surviving spouse, a person receiving an apportionment of benefits, or any of their fiduciaries setting forth the child's former name, the child's date of birth, and the date and fact of adoption together with evidence indicating that the child's original public record of birth has been removed from such records.

(2) *Evidence of child/natural parent relationship in apportionment cases.* If VA receives a claim for an apportionment under § 5.772 for a child adopted out of a veteran's family, the evidence must be sufficient to establish the veteran as the natural parent of the child. See § 5.221.

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

Cross Reference: § 5.1, for the definition of ''certified statement''.

§ 5.225 Child status based on adoption into a veteran's family under foreign law.

(a) *Scope*—(1) *Purpose.* VA will apply this section to determine the validity of an adoption for benefit purposes when a person was adopted into a veteran's family under the laws of a foreign country.

(2) *Foreign country.* For purposes of this section, the term *foreign country* means any location except for a State, as that term is defined in § 5.1.

(3) *Inclusion of certain Philippine veterans.* For purposes of this section, the term ''veteran'' includes a Commonwealth Army veteran or new Philippine Scout under § 5.610.

(b) *Living veteran—adopted person living in a foreign country*—(1) *Requirements for recognition of adoption.* If the veteran is alive and the person adopted under the law of a foreign country lives in a foreign country, VA will recognize the person's adoption as valid if all of the following conditions are met:

(i) The person was under age 18 when adopted;

(ii) The veteran provides one-half or more of the person's support;

(iii) The person's natural parent does not have custody of the person unless the natural parent is also the veteran's spouse; and

(iv) The person lives with the veteran or with the divorced spouse of the veteran if the divorced spouse is also the natural or adoptive parent. This requirement does not apply when the person is attending an educational institution full-time, or when the person, the veteran, or the divorced spouse is confined in a hospital, nursing home, other institution, or other health-care facility.

(2) *Continuing requirements.* The person must continue to meet the requirements noted in paragraphs (b)(1)(ii) through (iv) of this section following the adoption. After the initial award of benefits to or for the child, VA may from time to time verify that the person continues to meet these requirements. A beneficiary's failure to provide verifying information or documents upon VA's request may result in suspension or discontinuance of payments until VA receives proof that the person still meets the requirements.

(c) *Living veteran—adopted person not living in a foreign country.* If the veteran is alive and the person adopted under foreign law does not live in a foreign country, VA will determine the validity of the adoption under §§ 5.220 and 5.222.

(d) *Deceased veteran and surviving spouse adoptions*—(1) *Applicability.* This paragraph (d) applies if a veteran adopted a person under the laws of a foreign country, but the parent/child relationship was not established for VA purposes during the veteran's lifetime. This paragraph (d) also applies if a surviving spouse adopted a person under the laws of a foreign country after the veteran's death.

(2) *Requirements for recognition of adoption.* VA will recognize the person's adoption as valid if the veteran was entitled to and was receiving a VA dependent's allowance or similar VA monetary benefit for the person at any time during the 1 year before the veteran's death or if all of the following conditions are met:

(i) The person was under age 18 when adopted; and

(ii) All of the following conditions were met for at least 1 year before the veteran's death:

(A) The veteran provided one half or more of the person's support;

(B) The person's natural parent did not have custody of the person unless the natural parent is the veteran's surviving spouse; and

(C) The person lived with the veteran or with the divorced spouse of the veteran if the divorced spouse is also the natural or adoptive parent. This requirement does not apply when the person is attending an educational institution full-time, or when the person, the veteran, or the divorced spouse is confined in a hospital, nursing

home, other institution, or other health-care facility.

(3) *Additional requirements when the person was adopted by a surviving spouse after the veteran's death.* If a surviving spouse adopts a person after the veteran's death, the adoption must also meet the requirements of § 5.223 for VA to recognize the person's adoption as valid.

(Authority: 38 U.S.C. 101(4), 501(a))

Cross Reference: § 5.1, for the definition of ''nursing home'' and § 5.1, for the definition of ''State''.

§ 5.226 Child status based on being a veteran's stepchild.

(a) *Definitions.* The following definitions apply for purposes of this section:

(1) *Stepchild* means a natural or adopted child of a veteran's spouse, but not of the veteran, including the child of a surviving spouse whose marriage to the veteran is deemed valid under § 5.200.

(2) *Veteran/stepchild relationship,* for purposes of this part, means a relationship between the veteran and the stepchild that meets the requirements of this section.

(b) *Establishing a veteran/stepchild relationship.* To establish a veteran/stepchild relationship all of the following conditions must be met:

(1) The stepchild is a member of the veteran's household, as described in paragraph (c) of this section;

(2) The stepchild is related to the spouse of the veteran by birth or adoption; and

(3) The veteran is, or was at the time of his or her death, married to the natural or adoptive parent of the stepchild.

(c) *Member of veteran's household.* VA will consider a stepchild to be or to have been a member of the veteran's household if the conditions in one of the following paragraphs are met:

(1) The stepchild became the veteran's stepchild before reaching 18 years of age and is residing with the veteran or was residing with the veteran at the time of the veteran's death;

(2) The stepchild is pursuing a course of instruction as described in § 5.220(b)(2) who became the veteran's stepchild after reaching 18 years of age, but before reaching 23 years of age; and who is residing with the veteran or was residing with the veteran at the time of the veteran's death; or

(3) The stepchild receives, or at the time of the veteran's death was receiving, at least half of his or her support from the veteran. This includes a stepchild not residing with the veteran solely for medical, school, or similar reasons, and a stepchild who is residing with another person who has custody of the stepchild.

(d) *Effect of termination of marriage or legal separation on stepchild relationship*—(1) *Termination of marriage after a veteran becomes entitled to benefits.* If the marriage between a veteran and a stepchild's natural or adoptive parent ended, or they legally separated, after the date of the veteran's entitlement to benefits, then VA will no longer recognize the veteran/stepchild relationship unless:

(i) The stepchild continues to reside with the veteran; or

(ii) The veteran continues to provide at least half of the stepchild's support.

(2) *Termination of marriage before a veteran becomes entitled to benefits.* If the marriage between a veteran and a stepchild's natural or adoptive parent ended, or they legally separated, before the date of the veteran's entitlement to benefits, then VA will establish the stepchild as the veteran's child provided:

(i) The validity of the marriage can be proved; and

(ii) The stepchild continues to be a member of the veteran's household under paragraph (c) of this section after termination of the marriage.

(Authority: 38 U.S.C. 101(4), 501(a))

Cross Reference: § 5.1, for the definition of ''custody of a child''.

§ 5.227 Child status based on permanent incapacity for self-support.

(a) *Scope.* An unmarried person who has reached 18 years of age can be established as a child if the person was permanently incapable of self-support before reaching age 18. This section sets out the criteria VA uses to make this determination.

(b) *Determining incapacity for self-support.* The principal factors VA considers in determining whether a person is incapable of self-support are:

(1) *Employment history*—(i) *Productive employment.* A person who earns sufficient income for his or her reasonable support by his or her efforts is not incapable of self-support.

(ii) *Intermittent employment.* VA may find a person incapable of self support if incapacity for self-support is otherwise established under this section even though he or she has had employment that is only part of a tryout or that is casual, intermittent, unsuccessful, or terminated after a short period because of disability.

(iii) *Charitable or therapeutic employment.* VA will not find capacity for self-support based on employment that is afforded only upon sympathetic, therapeutic, or charitable considerations and that involves no actual or substantial provision of services.

(iv) *Lack of employment.* The fact that a person has never been employed tends to show incapacity for self-support if the lack of employment was due to the person's physical or mental disabilities and not due to unwillingness to work or other factors unrelated to the person's disability.

(2) *Nature and extent of disability.* (i) In cases where the person is not provided with sufficient income for his or her reasonable support by his or her efforts, VA will consider the following elements:

(A) Whether the nature and extent of disability would render the average person incapable of self-support;

(B) The impact of the disability on the person's ability to care for himself or herself and to perform the ordinary tasks expected of a person of the same age; and

(C) Whether the person attended school, and the highest grade completed.

(ii) Rating criteria applicable to a disabled veteran set out in the Schedule for Rating Disabilities in part 4 of this chapter are not controlling.

(c) *Determining permanence of incapacity*—(1) *Principal factors.* The principal factors for determining whether incapacity is permanent include, but are not limited to, the following:

(i) The nature and extent of disability;

(ii) Whether the disability has worsened or improved over time; and

(iii) Whether there is a reasonable possibility that the disability will improve in the future.

(2) *Case-by-case determinations.* VA determines permanence of incapacity for self-support on a case-by-case basis. Evidence to establish this may have originated before or after the child reached 18 years of age. Although other types of evidence will be accepted and considered, generally, the following types of evidence are particularly relevant to this issue:

(i) VA medical examinations or treatment records;

(ii) Private medical examination reports or treatment records;

(iii) Statements of persons having knowledge of the child's condition through personal observation, such as teachers, tutors, or social workers; or

(iv) Statements from representatives of institutions where the child received care, schooling, or other related services.

(d) *Revision of child status determinations*—(1) *Certain protection*

provisions are inapplicable. A VA determination that a child is permanently incapable of self-support is not subject to protection under § 5.170(b), or § 5.173.

(2) *Reexamination.* Only in unusual cases will VA request reexamination after it has found that a child is permanently incapable of self-support.

(3) *Intermittent employment.* A child previously shown by competent evidence to have been permanently incapable of self-support before reaching 18 years of age may be held to remain so at a later date even though there may have been a short intervening period or periods of employment of the type described in paragraph (b)(1)(ii) of this section, provided the cause of the incapacity is the same as that upon which VA previously found permanent incapacity and there was no intervening injury or disease that could be considered a major factor in current incapacity.

(4) *Court competency findings.* If VA receives evidence that shows that a child formerly found by VA to have been permanently incapable of self-support before reaching 18 years of age based on mental incompetency has been found competent by a court, VA will determine whether the child continues to be permanently incapable of self-support under this section. Such court determinations are not binding upon VA.

(Authority: 38 U.S.C. 101(4)(A)(ii), 501(a))

Cross Reference: § 5.1, for the definition of ''competent evidence''.

§ 5.228 Exceptions applicable to termination of child status based on marriage of the child.

The marriage of a child generally terminates his or her child status for VA purposes, except in the following circumstances.

(a) *Rule inapplicable to chapter 18 benefits.* Marriage of a veteran's child does not disqualify him or her for benefits due to birth defects of a child of certain veterans under 38 U.S.C. chapter 18, Benefits for Children of Vietnam Veterans and Certain Other Veterans.

(b) *Termination of marriage.* A child's marriage will not prevent a child from receiving benefits or a beneficiary from receiving benefits for that child, if the child's marriage:

(1) Was void, under § 5.196;

(2) Was annulled by a court having authority to annul the marriage, unless VA determines that the annulment was obtained through fraud by either party or by collusion of the parties;

(3) Ended by death before November 1, 1990; or

(4) Ended by divorce before November 1, 1990, by a court with authority to render the divorce decree, unless VA determines that the divorce was obtained through fraud by either party or by collusion of the parties.

(Authority: 38 U.S.C. 101(4), 103(e), 501(a), 1821, 1831; Sec. 9, Pub. L. 93–527, 88 Stat. 1702, 1705; Sec. 8004, Pub. L. 101–508, 104 Stat. 1388–343)

Cross Reference: § 5.1, for the definition of ''fraud''.

§ 5.229 Proof of age or birth.

In order to prove age or birth, a claimant must file a statement under § 5.181. If the statement is insufficient under § 5.181(c), VA will require the first type of evidence listed in this section as proof of age or birth, if obtainable. If this type of evidence is unobtainable, then age or birth may still be proven by the next type of obtainable evidence listed:

(a) A copy or abstract of the public record of birth (such as a birth certificate). A copy or abstract of the public record of birth established more than 4 years after the birth must be consistent with material on file with VA or must show on its face that it is based upon evidence that would be acceptable under this section.

(b) A copy of the public record of birth or a religious-context record documenting the birth of the child (such as a church record of baptism). An original or a copy of such a document created more than 4 years after the birth must be consistent with material on file with VA. The document must include at least one reference to age or relationship made when the reference was not essential to establishing entitlement to the benefit claimed.

(c) Service department records of birth.

(d) An affidavit or certified statement of the physician or midwife who was in attendance at birth.

(e) A copy of a Bible or other family record containing reference to the birth. The copy must be accompanied by a statement from a notary public, or other officer who has authority to administer oaths, certifying all the following criteria:

(1) The year the Bible or other book in which the record appears was printed;

(2) Whether it appears the record has been erased or changed in any way; and

(3) Whether it appears the entries were made on the date noted in the record.

(f) Affidavits or certified statements of two or more persons, preferably disinterested, who have knowledge of the name of the person born; the month, year, and place of birth of that person; and the parents' names. These persons must also provide VA with their own ages and an explanation as to how they came to know the facts surrounding the birth.

(g) Other reliable and convincing evidence that provides relevant information. This includes, but is not limited to:

(1) Census records;
(2) Hospital records;
(3) Insurance policies;
(4) School records;
(5) Employment records;
(6) Naturalization records; and
(7) Immigration records.

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

Cross Reference: § 5.1, for the definition of ''certified statement''.

Effective Dates of Changes in Child Status

§ 5.230 Effective date of award of pension or dependency and indemnity compensation to or for a child born after the veteran's death.

(a) The effective date of an award, or an increased award, of pension or of dependency and indemnity compensation (DIC) to or for a child born after the parent/veteran's death is the date the child was born if VA receives either of the following types of evidence within the time specified:

(1) Proof of birth received no later than 1 year after the date of birth; or

(2) Notification of the expected or actual birth received no later than 1 year after the veteran's death, provided that the notice is sufficient to indicate an intent to claim pension or DIC benefits described in this section.

(b) If the evidence described in paragraph (a) of this section is received more than 1 year after the child's birth in the case of paragraph (a)(1) of this section or the veteran's death in the case of paragraph (a)(2) of this section, then the effective date of the award or increase is the first of the month after the month of receipt of the claim.

(Authority: 38 U.S.C. 5110(a), (n))

§ 5.231 Effective date of reduction or discontinuance: child reaches age 18 or 23.

A reduction or discontinuance of pension, disability compensation, or dependency and indemnity compensation because a person no longer qualifies as a child for benefit purposes based on age will be effective on the child's 18th or 23rd birthday, as applicable under § 5.220(b). For effective dates of reductions or discontinuance applicable when a child completes the course of education or otherwise discontinues school

attendance before his or her 23rd birthday, see § 5.696.

(Authority: 38 U.S.C. 5112(a))

§ 5.232 Effective date of reduction or discontinuance: terminated adoptions.

A reduction or discontinuance of pension, disability compensation, or dependency and indemnity compensation because a person no longer qualifies as an adopted child under § 5.220(c)(3) or § 5.222, will be effective the earliest of the following dates:

(a) The day after the date the child left the custody of the adopting parent during the interlocutory period;

(b) The day after the date the child left the custody of the adopting parent during the term of an adoption placement agreement;

(c) The day after the date of rescission of the adoption decree; or

(d) The day after the date of termination of the adoption placement agreement.

(Authority: 38 U.S.C. 5112(a))

Cross Reference: § 5.1, for the definition of ''custody of a child''.

§ 5.233 Effective date of reduction or discontinuance: stepchild no longer a member of the veteran's household.

If a reduction or discontinuance of pension, disability compensation, or dependency and indemnity compensation is because a person no longer qualifies as a stepchild under § 5.220(c)(2), because he or she is no longer a member of the veteran's household, the effective date of a reduction or discontinuance will be the day after the date the stepchild ceased being a member of the veteran's household.

(Authority: 38 U.S.C. 5112(a))

§ 5.234 Effective date of an award, reduction, or discontinuance of benefits based on child status due to permanent incapacity for self-support.

(a) *Applicability.* This section provides the effective dates of:

(1) An award of pension, disability compensation, or dependency and indemnity compensation to or for a person who is a child for VA purposes under § 5.220(b)(1), because the person became permanently incapable of self-support before reaching age 18.

(2) A reduction, or a discontinuance of pension, disability compensation, or dependency and indemnity compensation to or for a person who is a child for VA purposes under § 5.220(b)(1), because the person is no longer permanently incapable of self-support.

(b) *Awards* The effective dates for benefits based upon a child's permanent incapacity for self-support, to or for a child after the child reaches 18 years of age are as follows:

(1) *Initial awards.* The effective dates of initial awards are governed by applicable effective date rules under § 5.183.

(2) *Claim for continuation of benefits.* (i) If VA receives a claim for the continuation of the benefits no later than 1 year after the child's 18th birthday, then the effective date of a continuation is the date of the child's 18th birthday.

(ii) If VA receives a claim for the continuation of the benefits more than 1 year after the child's 18th birthday, then the effective date of a continuation is the date VA receives a claim for benefits.

(c) *Reduction or discontinuance of benefits*—(1) *Pension benefits.* If VA reduces or discontinues pension benefits because the child is no longer incapable of self-support, the effective date will be the first day of the month after the month VA last paid benefits.

(2) *Disability compensation or dependency and indemnity compensation benefits.* If VA reduces or discontinues disability compensation or dependency and indemnity compensation because the child is no longer incapable of self-support the effective date will be the first day of the month after the expiration of the 60-day notice period described in § 5.83.

(Authority: 38 U.S.C. 5110, 5112)

§ 5.235 Effective date of an award of benefits due to termination of a child's marriage.

(a) *Applicability.* This section states the effective dates of awards to or for a child when status as a child has been restored due to termination of the child's marriage under § 5.228.

(b) *Effective date*—(1) *Void marriages.* If a child's marriage is void, the award of benefits is effective the later of the following dates:

(i) The date the child and the other person stopped living together; or

(ii) The date VA receives a claim for benefits.

(2) *Annulled marriages.* If a child's marriage is annulled, the award of benefits is effective:

(i) The date the annulment decree became final, if VA receives a claim for benefits no later than 1 year after that date; or, if not,

(ii) The date VA receives a claim for benefits.

(3) *Marriage terminated by death or divorce before November 1, 1990.* Awards under § 5.228(b)(3) or (4) (pertaining to marriages terminated by death or divorce before November 1, 1990) are effective on the date VA receives a claim for benefits.

(Authority: 38 U.S.C. 501(a), 5110(a), (k), (*l*); Sec. 9, Pub. L. 93–527, 88 Stat. 1702, 1705; Sec. 8004, Pub. L. 101–508, 104 Stat. 1388)

§§ 5.236–5.237 [Reserved]

Parent Status

§ 5.238 Status as a veteran's parent.

(a) *Person who qualifies as a veteran's parent for VA purposes.* Except as otherwise provided in this section, a parent of a veteran is one of the following persons:

(1) A veteran's natural mother or father;

(2) A veteran's mother or father through adoption; or

(3) A person who stands in the relationship of a parent to a veteran, subject to the following requirements:

(i) The person stood in the relationship of a parent to the veteran for no less than 1 year at any time before the veteran's entry into active military service; and

(ii) The relationship began before the veteran's 21st birthday, although it may have ended at any time.

(b) *Institutions do not qualify.* VA will not recognize an institution as a veteran's parent, even if the institution is providing care for the veteran in place of a parent.

(c) *Abandonment.* VA will not provide benefits to a person based on that person's status as a veteran's natural or adoptive parent if that person abandoned the veteran, unless that person subsequently assumed the legal and moral obligations of a parent with respect to the veteran. For purposes of this section, *abandoned* means that a veteran's natural or adoptive parent did not assume the legal and moral obligations of a parent with respect to the veteran. Abandonment entails not just a failure to provide support, but a refusal to do so. It is not necessary to show that someone else assumed the parental relationship for abandonment to occur.

(d) *Not more than one mother and one father recognized*—(1) *General rule.* VA will recognize not more than one father and not more than one mother as parents of a veteran.

(2) *Different persons qualified as a veteran's mother or father at different times.*

(i) If two or more persons qualified as a veteran's mother or father under this section at different times, VA will recognize the person who last qualified before the veteran's last entry into active military service.

(ii) VA will recognize a veteran's natural parent as the mother or father of the veteran, if he or she was the last person to have a parental relationship with the veteran before the veteran last entered active military service. This is true even if that parent's parental rights have been terminated by a court.

(e) *A person claims status as a veteran's mother or father under paragraph (a)(3) of this section while the veteran's natural or adoptive mother or father is still living.*

Unless the natural or adoptive mother or father relinquished parental control of the veteran, VA will not recognize a person identified in paragraph (a)(3) of this section as the veteran's mother or father if the natural or adoptive mother or father was living during the period the person claims to have stood in the relationship of a mother or father to the veteran. For purposes of this paragraph (e), *relinquished parental control* means that a veteran's natural or adoptive parent ceased to provide for the child and that the parent and child relationship was broken. Relinquishment of parental control does not necessarily mean abandonment by the parent. However, a finding of abandonment would automatically establish relinquishment of control. It is not necessary to have had a court terminate parental rights.

(Authority: 38 U.S.C. 101(5), 501(a))

§ 5.239 [Reserved]

Subpart E—Claims for Service Connection and Disability Compensation

Service-Connected and Other Disability Compensation

§ 5.240 Disability compensation.

(a) *Definition. Disability compensation* means a monthly payment VA makes to a veteran for a service-connected disability, as described in § 5.241, or for a disability compensated as if it were service connected, under § 5.350.

(b) *Additional disability compensation based on having dependents.* Additional disability compensation is payable to a veteran who has a spouse, child, or dependent parent if the veteran is entitled to disability compensation based on a single or a combined disability rating of 30 percent or more. The additional disability compensation authorized by 38 U.S.C. 1115 is payable in addition to monthly disability compensation payable under 38 U.S.C. 1114.

(Authority: 38 U.S.C. 101(13), 1110, 1114, 1115, 1131, 1135, 1151)

§ 5.241 Service-connected disability.

A *service-connected disability* is a current disability as to which any of the following is true:

(a) The disability was caused by an injury or disease incurred, or presumed to have been incurred, in the line of duty during active military service. See §§ 5.260 through 5.269 (concerning presumptions of service connection).

(b) The disability was caused by a preservice injury or disease aggravated, or presumed to have been aggravated, in the line of duty during active military service. See § 5.245.

(c) The disability is secondary to a service-connected disability, pursuant to §§ 5.246 through 5.248 (governing awards of secondary service connection).

(Authority: 38 U.S.C. 1110, 1112, 1116, 1117, 1118, 1131, 1133, 1137)

§ 5.242 General principles of service connection.

When a veteran seeks service connection:

(a) VA will give due consideration to any evidence of record concerning the places, types, and circumstances of the veteran's service as shown by the veteran's service record, the official history of each organization in which the veteran served, the veteran's medical records, and all pertinent medical and lay evidence; and

(b) VA will not consider a statement that a veteran signed during service that:

(i) Pertains to the origin, incurrence, or aggravation of an injury or disease; and

(ii) Was against the veteran's interest at the time he or she signed it.

(Authority: 10 U.S.C. 1219; 38 U.S.C. 1154(a))

§ 5.243 Establishing service connection.

(a) *Requirements.* Except as provided in §§ 5.246 and 5.247, and paragraph (c) of this section, proof of the following elements is required to establish service connection:

(1) A current disability;

(2) Incurrence or aggravation of an injury or disease in active military service; and

(3) A causal link between the injury or disease incurred in, or aggravated by, active military service and the current disability.

Note 1 to paragraph (a): *Permanent disability shown in service.* VA will consider all three elements of paragraph (a) of this section proven if service records establish that an injury or disease incurred in or aggravated by active military service produced a disability that is clearly permanent by its nature, such as the amputation of a limb or the anatomical loss of an organ.

Note 2 to paragraph (a): *Chronic disease or chronic residual of an injury in temporary remission.* VA will not deny service connection for lack of a current disability solely because a chronic disease, or a chronic residual of an injury, enters temporary remission. Examples of chronic diseases and chronic residuals of injury subject to temporary remission include chronic tinnitus, malaria, mental illness, skin disease, and intervertebral disc syndrome.

(b) *Time of diagnosis is not necessarily controlling.* Proof of incurrence of a disease during active military service does not require diagnosis during service if the evidence otherwise establishes that the disease was incurred in service.

(c) *Residuals of chronic diseases*—(1) *General rule.* VA will grant service connection for a current disability not clearly due to an intercurrent cause if the current disability is caused by a chronic disease and competent evidence establishes that the veteran had the same chronic disease in service or within an applicable presumptive period.

(2) *Definition of chronic disease.* For purposes of this paragraph (c), a chronic disease means a disease listed in § 5.261(c).

Note to paragraph (c)(2): Proof that a disease was chronic in service requires a combination of manifestations in service sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis in service including the word ''chronic.'' See also § 5.260(c). Isolated findings in service, such as joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or any cough, would not alone establish the presence in service of a chronic disease, such as arthritis, disease of the heart, nephritis, or pulmonary disease, first shown as a clear-cut clinical entity at some later date.

(3) *Continuity of signs or symptoms.* Signs or symptoms noted in service, or during an applicable presumptive period, may prove the existence of an a chronic disease when all of the following are shown by competent evidence:

(i) The veteran had signs or symptoms of a chronic disease during active military service or during an applicable presumptive;

(ii) The signs or symptoms continued from the time of discharge or release from active military service, or from the end of an applicable presumptive period until the present; and

(iii) The signs or symptoms currently demonstrated are signs or symptoms of a chronic disease.

(Authority: 38 U.S.C. 101(16), 501(a), 1110, 1131)

§ 5.244 Presumption of sound condition on entry into military service.

(a) *Presumption of sound condition.* VA will presume that a veteran was in sound condition upon entry into active military service, which means that the veteran was free from injury or disease, except as noted in the report of a medical examination conducted for entry into active military service.

(b) *Medical history recorded in entry examination reports*—(1) *Medical histories.* The presumption of sound condition applies if an examiner recorded a history of injury or disease in an entry examination report, but the examiner did not report any contemporaneous clinical findings related to such injury or disease. VA may consider the notation of history together with other evidence in determining whether the presumption of sound condition is rebutted under paragraph (e) of this section.

(2) *Medical examination reports.* The presumption of sound condition is rebuttable under paragraph (d) of this section even if an entry medical examination shows that the examiner tested specifically for a certain injury or disease and did not find that injury or disease, if other evidence of record is sufficient to overcome the presumption.

(c) *Rebutting the presumption.*

(1) For veterans with any wartime service and for veterans with peacetime service after December 31, 1946, VA can rebut the presumption only with clear and unmistakable evidence that the injury or disease resulting in the disability for which the veteran claims service connection both:

(i) Preexisted service; and

(ii) Was not aggravated by service, which means that during service there was no increase in disability due to the preexisting injury or disease, or that any such increase was due to the natural progress of the disease.

(2) To determine whether there was an increase in the severity of disability during service (or during any applicable presumptive period) resulting from a preexisting injury or disease, see § 5.245(b).

(3) If there was an increase in the severity of disability during service (or during any applicable presumptive period) resulting from a preexisting injury or disease, to determine whether the increase was due to the natural progress of the disease, see § 5.245(c).

(d) Medical principles regarding preexisting conditions. There are medical principles so universally recognized as to constitute fact (clear and unmistakable proof), and when in accordance with these principles existence of a disability prior to service is established, no additional or confirmatory evidence is necessary. If residual conditions (scars; fibrosis of the lungs; atrophies following disease of the central or peripheral nervous system; healed fractures; absent, displaced or resected parts of organs; supernumerary parts; congenital malformations or hemorrhoidal tags or tabs, etc.) are shown during service but there is no evidence of the relevant antecedent active disease or injury during service, that is satisfactory proof that they preexisted service. Similarly, manifestation of lesions or symptoms of chronic disease from date of enlistment, or so close to such date that the disease could not have originated in so short a period, will be satisfactory proof that they existed preservice. VA will consider conditions of an infectious nature with regard to the circumstances of the infection and if manifested in less than the respective incubation periods after reporting for duty, VA will consider them to have preexisted service. VA will consider the following to have existed preservice:

(1) Personality disorders if they are characterized by developmental defects or pathological trends in the personality structure manifested by a lifelong pattern of action or behavior;

(2) Chronic psychoneurosis of long duration; or

(3) Other psychiatric symptomatology shown to have existed prior to service with the same manifestations during service, which were the basis of the service diagnosis.

(Authority: 38 U.S.C. 1110, 1111, 1131, 1137)

§ 5.245 Service connection based on aggravation of preservice injury or disease.

(a) *Presumption of aggravation.* When an injury or disease was noted in the report of examination for entry into active military service, VA will presume that active military service aggravated a preexisting injury or disease if there was an increase in disability during service (or during any applicable presumptive period) resulting from the injury or disease.

(b) *Determining whether disability increased during service*—(1) *Increase in severity.* For purposes of this section, increase in disability during active military service means the disability resulting from the preexisting injury or disease permanently became more severe during service (or during any applicable presumptive period) than it was before active military service.

(2) *Temporary flare-ups.* Except as provided in paragraph (b)(4) of this section, temporary or intermittent flare-ups of signs or symptoms of a preexisting injury or disease do not constitute aggravation in service unless the underlying condition worsened, resulting in increased disability.

(3) *Effects of medical or surgical treatment.* The usual effects of medical or surgical treatment in service that ameliorates a preexisting injury or disease, such as postoperative scars, or absent or poorly functioning parts or organs, are not an increase in the severity of the underlying condition and they will not be service connected unless the preexisting injury or disease was otherwise aggravated by service.

(4) *Combat or prisoner-of-war service.* The development of signs or symptoms, whether temporary or permanent, of a preexisting injury or disease during or proximately following combat with the enemy, as defined in § 5.249(a)(2), or following status as a prisoner of war will establish aggravation of the disability resulting from that preexisting injury or disease.

(c) *Rebutting the presumption—natural progress of a disease.* The presumption of aggravation is rebutted if VA specifically finds by clear and unmistakable evidence that the increase in the severity of disability during service (or during an applicable presumptive period) was normal for the disease, that is, active military service did not contribute to the increase.

(Authority: 38 U.S.C. 1153, 1154)

§ 5.246 Secondary service connection—disability that is due to or the result of service-connected disability.

Except as provided in § 5.365(a), VA will grant service connection for a disability that is due to or the result of a service-connected disability.

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

§ 5.247 Secondary service connection—nonservice-connected disability aggravated by service-connected disability.

VA will grant service connection for any increase in severity of a nonservice-connected disability if the increase was due to or the result of a service-connected disability, and the increase was not due to the natural progress of the nonservice-connected disease. However, VA cannot grant service connection under this section without medical evidence establishing the severity of the nonservice-connected disability before or contemporaneous with the increase in severity due to the service-connected disability. The agency of original jurisdiction (AOJ) will use the Schedule for Rating Disabilities in part 4 of this chapter to rate the severity level of the nonservice-connected disability prior to the increase in severity, any increase in severity due to the natural progress of the disease, and

the current severity level of the disability. The AOJ will then determine the amount of aggravation by subtracting the rating prior to aggravation and any increase in severity due to the natural progress of the disease from the current severity level. The result will be the increase due to or the result of a service-connected disability. VA will grant service connection only for that increase.

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

§ 5.248 Service connection for cardiovascular disease secondary to service-connected lower extremity amputation.

VA will grant secondary service connection for ischemic heart disease or other cardiovascular disease that develops after a veteran has a service-connected amputation of one lower extremity at or above the knee or service-connected amputations of both lower extremities at or above the ankles.

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

§ 5.249 Special service connection rules for combat-related injury or disease.

(a) *Combat-related incurrence or aggravation of injury or disease shown by lay or other evidence.* (1) VA will accept that an injury or disease was incurred or aggravated in service if a veteran engaged in combat with the enemy during a period of war, campaign, or expedition, and there is satisfactory lay or other evidence that the injury or disease was incurred in or was aggravated by such combat. Lay evidence may include a veteran's description of an event, disease, or injury. VA will accept such evidence as sufficient proof of incurrence or aggravation in service of an injury or disease even though there is no official record of the incurrence or aggravation. The evidence must be consistent with the circumstances, conditions, or hardships of the veteran's combat with the enemy. Incurrence or aggravation established under this paragraph (a) may be rebutted by clear and convincing evidence to the contrary.

(2) *Combat with the enemy* means personal participation in an actual fight or encounter with a military foe, hostile unit, or instrument or weapon of war. It includes presence during such events as a combatant or while performing a duty in support of combatants, such as providing medical care to the wounded.

(b) *Decorations as evidence of combat.* When a veteran has received any of the combat decorations listed below, VA will presume that the veteran engaged in combat with the enemy, unless there is clear and convincing evidence to the contrary:

(1) Air Force Cross
(2) Air Medal with ''V'' Device
(3) Army Commendation Medal with ''V'' Device
(4) Bronze Star Medal with ''V'' Device
(5) Combat Action Ribbon
(6) Combat Infantryman Badge
(7) Combat Medical Badge
(8) Combat Aircrew Insignia
(9) Distinguished Service Cross
(10) Joint Service Commendation Medal with ''V'' Device
(11) Medal of Honor
(12) Navy Commendation Medal with ''V'' Device
(13) Navy Cross
(14) Purple Heart
(15) Silver Star
(16) Combat Action Badge
(17) Any other form of decoration that the Secretary concerned may designate for award exclusively to persons for actions performed while engaged in combat with the enemy.

(Authority: 38 U.S.C. 501(a), 1154(b))

Cross Reference: §§ 5.141 (evidence in claims of former prisoners of war), 5.245(b)(4), Service connection based on aggravation of preservice injury or disease, and 5.250(b)(2), Service connection for posttraumatic stress disorder.

§ 5.250 Service connection for posttraumatic stress disorder.

(a) *Service connection for posttraumatic stress disorder (PTSD).* Service connection for PTSD requires:

(1) Medical evidence diagnosing PTSD in accordance with § 4.125(a) of this chapter;

(2) A link, established by medical evidence, between current signs or symptoms and an in-service stressor; and

(3) Except as provided in paragraphs (c), (d), and (e) of this section, credible supporting evidence that the claimed in-service stressor occurred. For purposes of this section, *credible supporting evidence* means credible evidence from any source, other than the claimant's statement, that corroborates the occurrence of the in-service stressor.

(b) *VA will not deny a claim without trying to verify the claimed stressor.* If the existence of the claimed stressor is not verified by credible evidence, VA will seek verification from the appropriate service department or other entity. The exception to this rule is when, upon VA's request, the claimant fails to provide the information needed by the appropriate service department or other entity to try to verify the claimed stressor.

(c) *Special rule for veterans diagnosed with PTSD during active military service.* If the evidence establishes a diagnosis of PTSD during service and the claimed stressor is related to that service, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's active military service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

(d) *Special rules for veterans who engaged in combat with the enemy or who were prisoners of war.* To determine if a stressor occurred during combat with the enemy or while a prisoner of war, VA will apply the rules in § 5.249 or § 5.141.

(e)(1) *Adequacy of the stressor confirmed by VA psychiatrist or psychologist.* In the absence of clear and convincing evidence to the contrary, and provided the claimed in-service stressor is consistent with the places, types, and circumstances of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the stressor if:

(i) The stressor is related to the veteran's fear of hostile military or terrorist activity; and

(ii) A VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the stressor is adequate to support a diagnosis of posttraumatic stress disorder and that the veteran's symptoms are related to the claimed stressor.

(2) For purposes of this paragraph (e), *fear of hostile military or terrorist activity* means:

(i) That a veteran experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, such as:

(A) From an actual or potential improvised explosive device;

(B) Vehicle-imbedded explosive device;

(C) Incoming artillery, rocket, or mortar fire;

(D) Grenade;

(E) Small arms fire, including suspected sniper fire; or

(F) Attack upon friendly military aircraft, and

(ii) The veteran's response to the event or circumstance involved a psychological or psycho-physiological state of fear, helplessness, or horror.

(f) *Special rules for establishing a stressor based on personal assault.* (1) VA will not deny a PTSD claim that is

based on in-service personal assault without:

(i) Advising the veteran that evidence from sources other than the veteran's service records, including evidence described in paragraph (c)(2) of this section, may constitute credible supporting evidence of the stressor; and

(ii) Providing the veteran with an opportunity to furnish this type of evidence or advise VA of potential sources of such evidence.

(2) Evidence that may establish a stressor based on in-service personal assault includes, but is not limited to, the following:

(i) Records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians;

(ii) Pregnancy tests or tests for sexually transmitted diseases;

(iii) Statements from family members, roommates, fellow servicemembers, or clergy; or

(iv) Evidence of behavioral changes following the claimed assault (which may be shown in any of the following sources), including: A request for a transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; or unexplained economic or social behavior changes.

(3) VA may submit any evidence that it receives to an appropriate medical or mental health professional for an opinion as to whether it indicates that a personal assault occurred.

(Authority: 38 U.S.C. 501(a), 1110, 1131, 1154)

§ 5.251 Current disabilities for which VA cannot grant service connection.

(a) *General rule.* VA will not grant service connection for the following disabilities because they are not the result of an injury or disease for purposes of service connection:

(1) Congenital or developmental defects (such as congenital or developmental refractive error of the eye);

(2) Developmental personality disorders; or

(3) Developmental intellectual disability (mental retardation).

(b) *Distinguishable disabilities.* VA will grant service connection for the following disabilities, which are scientifically distinguishable from those listed in paragraph (a) of this section and actually result from an injury or disease:

(1) Malignant or pernicious myopia;

(2) Personality change (as distinguished from personality disorder) as part of, or due to or the result of, an organic mental disorder or a service-connected general medical condition (such as psychomotor epilepsy), or due to injury. See § 5.246.

(3) Nondevelopmental intellectual disability as part of, or due to or the result of, a service-connected disability. See § 5.246.

(c) *Superimposed disabilities.* Paragraph (a) of this section does not preclude granting service connection for a disability that is superimposed on a disability listed in paragraph (a) of this section.

(d) *Hereditary diseases.* Paragraph (a)(1) of this section does not preclude granting service connection for disability due to an inherited or familial disease (as distinguished from congenital or developmental defects in paragraph (a)(1) of this section). See § 5.261(e) regarding presumptions related to certain inherited or familial diseases.

(e) *Diseases of allergic etiology.* Paragraph (a) of this section does not preclude granting service connection for disability due to diseases of allergic etiology, including, but not limited to, bronchial asthma and urticaria.

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

§§ 5.252–5.259 [Reserved]

Presumptions of Service Connection for Certain Diseases, Disabilities, and Related Matters

§ 5.260 General rules governing presumptions of service connection.

(a) *The purpose of presumptions of service connection.* Presumptions of service connection apply when the evidence would not warrant service connection without their aid. A presumption of service connection establishes a material fact (or facts) necessary to establish service connection, even when there is no evidence that directly establishes that material fact (or facts). Examples of material facts include onset of a disease or exposure to certain herbicide agents during a veteran's military service. The evidence must prove that the presumption applies to the claimant, but after such a showing there is no need for additional evidence of the material fact(s) established by the presumption. Presumptions of service connection are set forth in §§ 5.261 through 5.268 and § 5.270. The general rules in this section apply to those sections, except as otherwise provided. VA will not use the existence of a presumptive period to deny service connection for a presumptive disease diagnosed after the presumptive period if direct evidence shows it was incurred or aggravated during service.

(b) *Presumptive period.* (1) *Definition.* Certain presumptions apply only when a disease becomes manifest to a degree of 10 percent or more disabling (as defined by the rating criteria in the Schedule for Rating Disabilities in part 4 of this chapter) within a prescribed time period, called the ''presumptive period.'' This does not mean that the disease must have actually been diagnosed during that period. A presumption of service connection applies when the evidence shows there were symptoms during the presumptive period sufficient to support a finding that a disease diagnosed after the presumptive period was actually disabling to the required degree during the presumptive period. This includes instances where the principles of continuity of signs or symptoms in § 5.243(d) establish a link between symptoms during the presumptive period and a subsequent diagnosis. It also includes instances where manifestations during the presumptive period are followed within a reasonable time by a diagnosis. What constitutes a reasonable time depends on the nature and course of the disease and any other relevant factors. Simply because a disease is far advanced when diagnosed does not mean that it was at least 10 percent disabling during the presumptive period. Evidence is still required that the claimed disability was at least 10 percent disabling during the presumptive period.

(2) *Lay and medical evidence.* Whether a disease became manifest during a presumptive period may be established by competent medical evidence, competent lay evidence, or both. Competent medical evidence should set forth the signs or symptoms shown by an examination performed during the presumptive period. Competent lay evidence should describe the material and relevant facts as to the veteran's disability observed during the presumptive period, not merely conclusions based upon opinion.

(c) *Rebutting a presumption of service connection.* (1) *Presumption rebutted by affirmative evidence.* VA cannot grant service connection under §§ 5.261 through 5.268, § 5.270 or § 5.271, when the presumption has been rebutted by affirmative evidence (as defined in paragraph (c)(2) of this section) that is competent to indicate the onset or existence of a disease, injury, or disability, such as affirmative evidence that establishes that:

(i) An intervening or nonservice-related injury or disease caused the injury, disease, or disability;

(ii) The veteran's willful misconduct caused the injury, disease, or disability (see § 5.661);

(iii) The injury or disease was not incurred in service or, in the case of a preexisting condition, was not aggravated during service; or

(iv) A cancer (for which service connection is claimed under § 5.262 or § 5.268) originated in another area of the body and then spread to one of the specific areas listed in § 5.262(e) or § 5.268(b).

(2) *Definition. Affirmative evidence* means evidence that supports the existence of a particular fact, and does not mean the mere absence of evidence. However, the absence of evidence may be a basis for affirmative evidence. For example, a medical professional may conclude that a disease or disability existed or started at a particular time based on an absence of evidence of signs or symptoms of the condition before that time.

(Authority: 38 U.S.C. 501(a), 1112, 1113, 1137)

Cross Reference: § 5.1, for the definition of ''competent lay evidence'' and ''willful misconduct''.

§ 5.261 Certain chronic diseases VA presumes are service connected.

(a) *Eligibility.* VA will presume a disease listed in paragraph (c) of this section was incurred or aggravated in service, if it first became manifest to a degree of 10 percent or more disabling:

(1) No later than 1 year after separation from a qualifying period of service; or

(2) No later than such other time after a qualifying period of service as provided in paragraph (d) of this section.

(b) *Qualifying period of service.* A qualifying period of service is:

(1) A period of 90 days or more of active, continuous service that began before December 31, 1946, and included service during a period of war; or

(2) Any period of 90 days or more of active, continuous service after December 31, 1946.

(c) *Diseases presumed service connected.* VA will grant service connection on a presumptive basis for any chronic disease listed in this paragraph (c) where a disease becomes manifest to a degree of disability of 10 percent or more during the applicable presumptive period for the disease. For purposes of this section, VA will consider the diseases listed in the table at the end of paragraph (d) of this section to be chronic because of slow onset and persistent progress, even if they are initially diagnosed as acute. Unless the clinical picture is clear otherwise, VA will consider whether an acute condition is an exacerbation of a chronic disease. VA cannot apply the presumption of service connection when the evidence shows that the disease existed prior to military service to a degree of 10 percent or more disabling (as defined by the rating criteria in the Schedule for Rating Disabilities in part 4 of this chapter). However, VA will apply the presumption where there is evidence that the disease existed prior to entry into service to a degree of less than 10 percent disabling. Only conditions listed in this section are chronic for purposes of this section.

Disease:	Disease must manifest to a degree of 10 percent or more disabling no later than this period after: • Either discharge or release from service under paragraph (a) of this section; or • The end of the war period under paragraph (c) of this section.
Anemia, primary	1 year.
Arteriosclerosis	1 year.
Arthritis	1 year.
Atrophy, progressive muscular	1 year.
Brain hemorrhage	1 year.
Brain thrombosis	1 year.
Bronchiectasis	1 year.
Calculi of the kidney, bladder, or gallbladder	1 year.
Cardiovascular-renal disease, including, but not limited to, hypertension. See paragraph (e) of this section.	1 year.
Cirrhosis of the liver	1 year.
Coccidioidomycosis	1 year.
Diabetes mellitus	1 year.
Encephalitis lethargica residuals	1 year.
Endocarditis (this term covers all forms of valvular heart disease)	1 year.
Endocrinopathies	1 year.
Epilepsies	1 year.
Hansen's disease	3 years.
Hodgkin's disease	1 year.
Leukemia (acute or chronic)	1 year.
Lupus erythematosus, systemic	1 year.
Multiple sclerosis	7 years.
Myasthenia gravis	1 year.
Myelitis	1 year.
Myocarditis	1 year.
Nephritis	1 year.
Organic diseases of the nervous system	1 year.
Osteitis deformans (Paget's disease)	1 year.
Osteomalacia	1 year.
Palsy, bulbar	1 year.
Paralysis agitans	1 year.
Psychoses	1 year.
Purpura idiopathic, hemorrhagic	1 year.
Raynaud's disease	1 year.

Sarcoidosis	1 year.
Scleroderma	1 year.
Sclerosis, amyotrophic lateral	1 year.
Syringomyelia	1 year.
Thromboangiitis obliterans (Buerger's disease)	1 year.
Tuberculosis, active (see § 5.341, Presumption of service connection for disease; wartime and service after December 31, 1946).	3 years.
Tumors, malignant	1 year.
Tumors, of the brain or spinal cord or peripheral nerves	1 year.
Ulcers, peptic (gastric or duodenal)	1 year.

(d) *Cardiovascular-renal disease, including, but not limited to, hypertension.* The term ''cardiovascular-renal disease'' applies to combination involvement of arteriosclerosis, nephritis, and organic heart disease. VA will consider hypertension which was 10 percent or more disabling during the 1-year presumptive period as a chronic disease.

(e) *Hereditary disease.* For purposes of granting service connection for a chronic disease on a presumptive basis, VA will presume that an inherited or familial disease listed in paragraph (d) of this section was incurred in or aggravated by service, if the disease first became manifest to a degree of 10 percent or more disabling during the applicable presumptive period following discharge or release from active military service.

(Authority: 38 U.S.C. 501(a), 1101(3), 1112(a), 1137)

§ 5.262 Presumption of service connection for diseases associated with exposure to certain herbicide agents.

(a) *General rules.*—(1) *Presumption of exposure.* (i) *Vietnam.* VA will presume that a veteran who, during active military service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, was exposed to an herbicide agent. VA will presume that the last date on which such a veteran was exposed to an herbicide agent is the last date on which that veteran served in the Republic of Vietnam during that period. For purposes of this section, ''Service in the Republic of Vietnam'' includes only service on land, or on an inland waterway, in the Republic of Vietnam.

(ii) *Korea.* VA will presume that a veteran who, during active military service, served between April 1, 1968, and August 31, 1971, in a unit that, as determined by the Department of Defense, operated in or near the Korean DMZ in an area in which herbicides are known to have been applied during that period, was exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

(2) *Presumption of service connection.* Where a veteran who was exposed to an herbicide agent during active military service is diagnosed with a disease listed in paragraph (e) of this section that becomes manifest to a degree of 10 percent or more disabling during the period described in paragraph (e) of this section, VA will presume that the disease was incurred in or aggravated by service.

(b) *Definition of herbicide agent.* For purposes of this section, the term *herbicide agent* means 2,4–D; 2,4,5–T and its contaminant TCDD; cacodylic acid; or picloram.

(c) *No minimum period of service required.* Any period of active military service involving presumed or established exposure to an herbicide agent is sufficient for purpose of establishing presumptive service connection of a specified disease under this section.

(d) *Rebutting the presumption of exposure.* The presumption of exposure applies unless affirmative evidence establishes that the veteran was not exposed to an herbicide agent during active military service.

(e) *Diseases presumed service connected.* The following table lists the diseases that VA will presume to be service connected based on this section. VA will not apply the presumption of service connection where the evidence shows that the disease existed prior to active military service to a degree of 10 percent or more disabling (as defined by the rating criteria in the Schedule for Rating Disabilities in part 4 of this chapter). VA will apply the presumption where there is evidence that the disease existed prior to entry into such service to a degree of less than 10 percent disabling.

Disease:	Disease must manifest to a degree of 10 percent or more disabling:
AL Amyloidosis	any time after exposure.
Chloracne or other acneform disease consistent with chloracne	no later than 1 year after the last day of exposure.
All chronic B-cell leukemias (including, but not limited to, hairy-cell leukemia and chronic lymphocytic leukemia).	any time after exposure.
Hodgkin's disease	any time after exposure.
Multiple myeloma	any time after exposure.
Non-Hodgkin's lymphoma	any time after exposure.
Early-onset peripheral neuropathy	no later than 1 year after the last day of exposure.
Porphyria cutanea tarda	no later than 1 year after the last day of exposure.
Prostate cancer	any time after exposure.
Respiratory cancers (cancer of the lung, bronchus, larynx, or trachea)	any time after exposure.
Soft-tissue sarcoma (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma).[1]	any time after exposure.
Type 2 diabetes (also known as Type II diabetes mellitus or adult-onset diabetes).	any time after exposure.
Ischemic heart disease (including, but not limited to, acute, subacute, and old myocardial infarction; atherosclerotic cardiovascular disease including coronary artery disease (including coronary spasm) and coronary bypass surgery; and stable, unstable and Prinzmetal's angina).[2]	any time after exposure.

Disease:	Disease must manifest to a degree of 10 percent or more disabling:
Parkinson's disease	any time after exposure.

[1] The term ''soft-tissue sarcoma'' includes the following diseases:
Adult fibrosarcoma.
Alveolar soft part sarcoma.
Angiosarcoma (hemangiosarcoma and lymphangiosarcoma).
Clear cell sarcoma of tendons and aponeuroses.
Congenital and infantile fibrosarcoma.
Dermatofibrosarcoma protuberans.
Ectomesenchymoma.
Epithelioid leiomyosarcoma (malignant leiomyoblastoma).
Epithelioid sarcoma.
Extraskeletal Ewing's sarcoma.
Leiomyosarcoma.
Liposarcoma.
Malignant fibrous histiocytoma.
Malignant ganglioneuroma.
Malignant giant cell tumor of tendon sheath.
Malignant glomus tumor.
Malignant granular cell tumor.
Malignant hemangiopericytoma.
Malignant mesenchymoma.
Malignant schwannoma, including, but not limited to, malignant schwannoma with rhabdomyoblastic differentiation (malignant Triton tumor), glandular and epithelioid malignant schwannomas.
Proliferating (systemic) angioendotheliomatosis.
Rhabdomyosarcoma.
Synovial sarcoma (malignant synovioma).

[2] For purposes of this section, the term ischemic heart disease does not include hypertension or peripheral manifestations of arteriosclerosis such as peripheral vascular disease or stroke, or any other condition that does not qualify within the generally accepted medical definition of ischemic heart disease.

(Authority: 38 U.S.C. 501(a), 1116)

§ 5.263 Presumption of service connection for non-Hodgkin's lymphoma based on service in Vietnam.

(a) *Service in Vietnam.* For purposes of this section, ''service in Vietnam'' includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.

(b) *Service connection based on service in Vietnam.* Service in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease.

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

§ 5.264 Diseases VA presumes are service connected in a former prisoner of war.

(a) *Eligibility.* Any period of active military service is sufficient for establishing presumptive service connection for a disease specified in this section. The requirements for the length of internment as a prisoner of war (POW) are stated in paragraphs (b) and (c) of this section. A veteran is eligible for the presumption if the veteran:

(1) Is a former POW under § 5.140; and

(2) Is diagnosed as having a disease listed in paragraph (b) or (c) of this section that first became manifest to a degree of 10 percent or more disabling at any time after discharge or release from active military service, even if there is no record of such disease during such service.

(b) *Diseases presumed service connected following internment of any duration.* VA will presume the following diseases were incurred in or aggravated by service if the criteria of paragraph (a) of this section are met:

(1) Any of the anxiety disorders as listed in § 4.130 of this chapter, including, but not limited to, posttraumatic stress disorder (PTSD);

(2) Atherosclerotic heart disease or hypertensive vascular disease (including, but not limited to, hypertensive heart disease) and their complications (including, but not limited to, myocardial infarction, congestive heart failure, and arrhythmia);

(3) Dysthymic disorder (or depressive neurosis);

(4) Organic residuals of frostbite, if the Secretary determines that the veteran was detained or interned in climatic conditions consistent with the occurrence of frostbite;

(5) Osteoporosis if the Secretary determines that the veteran has PTSD;

(6) Post-traumatic osteoarthritis;

(7) Psychosis; and

(8) Stroke and its complications.

(c) *Presumption of service connection for 30 days or more of internment.* VA will presume the following diseases were incurred in or aggravated by service if the veteran was interned for 30 days or more and the criteria of paragraph (a) of this section are met:

(1) Beriberi;

(2) Beriberi heart disease, including ischemic heart disease if localized edema experienced during captivity;

(3) Chronic dysentery;

(4) Cirrhosis of the liver;

(5) Helminthiasis;

(6) Irritable bowel syndrome;

(7) Nutritional deficiency, including, but not limited to, avitaminosis and malnutrition;

(8) Optic atrophy associated with malnutrition;

(9) Osteoporosis;

(10) Pellagra;

(11) Peptic ulcer disease; and

(12) Peripheral neuropathy except where directly related to infectious causes.

(Authority: 38 U.S.C. 501(a), 1112(b))

Cross Reference: § 5.1, for the definition of ''psychosis''. § 5.140, Determining former prisoner of war status, for the definition of ''former prisoner of war''.

§ 5.265 Tropical diseases VA presumes are service connected.

(a) *Eligibility.* VA will presume any disease listed in paragraph (d) of this section was incurred in or aggravated by service if it first became manifest to a degree of 10 percent or more disabling:

(1) No later than 1 year after separation from a qualifying period of service; or

(2) Within a period that indicates (based on accepted medical literature) that the incubation period began during a qualifying period of service.

(b) *Qualifying period of service.* For purposes of this section, ''a qualifying period of service'' is:

(1) A period of 90 days or more of continuous active military service that began before December 31, 1946, and included service during a period of war; or

(2) Any period of 90 days or more continuous active military service after December 31, 1946.

(c) *Claims based on service ending before December 7, 1941.* In claims based on service ending before December 7, 1941, for purpose of determining whether a tropical disease manifested within a presumptive period under this section, the date of separation from wartime service will be the date of discharge or release during a war period, or if service continued after the war, the end of the war period.

(d) *Tropical diseases presumed service connected.* VA will presume that the following diseases were incurred in or aggravated by service if the criteria of paragraphs (a) through (c) of this section are met:

(1) Amebiasis;
(2) Blackwater fever;
(3) Cholera;
(4) Dracontiasis;
(5) Dysentery;
(6) Filariasis;
(7) Leishmaniasis, including, but not limited to, kala-azar;
(8) Loiasis;
(9) Malaria;
(10) Onchocerciasis;
(11) Oroya fever;
(12) Pinta;
(13) Plague;
(14) Schistosomiasis;
(15) Yaws; and
(16) Yellow fever.

(e) *Rebuttal of presumption.* Lack of active military service in a locality with a high incidence of the disease may be considered evidence to rebut the presumption. Post-service residence during the applicable presumptive period in a region where the particular disease is endemic may also be considered evidence to rebut the presumption. VA will consider the known incubation periods of tropical diseases in determining whether the presumption of service connection has been rebutted.

(Authority: 38 U.S.C. 1101(4), 1112(a)(2), 1137)

(f) *Claims for service connection of tropical diseases based on peacetime service before January 1, 1947.* This paragraph (f) applies to a veteran with peacetime service before January 1, 1947, who served 6 months or more. The requirement of 6 months or more of service means active, continuous service, during one or more enlistment periods. Any such veteran who develops a tropical disease listed in paragraph (d) of this section, or a disorder or disease resulting from therapy administered in connection with a tropical disease or as a preventative, will be considered to have incurred such disability in active military service if the disease or disorder is shown to have manifested:

(1) No later than 1 year after discharge or release from active military service; or

(2) At a time when accepted medical literature indicates that the incubation period commenced during active military service unless clear and unmistakable evidence shows that the tropical disease was not contracted as the result of active military service.

(Authority: 38 U.S.C. 1133)

§ 5.266 Disability compensation for certain qualifying chronic disabilities.

(a) *Qualifying chronic disability.* (1) *General rule.* VA will pay disability compensation to a Persian Gulf veteran who exhibits objective indications of a qualifying chronic disability, provided that such disability became manifest either during active military service in the Southwest Asia theater of operations during the Persian Gulf War, or to a degree of 10 percent or more disabling not later than December 31, 2016.

(i) *Objective indications of chronic disability.* For purposes of this section, ''objective indications of chronic disability'' include both ''signs'', in the medical sense of objective evidence perceptible to an examining physician, and other non-medical indicators that are capable of independent verification.

(ii) *6-month period of chronicity.* For purposes of this section, disabilities that have existed for 6 months or more and disabilities that exhibit intermittent episodes of improvement and worsening over a 6-month period will be considered chronic. The 6-month period of chronicity will be measured from the earliest date on which the pertinent evidence establishes that the signs or symptoms of the disability first became manifest.

(2) *Definition.* For purposes of this section, a *qualifying chronic disability* is a chronic disability resulting from any of the following (or any combination of the following):

(i) An undiagnosed illness;

(ii) A medically unexplained chronic multisymptom illness that is defined by a cluster of signs or symptoms; or

(iii) Any diagnosed illness that the Secretary determines in regulations prescribed under 38 U.S.C. 1117(d) warrants a presumption of service connection.

(3) *Rating a qualifying chronic disability.* A qualifying chronic disability referred to in this section will be rated using rating criteria from the Schedule for Rating Disabilities in part 4 of this chapter for an injury or disease in which the functions affected, anatomical localization, or signs or symptoms are similar.

(4) *Qualifying chronic disability considered service connected.* A qualifying chronic disability to which this section refers will be considered service connected for purposes of all laws of the U.S.

(b) *Undiagnosed illness.* (1) *Definition.* The term *undiagnosed illness* means an illness that by history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis.

(2) *Signs and symptoms.* Signs or symptoms that may be manifestations of undiagnosed illness include, but are not limited to:

(i) Abnormal weight loss;
(ii) Cardiovascular signs or symptoms;
(iii) Fatigue;
(iv) Gastrointestinal signs or symptoms;
(v) Headache;
(vi) Joint pain;
(vii) Menstrual disorders;
(viii) Muscle pain;
(ix) Neurologic signs and symptoms;
(x) Neuropsychological signs or symptoms;
(xi) Signs or symptoms involving the respiratory system (upper or lower);
(xii) Signs or symptoms involving skin; and
(xiii) Sleep disturbances.

(c) *Medically unexplained chronic multisymptom illness.* (1) *Definition.* The term *medically unexplained chronic multisymptom illness* means a diagnosed illness without conclusive etiology or pathophysiology, which is characterized by overlapping signs and symptoms, and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities. Chronic multisymptom illnesses of partially understood etiology and pathophysiology, such as diabetes and multiple sclerosis, will not be considered medically unexplained.

(2) *Illnesses.* Medically unexplained chronic multisymptom illnesses include, but are not limited to, those that are defined by a cluster of signs or symptoms, such as:

(i) Chronic fatigue syndrome;
(ii) Fibromyalgia;
(iii) Functional gastrointestinal disorders (excluding structural gastrointestinal diseases).

Note to paragraph (c)(2)(iii): Functional gastrointestinal disorders are a group of conditions characterized by chronic or recurrent symptoms that are unexplained by any structural, endoscopic, laboratory, or other objective signs of injury or disease and may be related to any part of the gastrointestinal tract. Specific functional gastrointestinal disorders include, but are not limited to, irritable bowel syndrome, functional dyspepsia, functional vomiting, functional constipation, functional bloating, functional abdominal pain syndrome, and functional dysphagia. These disorders are commonly characterized by symptoms including abdominal pain, substernal burning or pain, nausea, vomiting, altered bowel habits (including diarrhea, constipation), indigestion, bloating, postprandial fullness, and painful or difficult swallowing. Diagnosis of specific functional gastrointestinal disorders is made in accordance with established medical principles, which generally require symptom onset at least 6 months prior to diagnosis and the presence of symptoms sufficient to diagnose the specific disorder at least 3 months prior to diagnosis.

(3) *Signs and symptoms.* Signs or symptoms that may be manifestations of a medically unexplained chronic multisymptom illness include, but are not limited to:

(i) Abnormal weight loss;
(ii) Cardiovascular signs or symptoms;
(iii) Fatigue;
(iv) Gastrointestinal signs or symptoms;
(v) Headache;
(vi) Joint pain;
(vii) Menstrual disorders;
(viii) Muscle pain;
(ix) Neurologic signs and symptoms;
(x) Neuropsychological signs or symptoms;
(xi) Signs or symptoms involving the respiratory system (upper or lower);
(xii) Signs or symptoms involving skin; and
(xiii) Sleep disturbances.

(d) *Definitions.* For purposes of this section:

(1) *Persian Gulf veteran* means a veteran who served on active military service in the Southwest Asia theater of operations during the Persian Gulf War.

(2) The *Southwest Asia theater of operations* means Iraq, Kuwait, Saudi Arabia, the neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, the Gulf of Aden, the Gulf of Oman, the Persian Gulf, the Arabian Sea, the Red Sea, and the airspace above these locations.

(Authority: 38 U.S.C. 1117, 1118)

§ 5.267 Presumption of service connection for conditions associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite.

(a) *Presumption of service connection.* VA will presume that the injuries and diseases listed in paragraph (b) of this section were incurred in or aggravated by service when the evidence of record establishes that the veteran:

(1) Underwent full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite during active military service; and

(2) Subsequently developed an injury or disease associated with a specific agent, as shown in paragraph (b) of this section.

(b) *Listed injuries or diseases.* The following table lists injuries or diseases that VA will consider associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite.

Injury or disease	Associated with nitrogen mustard?	Associated with sulfur mustard?	Associated with Lewisite?
Acute nonlymphocytic leukemia	Yes	No	No.
Asthma, chronic	Yes	Yes	Yes.
Bronchitis, chronic	Yes	Yes	Yes.
Conjunctivitis, chronic	Yes	Yes	No.
Corneal opacities	Yes	Yes	No.
Emphysema, chronic	Yes	Yes	Yes.
Keratitis	Yes	Yes	No.
Laryngeal cancer	Yes	Yes	No.
Laryngitis, chronic	Yes	Yes	Yes.
Lung cancer (except mesothelioma)	Yes	Yes	No.
Nasopharyngeal cancer	Yes	Yes	No.
Obstructive pulmonary disease, chronic	Yes	Yes	Yes.
Scar formation	Yes	Yes	No.
Squamous cell carcinoma of the skin	Yes	Yes	No.

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

§ 5.268 Presumption of service connection for diseases associated with exposure to ionizing radiation.

(a) *Eligibility.* This section applies to a ''radiation-exposed veteran.'' That is, any person who, while serving on active duty or as a member of a reserve component of the Armed Forces during a period of active duty for training or inactive duty training, participated in a radiation-risk activity.

(b) *Diseases presumed service connected.* VA will presume that the following diseases were incurred in or aggravated by service if they become manifest in a radiation-exposed veteran at any time after service:

(1) Bronchiolo-alveolar carcinoma;
(2) Cancer of the bile ducts;
(3) Cancer of the bone;
(4) Cancer of the brain;
(5) Cancer of the breast;
(6) Cancer of the colon;
(7) Cancer of the esophagus;
(8) Cancer of the gall bladder;
(9) Cancer of the lung;
(10) Cancer of the ovary;
(11) Cancer of the pancreas;
(12) Cancer of the pharynx;
(13) Cancer of the salivary gland;
(14) Cancer of the small intestine;
(15) Cancer of the stomach;
(16) Cancer of the thyroid;
(17) Cancer of the urinary tract (for purposes of this section, the term *urinary tract* means the kidneys, renal pelves, ureters, urinary bladder, and urethra);
(18) Leukemia (other than chronic lymphocytic leukemia);
(19) Lymphomas (except Hodgkin's disease);
(20) Multiple myeloma; and
(21) Primary liver cancer (except if cirrhosis or hepatitis B is indicated).

(c) *Radiation-risk activity.* For purposes of this section, *radiation-risk activity* means:

(1) Onsite participation in a test involving the atmospheric detonation of a nuclear device. For purposes of this section, *onsite participation* means:

(i) During the official operational period of a nuclear test, defined in paragraph (e) of this section, presence at the test site, or performance of official military duties in connection with ships, aircraft or other equipment used in direct support of the nuclear test;

(ii) During the 6-month period following the official operational period of a nuclear test, presence at the test site or other test staging area to perform

official military duties in connection with completion of projects related to the nuclear test including, but not limited to, decontamination of equipment used during the nuclear test;

(iii) Service as a member of the garrison or maintenance forces on Eniwetok during the periods June 21, 1951 through July 1, 1952; August 7, 1956 through August 7, 1957; or November 1, 1958 through April 30, 1959; and

(iv) Assignment to official military duties at Naval Shipyards involving the decontamination of ships that participated in Operation Crossroads.

(2) Service during the occupation of Hiroshima or Nagasaki, Japan, by U.S. forces during the period beginning on August 6, 1945, and ending on July 1, 1946. This includes official military duties within 10 miles of the city limits of either Hiroshima or Nagasaki, Japan, that were required to perform or support military occupation functions such as occupation of territory, control of the population, stabilization of the government, demilitarization of the Japanese military, rehabilitation of the infrastructure, or deactivation and conversion of war plants or materials.

(3) Internment as a prisoner of war in Japan during World War II, or service on active duty in Japan immediately following such internment, resulting in an opportunity for exposure to ionizing radiation comparable to that of the U.S. occupation forces in Hiroshima or Nagasaki, Japan, during the period beginning August 6, 1945, and ending July 1, 1946. This includes a former prisoner of war who at any time during the period August 6, 1945, through July 1, 1946:

(i) Was interned within 75 miles of the city limits of Hiroshima or within 150 miles of the city limits of Nagasaki;

(ii) Can affirmatively show that he or she worked within an area described in paragraph (c)(3)(i) of this section although not interned in either area;

(iii) Immediately following internment, performed official military duties described in paragraph (c)(2) of this section; or

(iv) Was repatriated through the port of Nagasaki.

(4) Official military duties on the grounds of a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or the area identified as K25 at Oak Ridge, Tennessee, for a total of at least 250 days before February 1, 1992, if, during such service the veteran:

(i) Was monitored for exposure to radiation of external parts of the body by a dosimetry badge each of the 250 days at the plant; or

(ii) For each of the 250 days, served in a position that had exposures comparable to a job that is or was monitored through the use of dosimetry badges.

Note to paragraph (c)(4): For purposes of this paragraph (c)(4), the term *day* refers to all or any portion of a calendar day.

(5) Service before January 1, 1974, on Amchitka Island, Alaska, if the veteran was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests.

(6) Service in a capacity that would qualify the person for inclusion as a member of the Special Exposure Cohort under section 3621(14) of the Energy Employees Occupational Illness Compensation Program Act of 2000, 42 U.S.C. 7384l(14) if it had been performed as an employee of the Department of Energy.

(d) *Atmospheric detonation.* For purposes of this section, the term ''atmospheric detonation'' includes underwater nuclear detonations.

(e) *Operational period.* For purposes of this section, for tests conducted by the U.S., the term *operational period* means:

(1) For Operation TRINITY, the period July 16, 1945, through August 6, 1945;

(2) For Operation CROSSROADS, the period July 1, 1946, through August 31, 1946;

(3) For Operation SANDSTONE, the period April 15, 1948, through May 20, 1948;

(4) For Operation RANGER, the period January 27, 1951, through February 6, 1951;

(5) For Operation GREENHOUSE, the period April 8, 1951, through June 20, 1951;

(6) For Operation BUSTER-JANGLE, the period October 22, 1951, through December 20, 1951;

(7) For Operation TUMBLER-SNAPPER, the period April 1, 1952, through June 20, 1952;

(8) For Operation IVY, the period November 1, 1952, through December 31, 1952;

(9) For Operation UPSHOT-KNOTHOLE, the period March 17, 1953, through June 20, 1953;

(10) For Operation CASTLE, the period March 1, 1954, through May 31, 1954;

(11) For Operation TEAPOT, the period February 18, 1955, through June 10, 1955;

(12) For Operation WIGWAM, the period May 14, 1955, through May 15, 1955;

(13) For Operation REDWING, the period May 5, 1956, through August 6, 1956;

(14) For Operation PLUMBBOB, the period May 28, 1957, through October 22, 1957;

(15) For Operation HARDTACK I, the period April 28, 1958, through October 31, 1958;

(16) For Operation ARGUS, the period August 27, 1958, through September 10, 1958;

(17) For Operation HARDTACK II, the period September 19, 1958, through October 31, 1958;

(18) For Operation DOMINIC I, the period April 25, 1962, through December 31, 1962; and

(19) For Operation DOMINIC II/PLOWSHARE, the period July 6, 1962, through August 15, 1962.

Note to § 5.268: If this section does not apply in a particular case, VA will consider service connection under § 5.269, Direct service connection for diseases associated with exposure to ionizing radiation.

(Authority: 38 U.S.C. 1112(c), 1137)

Cross Reference: § 5.1, for the definition of ''reserve component''. § 5.140, Determining former prisoner of war status, for the definition of ''former prisoner of war''.

§ 5.269 Direct service connection for diseases associated with exposure to ionizing radiation.

(a) *Scope.* This section does not establish a presumption of service connection. It establishes standards and procedures VA will apply when a claim for service connection is based on exposure to ionizing radiation during active military service, and is for a disease that is not presumed service connected under § 5.268. Service connection will not be granted under this section unless the veteran meets all of the requirements of (1), (2), and (3) of this paragraph (a). If a veteran meets these requirements, then before adjudication the VA agency of original jurisdiction (AOJ) will refer the claim to the Under Secretary for Benefits for further consideration in accordance with paragraph (d) of this section.

(1) The veteran was exposed to ionizing radiation as a result of participation in the atmospheric testing of nuclear weapons, the occupation of Hiroshima or Nagasaki, Japan, from September 1945 until July 1946 or any other claimed in-service event;

(2) The veteran subsequently developed a radiogenic disease listed in paragraph (b) of this section; and

(3) The disease first became manifest within the period specified in paragraph (b) of this section.

(b) *Radiogenic disease.* For purposes of this section, *radiogenic disease* means a disease that may be induced by ionizing radiation.

(1) *Listed diseases.* The following table lists diseases that VA will consider radiogenic when they manifest within the associated manifestation period.

Disease	Manifestation period
Bone cancer	No later than 30 years after exposure.
Cancer (any other not listed)	5 years or more after last exposure.
Leukemia (all forms except chronic lymphatic (lymphocytic))	At any time after exposure.
Lymphomas other than Hodgkin's disease	5 years or more after last exposure.
Non-malignant thyroid nodular disease	5 years or more after last exposure.
Parathyroid adenoma	5 years or more after last exposure.
Posterior subcapsular cataracts	6 months or more after exposure.
Tumors of the brain and central nervous system	5 years or more after last exposure.

(2) *Polycythemia vera.* Public Law 98–542 requires VA to determine whether sound medical and scientific evidence supports establishing a rule identifying polycythemia vera as a radiogenic disease. VA has determined that sound medical and scientific evidence does not support including polycythemia vera on the list of known radiogenic diseases under this regulation. Even so, VA will consider a claim based on the assertion that polycythemia vera is a radiogenic disease under the provisions of paragraph (b)(3) of this section.

(3) *Other diseases.* If a claimant claims disability compensation for a disease based on ionizing radiation exposure and that disease is not one listed in paragraph (b)(1) of this section, VA will consider the claim under this section if the claimant has cited or filed competent scientific or medical evidence that the claimed condition is a radiogenic disease.

(c) *Development of dose assessment by a VA agency of original jurisdiction*—(1) Dose assessment request. In all claims for service connection for a radiogenic disease under this section, the AOJ will request a dose assessment to determine the likelihood that exposure to ionizing radiation in service caused the veteran's disease. The AOJ will request a dose assessment as follows:

(i) *Atmospheric nuclear weapons test participation claims.* In all claims based upon participation in atmospheric nuclear testing, the AOJ will request dose assessment from the appropriate office of the Department of Defense.

(ii) *Hiroshima and Nagasaki occupation claims.* In all claims based on participation in the American occupation of Hiroshima or Nagasaki, Japan, prior to July 1, 1946, the AOJ will request a dose assessment from the appropriate office of the Department of Defense.

(iii) *Other exposure claims.* In all other claims involving ionizing radiation exposure, the AOJ will request any available records concerning the veteran's exposure to ionizing radiation from the proper custodian, as described in this paragraph (c). These records normally include, but are not limited to, the veteran's Record of Occupational Exposure to Ionizing Radiation (DD Form 1141), if maintained; service treatment records; dose records from the radiation dosimetry office of the veteran's branch of military service; and other records that might contain information pertaining to the veteran's ionizing radiation dose in service. The AOJ will forward all such records to the Under Secretary for Health, who will prepare a dose assessment, to the extent feasible, based on available methodologies. As used in this section, ''the Under Secretary for Health'' includes his or her designees.

(2) When a dose assessment obtained under paragraph (c)(1) of this section is reported as a range of doses to which a veteran may have been exposed, VA will presume exposure at the highest level of the range reported.

(3) *Evidence substantiating exposure.* For purposes of paragraph (c)(1)(i) and (ii) of this section, VA will not require a veteran or a veteran's survivors to produce evidence substantiating exposure, if the information in the veteran's service records or other records maintained by the Department of Defense is consistent with the assertion that the veteran was present where and when the claimed exposure occurred.

(4) *Presence at a nuclear site.* For purposes of paragraphs (c)(1)(i) and (ii) of this section, if military records do not establish presence at or absence from a site at which exposure to ionizing radiation is claimed to have occurred, VA will concede the veteran's presence at the site. Conceding presence under this section does not confer entitlement to the presumptive provisions of § 5.268.

(d) *Submission to the Under Secretary for Benefits.* (1) After the development in paragraphs (c)(1) through (4) of this section has been completed, except as provided in paragraph (d)(2) of this section, the AOJ will forward the dose assessment and any other evidence, along with the veteran's claims file, to the Under Secretary for Benefits for review.

(2) After the development in paragraphs (c)(1) through (4) of this section has been completed, the AOJ will decide the claim based on general principles of service connection without forwarding the claims file to the Under Secretary for Benefits for review if the evidence establishes that any of the following is true:

(i) The claimed disability or disease is not radiogenic (as provided in paragraphs (b)(1) through (3) of this section);

(ii) The disease did not become manifest during the time period specified in paragraph (b)(1) of this section; or

(iii) The veteran was either not exposed to ionizing radiation in service as claimed or the actual or estimated dose exposure was reported to be 0 rem.

(e) *Review and action by the Under Secretary for Benefits*—(1) *Referral to the Under Secretary for Health.* The Under Secretary for Benefits will review the evidence of record and may request an advisory medical opinion from the Under Secretary for Health as to whether the veteran's disease resulted from exposure to ionizing radiation in service. The Under Secretary for Health will also review any records obtained and the dose assessment(s) prepared. The Under Secretary for Health will prepare and send his or her advisory medical opinion to the Under Secretary for Benefits.

(2) *Reconciliation of dose assessments.* (i) *Reconciliation by the Under Secretary for Benefits.* Prior to referral to the Under Secretary for Health, the Under Secretary for Benefits will reconcile any material difference between the dose assessment obtained through the development process in paragraph (c)(1) of this section and the dose assessment from a credible source filed by or on behalf of the claimant.

(ii) *Independent expert opinion.* The Under Secretary for Benefits will

request an opinion from an independent expert when it is necessary to reconcile a material difference described in paragraph (e)(2)(i) of this section. The Director of the National Institutes of Health is responsible for selecting the independent expert. VA will forward the assessments and supporting documentation of record to the independent expert, who will then prepare a separate radiation dose assessment for consideration in adjudicating the claim. For purposes of this paragraph (e):

(A) The difference between the claimant's assessment and the dose assessment derived from official military records will ordinarily be considered material if one assessment is at least double the other assessment.

(B) A dose assessment will be considered to be from a ''credible source'' if prepared by a person or persons certified by an appropriate professional body in the field of health physics, nuclear medicine or radiology and if based on analysis of the facts and circumstances of the particular claim.

(f) *Opinion of the Under Secretary for Benefits.* (1) *General rule.* When the Under Secretary for Benefits receives the Under Secretary for Health's advisory medical opinion, he or she will review it, along with the evidence of record. If the Under Secretary for Benefits is convinced that sound scientific and medical evidence supports the determination that it is at least as likely as not that the veteran's disease resulted from ionizing radiation in service, he or she will inform the AOJ of this determination in writing. This document must include the rationale for the determination, including an evaluation of the claim based on the following:

(i) The probable dose, in terms of dose type, rate, and duration as a factor in inducing the disease, taking into account any known limitations in the dosimetry devices employed in its measurement or the methodologies employed in its estimation;

(ii) The relative sensitivity of the involved tissue to induction of the specific pathology by ionizing radiation;

(iii) The veteran's gender and pertinent family history;

(iv) The veteran's age at time of exposure;

(v) The time between exposure and onset of the disease; and

(vi) The extent to which exposure to ionizing radiation, or other carcinogens, outside of service may have contributed to development of the disease.

(2) *Definitions.* For purposes of paragraph (e)(1) of this section, the term *sound scientific evidence* means observations, findings, or conclusions that are statistically and epidemiologically valid, are statistically significant, are capable of replication, and are capable of withstanding peer review. The term *sound medical evidence* means observations, findings, or conclusions that are consistent with current medical knowledge and are so reasonable and logical as to serve as the basis of management of a medical condition.

(3) *Determination of no reasonable possibility of causation.* If the Under Secretary for Benefits determines there is no reasonable possibility that the veteran's disease resulted from ionizing radiation exposure in service, he or she will inform the AOJ in writing, stating the rationale for this conclusion.

(4) *Request for an outside consultant.* The Under Secretary for Benefits will request an opinion from an outside consultant when, after review of the evidence, including the opinion of the Under Secretary for Health, the Under Secretary for Benefits is unable to determine whether it is at least as likely as not, or whether there is no reasonable possibility, that the veteran's disease resulted from ionizing radiation exposure in service. The Under Secretary for Health will select the consultant from outside VA, based on the recommendation of the Director of the National Cancer Institute. The written request to the consultant will include copies of pertinent medical records, and, where available, dose assessments from official sources, credible sources, and independent experts. The request will identify the following elements:

(i) The disease, including the specific cell type and stage, if known, and when the disease first became manifest;

(ii) The circumstances, including date, of the veteran's exposure;

(iii) The veteran's age, gender, and pertinent family history;

(iv) The veteran's history of exposure to known carcinogens, occupationally or otherwise;

(v) Evidence of any other effects ionizing radiation exposure may have had on the veteran; and

(vi) Any other information relevant to determination of causation of the veteran's disease.

(5) *Consultant's opinion.* The consultant will evaluate the claim based on the factors specified in paragraph (f)(1) of this section. The consultant will provide his or her opinion in writing and state whether it is either likely, unlikely, or at least as likely as not that the veteran's disease resulted from exposure to ionizing radiation in service. The consultant will provide his or her rationale supporting the opinion.

(6) *Review of consultant's opinion.* The consultant will send the opinion to the Under Secretary for Benefits who will review it and transmit it with any comments to the AOJ for use in adjudication of the claim.

(g) *Adjudication of claim.* The AOJ will adjudicate the claim under the generally applicable provisions of this part, giving due consideration to all evidence of record, including any opinions provided by the Under Secretary for Benefits, the Under Secretary for Health, or any outside consultants, and the evaluations published pursuant to 38 CFR 1.17.

(h) *Supervening cause in claims based on exposure to ionizing radiation.* In no case will service connection be established if evidence establishes that a supervening condition or event unrelated to service is more likely the cause of the disease than was exposure to ionizing radiation in service.

(Authority: 38 U.S.C. 501; Pub. L. 98–542, 98 Stat. 2725)

Cross Reference: § 5.1,for the definition of ''agency of original jurisdiction,'',''competent evidence,'' ''service treatment records.''

§ 5.270 Presumption of service connection for amyotrophic lateral sclerosis.

(a) *Development of amyotrophic lateral sclerosis.* Except as provided in paragraph (b) of this section, the development of amyotrophic lateral sclerosis manifested at any time after discharge or release from active military service is sufficient to establish service connection for that disease.

(b) *Denial of service connection.* Service connection will not be established under this section if:

(1) The veteran did not have active, continuous service of 90 days or more; or If there is affirmative evidence that amyotrophic lateral sclerosis was not incurred during or aggravated by active military service;

(2) The presumption of service connection is rebutted in accordance with § 5.260(c).

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

§ 5.271 Presumption of service connection for infectious diseases.

(a) A disease listed in paragraph (b) of this section will be service connected if it becomes manifest in a veteran with a qualifying period of service, provided the provisions of paragraph (c) of this section are also satisfied.

(b) The diseases referred to in paragraph (a) of this section are the following:

(1) Brucellosis.
(2) Campylobacter jejuni.
(3) Coxiella burnetii (Q fever).
(4) Malaria.
(5) Mycobacterium tuberculosis.
(6) Nontyphoid Salmonella.
(7) Shigella.
(8) Visceral leishmaniasis.
(9) West Nile virus.

(c) The diseases listed in paragraph (b) of this section will be considered to have been incurred in or aggravated by service under the circumstances outlined in paragraphs (c)(1) and (2) of this section even though there is no evidence of such disease during the period of service.

(1) With three exceptions, the disease must have become manifest to a degree of 10 percent or more disabling no later than 1 year after the date of separation from a qualifying period of service as specified in paragraph (c)(2) of this section. Malaria must have become manifest to a degree of 10 percent or more disabling no later than 1 year after the date of separation from a qualifying period of service or at a time when standard or accepted medical literature indicate that the incubation period commenced during a qualifying period of service. There is no time limit for visceral leishmaniasis or tuberculosis to have become manifest to a degree of 10 percent or more disabling.

(2) For purposes of this section, the term *qualifying period of service* means either:

(i) A period of active military service in Afghanistan after September 18, 2001; or

(ii) A period of active military service in the Southwest Asia theater of operations during the Persian Gulf War. The *Southwest Asia theater of operations* means Iraq, Kuwait, Saudi Arabia, the neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, the Gulf of Aden, the Gulf of Oman, the Persian Gulf, the Arabian Sea, the Red Sea, and the airspace above these locations.

(d) *Long-term health effects potentially associated with infectious diseases*—(1) A report of the Institute of Medicine of the National Academy of Sciences has identified the following long-term health effects that potentially are associated with the infectious diseases listed in paragraph (b) of this section. These health effects and diseases are listed alphabetically and are not categorized by the level of association stated in the National Academy of Sciences report (see Table to § 5.271). If a veteran who has or had an infectious disease listed in the table also has a health effect identified in the table as potentially related to that infectious disease, VA must determine, based on the evidence in each case, whether the infectious disease caused the health effect for purposes of determining entitlement to disability compensation. This does not preclude a finding that other manifestations of disability or secondary conditions were caused by an infectious disease.

(2) If a veteran presumed service connected for one of the diseases listed in paragraph (b) of this section has one of the health effects listed in the table, which manifests within the period specified, or at any time if no period is specified, VA will request a medical opinion as to whether it is at least as likely as not that the veteran's infectious disease actually caused the associated health effect.

TABLE TO § 5.271—LONG-TERM HEALTH EFFECTS POTENTIALLY ASSOCIATED WITH INFECTIOUS DISEASES

Infectious disease	Health effect
Brucellosis	• Arthritis. • Cardiovascular, nervous, and respiratory system infections. • Chronic meningitis and meningoencephalitis. • Deafness. • Demyelinating meningovascular syndromes. • Episcleritis. • Fatigue, inattention, amnesia, and depression. • Guillain-Barré syndrome. • Hepatic abnormalities, including granulomatous hepatitis. • Multifocal choroiditis. • Myelitis-radiculoneuritis. • Nummular keratitis. • Papilledema. • Optic neuritis. • Orchioepididymitis and infections of the genitourinary system. • Sensorineural hearing loss. • Spondylitis. • Uveitis.
Campylobacter jejuni	• Guillain-Barré syndrome *if manifest within 2 months of the infection.* • Reactive arthritis *if manifest within 3 months of the infection.* • Uveitis *if manifest within 1 month of the infection.*
Coxiella burnetii (Q fever)	• Chronic hepatitis. • Endocarditis. • Osteomyelitis. • Post-Q-fever chronic fatigue syndrome. • Vascular infection.
Malaria	• Demyelinating polyneuropathy. • Guillain-Barré syndrome. • Hematologic manifestations (particularly anemia after falciparum malaria and splenic rupture after vivax malaria). • Immune-complex glomerulonephritis. • Neurologic disease, neuropsychiatric disease, or both. • Ophthalmologic manifestations, particularly retinal hemorrhage and scarring. • *Plasmodium falciparum.* • *Plasmodium malariae.* • *Plasmodium ovale.* • *Plasmodium vivax.* • Renal disease, especially nephrotic syndrome.

TABLE TO § 5.271—LONG-TERM HEALTH EFFECTS POTENTIALLY ASSOCIATED WITH INFECTIOUS DISEASES—Continued

Infectious disease	Health effect
Mycobacterium tuberculosis	• Active tuberculosis. • Long-term adverse health outcomes due to irreversible tissue damage from severe forms of pulmonary and extrapulmonary tuberculosis and active tuberculosis.
Nontyphoid Salmonella	• Reactive arthritis *if manifest within 3 months of the infection.*
Shigella	• Hemolytic-uremic syndrome *if manifest within 1 month of the infection.* • Reactive arthritis *if manifest within 3 months of the infection.*
Visceral leishmaniasis	• Delayed presentation of the acute clinical syndrome. • Post-kala-azar dermal leishmaniasis *if manifest within 2 years of the infection.* • Reactivation of visceral leishmaniasis in the context of future immunosuppression.
West Nile virus	• Variable physical, functional, or cognitive disability.

§§ 5.272–5.279 [Reserved]

Rating Service-Connected Disabilities

§ 5.280 General rating principles.

(a) *Use of rating schedule.* VA will use the Schedule for Rating Disabilities in part 4 of this chapter to rate the degree of disabilities in claims for disability compensation and in eligibility determinations. Instructions for using the schedule are in part 4 of this chapter.

(b) *Extra-schedular ratings in unusual cases.* (1) *Disability compensation.* To accord justice to the exceptional case where the Veterans Service Center (VSC) finds the VA Schedule for Rating Disabilities to be inadequate to rate a specific service-connected disability, the Under Secretary for Benefits or the Director of the Compensation Service, upon VSC submission, is authorized to approve on the basis of the criteria set forth in this paragraph (b) an extra-schedular rating commensurate with the average impairment of earning capacity due exclusively to the disability. The governing norm in these exceptional cases is a finding that the application of the regular schedular standards is impractical because the disability is exceptional or unusual due to such related factors as:

(i) Marked interference with employment, or

(ii) Frequent periods of hospitalization.

(2) *Effective date.* The effective date of an extra-schedular rating, either granting or increasing disability compensation, will be in accordance with § 5.311 in original and reopened claims, and in accordance with § 5.312 in claims for increased benefits.

(c) *Advisory opinions.* The VSC may submit to the Director of the Compensation Service for advisory opinion cases in which it does not understand the application of the Schedule for Rating Disabilities in part 4 of this chapter or in which the propriety of an extra-schedular rating is questionable.

(Authority: 38 U.S.C. 501(a), 1155)

§ 5.281 Multiple 0 percent service-connected disabilities.

VA will assign a 10-percent combined rating to a veteran with two or more permanent service-connected disabilities that are each rated as 0 percent disabling under the Schedule for Rating Disabilities in part 4 of this chapter, if the combined effect of such disabilities interferes with normal employability. VA cannot assign this 10 percent rating if the veteran has any other compensable rating.

(Authority: 38 U.S.C. 501(a), 1155)

§ 5.282 Special consideration for paired organs and extremities.

(a) *General rule.* VA will pay disability compensation for the combination of service-connected and nonservice-connected disabilities involving paired organs and extremities described in paragraph (b) of this section as if the nonservice-connected disability were service connected, but VA will not pay compensation for the nonservice-connected disability if the veteran's willful misconduct proximately caused it.

(b) *Qualifying combination of disabilities.* Disability compensation under paragraph (a) of this section is payable for the following disability combinations:

(1) Service-connected impairment of vision in one eye and nonservice-connected impairment of vision in the other eye if:

(i) The impairment of vision in each eye is rated at a visual acuity of 20/200 or less; or

(ii) The peripheral field of vision for each eye is 20 degrees or less.

(2) Service-connected anatomical loss or loss of use of one kidney and nonservice-connected involvement of the other kidney.

(3) Service-connected hearing impairment in one ear compensable to a degree of 10 percent or more disabling and nonservice-connected hearing impairment in the other ear that meets the provisions of § 5.366.

(4) Service-connected anatomical loss or loss of use of one hand or foot and nonservice-connected anatomical loss or loss of use of the other hand or foot.

(5) Permanent service-connected disability of one lung rated as 50 percent or more disabling and nonservice-connected disability of the other lung.

(c) *Offset of judgment, settlement, or compromise*—(1) *Required offset.* If a veteran receives money or property of value in a judgment, settlement, or compromise from a cause of action for a qualifying nonservice-connected disability involving an organ or extremity described in paragraph (b) of this section, VA will offset the value of such judgment, settlement, or compromise against the increased disability compensation payable under this section.

(2) *Offset procedure.* Beginning the first of the month after the veteran receives the money or property as damages, VA will not pay the increased disability compensation payable under this section until the total amount of such increased compensation that would otherwise have been payable equals the total amount of any money received as damages and the fair market value of any property received as damages. VA will not withhold the increased disability compensation payable before the end of the month in which the money or property was received.

(3) *Exception for Social Security or workers' compensation benefits.* Benefits received for the qualifying nonservice-connected disability under Social Security or workers' compensation laws are not subject to the offset described in paragraph (c)(1) of

this section, even if the benefits are awarded in a judicial proceeding.

(4) *Duty to report receipt of judgment, settlement, or compromise.* A veteran entitled to receive increased disability compensation under this section must report to VA the total amount of any money and the fair market value of any property received as damages described in paragraph (c)(1) of this section. Expenses related to the cause of action, such as attorneys' fees, cannot be deducted from the total amount to be reported.

(Authority: 38 U.S.C. 1160)

§ 5.283 Total and permanent total ratings and unemployability.

(a) *Total disability ratings*—(1) *General.* VA will consider total disability to exist when any impairment of mind or body renders it impossible for the average person to follow a substantially gainful occupation. VA generally will not assign total ratings for temporary exacerbations or acute infectious diseases except where the Schedule for Rating Disabilities in part 4 of this chapter (the Schedule) specifically prescribes total ratings for temporary exacerbations or acute infectious diseases. For compensation purposes, a total disability rating may be granted without regard to whether the impairment is shown to be permanent.

(2) *Schedular rating or total disability rating based on individual unemployability.* VA may assign a total rating for any disability or combination of disabilities in the following cases:

(i) The Schedule prescribes a 100 percent rating, or

(ii) In a case in which VA assigns a rating of less than 100 percent, if the veteran meets the requirements of § 4.16 of this chapter or, in pension cases, the requirements of § 4.17 of this chapter.

(3) *Ratings of total disability based on history.* In the case of a disability that has undergone some recent improvement, VA may nonetheless assign a rating of total disability, provided:

(i) That the disability was severe enough in the past to warrant a total disability rating;

(ii) That the disability:

(A) Required extended, continuous, or intermittent hospitalization;

(B) Produced total industrial incapacity for at least 1 year; or

(C) Results in recurring, severe, frequent, or prolonged exacerbations; and

(iii) That it is the opinion of the agency of original jurisdiction (AOJ) that, despite the recent improvement of the physical condition, the veteran will be unable to adjust into a substantially gainful occupation. The AOJ will consider the frequency and duration of totally incapacitating exacerbations since incurrence of the original injury or disease and the periods of hospitalization for treatment in determining whether the average person could reestablish himself or herself in a substantially gainful occupation.

(b) *Permanent total disability.* VA will consider a total disability to be permanent when an impairment of mind or body that makes it impossible for the average person to follow a substantially gainful occupation is reasonably certain to continue throughout the life of the disabled person.

(1) VA will consider the following disabilities or conditions as constituting a permanent total disability:

(i) The permanent anatomical loss or loss of use of both hands, or of both feet, or of one hand and one foot;

(ii) The anatomical loss or loss of sight of both eyes;

(iii) Being permanently so significantly disabled as to need regular aid and attendance; or

(iv) Being permanently bedridden.

(2) VA will consider an injury or disease of long-standing that is actually totally incapacitating as a permanent total disability, if the probability of permanent improvement under treatment is remote.

(3) VA may not assign a permanent total disability rating as a result of any incapacity from acute infectious disease, accident, or injury, unless there is present the permanent anatomical loss or loss of use of extremities or the permanent anatomical loss or loss of sight of both eyes, as described in paragraph (b)(1) of this section, the person is permanently so significantly disabled as to need regular aid and attendance or permanently bedridden, or when it is reasonably certain that following a decrease of the acute or temporary symptoms the person will continue to be totally disabled due to residuals of the disease, accident, or injury.

(4) VA may consider the age of the disabled person in determining whether a total disability is permanent.

(c) *Insurance ratings.* A rating of permanent and total disability for insurance purposes will have no effect on a rating for compensation or pension.

(Authority: 38 U.S.C. 501(a), 1155)

§ 5.284 Total disability ratings for disability compensation purposes.

(a) *General.* Subject to the limitation in paragraph (b) of this section, total disability compensation ratings may be assigned under the provisions of § 5.283.

(Authority: 38 U.S.C. 1155)

(b) *Incarcerated veterans.* VA will not assign a total disability rating based on individual unemployability for compensation purposes while a veteran is incarcerated in a Federal, State, or local penal institution for conviction of a felony if the rating would first become effective during such period of incarceration. However, VA will reconsider the case to determine if continued eligibility for such rating exists if a total disability rating based on individual unemployability existed prior to incarceration for the felony and routine review was required.

(Authority: 38 U.S.C. 5313(c))

(c) *Program for vocational rehabilitation.* Each time VA assigns a total disability rating based on individual unemployability, the agency of original jurisdiction will inform the Vocational Rehabilitation and Employment Service of the rating so the Vocational Rehabilitation and Employment Service may offer to evaluate whether it is reasonably feasible for the veteran to achieve a vocational goal.

(Authority: 38 U.S.C. 1163)

§ 5.285 Discontinuance of total disability ratings.

(a) *General.* VA will not reduce a total disability rating that was based on the severity of a person's disability or disabilities without examination showing material improvement in physical or mental condition. VA may reduce a total disability rating that was based on the severity of a person's disability or disabilities without examination if the rating was based on clear error.

(1) VA will consider examination reports showing material improvement in conjunction with all the facts of record, including whether:

(i) The veteran improved under the ordinary conditions of life, i.e., while working or actively seeking work; or

(ii) The symptoms have been brought under control by prolonged rest or by following a regimen which precludes work.

(2) If either circumstance in paragraph (a)(1)(ii) of this section applies, VA will not reduce a total disability rating until VA has reexamined the person after a period of 3 to 6 months of employment.

(3) Paragraphs (a) introductory text, (a)(1), and (a)(2) of this section do not apply to a total rating that was purely based on hospital, surgical, or residence treatment, or individual unemployability.

(b) *Individual unemployability.* (1) VA may reduce a service-connected total disability rating based on individual unemployability upon a showing of clear and convincing evidence of actual employability.

(2) When a veteran with a total disability rating based on individual unemployability is undergoing vocational rehabilitation, education, or training, VA will not reduce the rating because of that rehabilitation, education, or training unless the AOJ receives:

(i) Evidence of marked improvement or recovery in physical or mental conditions that demonstrates affirmatively the veteran's capacity to pursue the vocation or occupation for which the training is intended to qualify him or her;

(ii) Evidence of employment progress, income earned, and prospects of economic rehabilitation that demonstrates affirmatively the veteran's capacity to pursue the vocation or occupation for which the training is intended to qualify him or her; or

(iii) Evidence that the physical or mental demands of the course are obviously incompatible with total disability.

(3) Neither participation in, nor the receipt of remuneration as a result of participation in, a therapeutic or rehabilitation activity under 38 U.S.C. 1718 will be considered evidence of employability.

(4) If a veteran with a total disability rating based on individual unemployability begins a substantially gainful occupation, VA may not reduce the veteran's rating solely on the basis of having secured and followed such substantially gainful occupation unless the veteran maintains the occupation for a period of 12 consecutive months. For purposes of this paragraph (b)(4), VA will not consider brief interruptions in employment to be breaks in otherwise continuous employment.

(Authority: 38 U.S.C. 501(a), 1155, 1163(a))

Cross Reference: §§ 5.170, Calculation of 5-year, 10-year, and 20-year periods to qualify for protection, and 5.172, protection of continuous 20-year ratings.

§§ 5.286–5.299 [Reserved]

Additional Disability Compensation Based on a Dependent Parent

§ 5.300 Establishing dependency of a parent.

(a) *Conclusive dependency.* (1) VA will find that a veteran's parent is dependent if the parent is not residing in a foreign country and the parent's monthly income, as counted in accordance with §§ 5.302 through 5.304, does not exceed the following amounts:

(i) $400 for a mother or father, or a remarried parent and parent's spouse, not living together, or $660 for a mother and father, or a remarried parent and parent's spouse, living together; or

(ii) $185 for each additional family member, as defined by paragraph (c) of this section.

(2) If a parent meets the requirements of paragraph (a)(1) of this section, VA will not consider net worth.

(b) *Factual dependency.* If a parent does not meet the requirements of paragraph (a)(1) of this section, the veteran must establish dependency of the parent based on the following rules:

(1) *Income requirement.* VA will find dependency if the parent does not have sufficient income to provide reasonable maintenance for the parent, a parent's spouse living together with the parent, and any additional family members, as defined in paragraph (c) of this section.

(i) Reasonable maintenance includes not just basic necessities such as housing, food, clothing, and medical care, but also other items generally necessary to provide those conveniences and comforts of living consistent with the parent's reasonable style of life.

(ii) A finding that the parent's income includes financial contributions from the veteran does not establish that the parent is the veteran's dependent. VA will consider such contributions in connection with all of the other evidence when deciding factual dependency.

(iii) Income of a minor family member from business or property will be considered income of the parent only if it is actually available to the veteran's parent for the minor's support.

(2) *Net worth considered.* (i) VA will not find that dependency of a parent exists when some part of the parent's net worth should reasonably be used for that parent's maintenance. See § 5.414 for the factors used to determine whether net worth should reasonably be used for maintenance.

(ii) Net worth of a minor family member will be considered in determining dependency of a parent only if it is actually available to the veteran's parent for the minor's support.

(c) *Definition of family member.* For purposes of this section, the term *family member* means a relative who lives with the parent, other than a spouse, whom the parent is under a moral or legal obligation to support. This includes, but is not limited to, a relative under the legal age in the state where the parent resides, a relative of any age who is dependent on the parent because of physical or mental incapacity, and a relative who is physically absent from the household for a temporary purpose or for reasons beyond the relative's control.

(d) *Duty to report change in dependency status.* If a veteran is receiving additional disability compensation because of a parent's dependency and the parent's income exceeds the applicable amount specified in paragraph (a)(1) of this section, the veteran must report an increase in the parent's income or net worth to VA when the veteran acquires knowledge of the increase. Failure to report such an increase may create an overpayment subject to recovery by VA.

(e) *Remarriage of a parent.* Dependency will not be discontinued solely because a parent has married or remarried after VA has granted additional disability compensation for a dependent parent. Additional disability compensation for a parent's dependency will be continued if evidence is filed showing that the parent continues to meet the requirement for a finding of conclusive dependency or factual dependency under this section.

(Authority: 38 U.S.C. 102, 1115, 1135)

§ 5.301 [Reserved]

§ 5.302 General income rules—parent's dependency.

(a) *All payments included in income.* VA will count all payments of any kind from any source in determining the income of a veteran's parent, except as provided in § 5.304, Exclusions from income—parent's dependency. For the definition of ''payments'', see § 5.370(h).

(b) *Spousal income combined.* The dependent parent's income includes the income of the parent and the parent's spouse, unless the marriage has been terminated or the parent is legally separated from his or her spouse. Income is combined whether the parent's spouse is the veteran's other parent or the veteran's stepparent. The income of the parent's spouse will be subject to the same rules that are applicable to determining the income of the veteran's parent.

(c) *Income of family members under 21 years of age.* VA will count income earned by a family member who is under 21 years of age but will consider income from a business or property (including trusts) of such a family member only if that income is actually available to the veteran's parent for the support of that family member. For purposes of this section, ''family member'' is defined in § 5.300(c).

(d) *Income-producing property.* VA will count income from all property, real or personal, in which a veteran's

parent has an interest. See § 5.410(f) for how VA determines ownership of property.

(e) *Calculation of income from profit on the sale of property.* The following rules apply when determining the amount of income a parent receives from net profit on the sale of business or non-business real or personal property, except for net profit on the sale of a parent's principal residence, which is governed by § 5.304(h).

(1) *Value deducted from sales price.* (i) If the parent purchased the property after VA established the veteran's entitlement to additional disability compensation based on the parent's dependency, VA will deduct the purchase price, including the cost of improvements, from the selling price to determine net profit.

(ii) If the parent purchased the property before VA established the veteran's entitlement to additional disability compensation based on the parent's dependency, VA will deduct the value of the property on the date of entitlement from the selling price to determine net profit.

(2) *Installment sales.* If the parent receives payments from the sale of the property in installments, such payments will not be considered income until the total amount received is equal to the purchase price of the property (including cost of improvements), or, where paragraph (e)(1)(ii) of this section applies, until the total amount received is equal to the value of the property on the date VA established the veteran's entitlement to additional disability compensation based on the parent's dependency. Principal and interest received with each payment will not be counted separately.

(Authority: 38 U.S.C. 102)

§ 5.303 Deductions from income—parent's dependency.

(a) *Expenses of a business or profession.* VA will deduct from a parent's income necessary operating expenses of a business, farm, or profession. See § 5.413 for how to calculate these expenses.

(b) *Expenses associated with recoveries for death or disability.* VA will deduct from a parent's income medical, legal, or other expenses incident to injury or death from recoveries for such injury or death. For purposes of this paragraph (b), the recovery may be from any of the following sources:

(1) Commercial disability, accident, life, or health insurance;

(2) The Office of Workers' Compensation Programs of the U.S. Department of Labor;

(3) The Social Security Administration;

(4) The Railroad Retirement Board;

(5) Any workmen's compensation or employer's liability statute; or

(6) Legal damages collected for personal injury or death.

(c) *Certain salary deductions not deductible.* For purpose of calculating a parent's income, a salary may not be reduced by the amount of deductions made under a retirement act or plan or for income tax withholding.

(Authority: 38 U.S.C. 102)

§ 5.304 Exclusions from income—parent's dependency.

VA will exclude the following when calculating income for the purpose of establishing a parent's dependency:

(a) *Property rental value.* The rental value of a residence a parent owns and lives in.

(b) *Certain waived retirement benefits.* Retirement benefits from any of the following sources, if the benefits have been waived pursuant to Federal statute:

(1) Civil Service Retirement and Disability Fund;

(2) Railroad Retirement Board;

(3) District of Columbia for firemen, policemen, or public school teachers; or

(4) Former U.S. Lighthouse Service.

(c) *Death gratuity.* Death gratuity payments by the Secretary concerned under 10 U.S.C. 1475 through 1480. This includes death gratuity payments in lieu of payments under 10 U.S.C. 1478 made to certain survivors of Persian Gulf conflict veterans authorized by sec. 307, Public Law 102–25, 105 Stat. 82.

(d) *Certain VA benefit payments.* The following VA benefit payments:

(1) Payments under 38 U.S.C. chapter 11, Compensation for Service-Connected Disability or Death;

(2) Payments under 38 U.S.C. chapter 13, Dependency and Indemnity Compensation for Service-Connected Death;

(3) Nonservice-connected VA disability and death pension payments;

(4) Payments under 38 U.S.C. 5121, Payment of certain accrued benefits upon death of a beneficiary;

(5) Payments under 38 U.S.C. 2302, Funeral expenses; and

(6) The veteran's month-of-death rate paid to a surviving spouse under § 5.695.

(e) *Certain life insurance payments.* Payments under policies of Servicemembers' Group Life Insurance, U.S. Government Life Insurance, National Service Life Insurance, or Veterans' Group Life Insurance.

(f) *State service bonuses.* Payments of a bonus or similar cash gratuity by any State based upon service in the Armed Forces.

(g) *Fire loss reimbursement.* Proceeds from fire insurance.

(h) *Profit from sale of principal residence.* Net profit from the sale of the parent's principal residence.

(1) *Extent of exclusion.* VA will not count net profit realized from the sale of the parent's principal residence to the extent that it is applied within the calendar year of the sale, or the following calendar year, to the purchase price of another residence as the parent's principal residence.

(2) *Limitation on date of purchase of replacement residence.* This exclusion does not apply if the parent applied the net profit from the sale to the price of a residence purchased earlier than the calendar year preceding the calendar year of sale of the old residence.

(3) *Time limit for reporting application of profit to purchase of replacement residence.* To qualify for this exclusion, the veteran must report the application of the net profit from the sale of the old residence to the purchase of the replacement residence no later than 1 year after the date it was so applied.

(i) *Payment for civic obligations.* Payments received for discharge of jury duty or other obligatory civic duties.

(j) *Increased inventory value of a business.* The value of an increase of stock inventory of a business.

(k) *Employer contributions.* An employer's contributions to health and hospitalization plans for either an active or retired employee.

(l) *Caregiver stipend.* The stipend for primary family caregivers authorized by 38 U.S.C. 1720G(a)(3)(A)(ii)(V) and 38 CFR 71.40(c)(4).

(m) *Other payments.* Payments listed in § 5.706.

(Authority: 38 U.S.C. 102)

§§ 5.305–5.310 [Reserved]

Disability Compensation Effective Dates

§ 5.311 Effective dates—award of disability compensation.

(a) *Claim received no later than 1 year after discharge or release from active military service.* If VA grants disability compensation based on a claim VA received no later than 1 year after the date the veteran was discharged or released from a continuous period of active military service during which the veteran incurred the injury or disease, the effective date of the award is the later of:

(1) The day after such discharge or release from active military service; or

(2) The date entitlement arose.

(b) *Claim received more than 1 year after discharge or release from active military service.* If VA grants disability compensation based on a claim VA received more than 1 year after the date the veteran was discharged or released from a continuous period of active military service during which the veteran incurred the injury or disease, the effective date of the award is the date established by § 5.150(a).

(Authority: 38 U.S.C. 5110(a), (b)(1))

§ 5.312 Effective dates—increased disability compensation.

(a) *Applicability.* This section establishes the effective date of an award of increased disability compensation based on:

(1) A higher disability rating under subpart B of the Schedule for Rating Disabilities in part 4 of this chapter.

(2) A higher disability rating under the extra-schedular provision in § 5.280(b).

(3) A higher disability rating under § 4.16 of this chapter.

(4) An award or a higher rate of special monthly compensation.

Note to paragraph (a): This section does not establish the effective date of an award of secondary service connection under § 5.246 or § 5.247 which is governed by § 5.311.

(b) *Effective date of increase*—(1) *Claim received no later than 1 year after increase.* An award of increased disability compensation will be effective on the date that the evidence warrants a higher disability rating, or an award or higher rate of special monthly compensation, if VA received a claim for increased disability compensation no later than 1 year after that date.

(2) *Claim received more than 1 year after increase.* An award of increased disability compensation will be effective on the date established by § 5.150(a) if VA received a claim for increased disability compensation more than 1 year after the date that the evidence warrants a higher disability rating, or an award or higher rate of special monthly compensation.

(Authority: 38 U.S.C. 5110(a) and (b)(2))

§ 5.313 Effective dates—discontinuance of compensation for a total disability rating based on individual unemployability.

(a) *Scope.* This section applies to discontinuance of a veteran's total disability rating based on individual unemployability (TDIU) after employability is regained or based on failure to return an employment questionnaire to VA.

(b) *Discontinuance on regaining employability.* If VA determines that a veteran has regained employability, VA will discontinue the TDIU rating and assign the existing schedular rating. Assignment of the existing schedular rating and the reduction in disability compensation will be effective in accordance with paragraph (e) of § 5.177.

(c) *Failure to return employment questionnaire.* If a veteran fails to return an employment questionnaire to VA within the time specified in VA Form 21–4140, VA will discontinue the TDIU rating and assign the existing schedular rating. Assignment of the existing schedular rating and the reduction in disability compensation will be effective beginning the first day of the month after the month VA last paid TDIU benefits.

(Authority: 38 U.S.C. 5112(a) and (b)(6))

§ 5.314 Effective dates—discontinuance of additional disability compensation based on parental dependency.

(a) *Scope.* This section applies to discontinuance of additional disability compensation paid to a veteran for a dependent parent if that parent is no longer dependent.

(b) *Discontinuance based on a change in a parent's economic status.* If VA determines that a veteran's parent is no longer dependent due to an improvement in economic status, the additional disability compensation paid due to parental dependency will be discontinued as follows:

(1) *Increase in income.* If dependency ends based on an increase in income, VA will discontinue paying the additional disability compensation on the first day of the month after the month in which the income increased.

(2) *Increase in net worth.* If dependency ends based on an increase in net worth, VA will discontinue paying the additional disability compensation on the first day of the calendar year after the year in which the net worth increased.

(c) *Discontinuance based on a change in a parent's marital status.* If VA determines that the marriage, remarriage, annulment of a marriage, or divorce of a dependent parent resulted in the end of dependency of that parent, VA will discontinue paying the additional disability compensation effective the first day of the month after the date the change in marital status occurred.

(d) *Discontinuance based on a parent's death.* If a dependent parent dies, VA will discontinue paying the additional disability compensation on the first day of the month after the month of death.

(Authority: 38 U.S.C. 5112(b)(2) and (4))

§ 5.315 Effective dates—additional disability compensation based on decrease in the net worth of a dependent parent.

(a) *Scope.* This rule applies under the following circumstances:

(1) VA previously denied a claim or discontinued payments of additional disability compensation based upon parental dependency because of a parent's net worth;

(2) The denial or discontinuation became final; and

(3) Entitlement to additional disability compensation based upon parental dependency was subsequently established, or reestablished, because of a decrease in the parent's net worth.

(b) *Payment of additional compensation.* If a parent's net worth decreases so that additional disability compensation based on parental dependency is warranted, VA will pay additional disability compensation as follows:

(1) For claims filed before the actual decrease in net worth, effective the first day of the month after the month of the decrease; or

(2) For claims filed after the actual decrease in net worth, effective the first day of the month after the receipt of a new claim for additional disability compensation.

(Authority: 38 U.S.C. 501(a), 5110)

§§ 5.316–5.319 [Reserved]

Special Monthly Compensation: General

§ 5.320 Determining need for regular aid and attendance.

For purposes of this part, a person needs regular aid and attendance if he or she meets either of the following conditions:

(a) *Person has need for assistance.* The person, based on his or her condition as a whole, has a temporary or permanent need for assistance, which may be provided by a family member or other member of his or her household, as shown by the extent to which his or her ability to perform any or all of the following functions is impaired:

(1) Getting dressed or undressed.

(2) Keeping clean and presentable.

(3) Making frequent and necessary adjustments to a prosthetic or orthopedic appliance. This does not include the adjustment of appliances that able persons also cannot adjust without assistance, such as lacing at the back, supports, and belts.

(4) Eating or drinking, as a result of the loss of coordination of the upper extremities or extreme weakness.

(5) Attending to bowel and bladder needs.

(6) Protecting himself or herself from the hazards or dangers of his or her daily environment.

(Authority: 38 U.S.C. 1114(*l*)–(m), (r))

(b) *Person is bedridden.* The person is bedridden. *Bedridden* means the person must remain in bed due to his or her disability or disabilities based on medical necessity and not based on a prescription of periods of intermittent bed rest. See § 5.324(e) (regarding entitlement to special monthly compensation based on being permanently bedridden).

(Authority: 38 U.S.C. 1114(*l*)–(m), (r))

§ 5.321 Additional disability compensation for a veteran whose spouse needs regular aid and attendance.

(a) *General entitlement.* A veteran who has a service-connected disability rating of at least 30 percent is entitled to special monthly compensation if his or her spouse needs regular aid and attendance, as defined in paragraphs (b) and (c) of this section.

(b) *Automatic eligibility.* The spouse will be considered to need regular aid and attendance if any of the following factors apply:

(1) The spouse has corrected visual acuity of 5/200 or less in both eyes;

(2) The spouse has concentric contraction of the visual field to 5 degrees or less in both eyes; or

(3) The spouse is a patient in a nursing home because of mental or physical incapacity.

(c) *Factual need.* If the spouse does not meet the criteria in paragraph (b) of this section, the spouse will be considered to need regular aid and attendance if he or she meets the criteria of § 5.320.

(Authority: 38 U.S.C. 1115)

Cross Reference: § 5.1, for the definition of ''nursing home''.

§ 5.322 Special monthly compensation: general information and definitions of disabilities.

(a) *Scope.* (1) *Special monthly compensation (SMC).* Multiple regulations (§§ 5.321 and 5.323 through 5.333) allow SMC to a veteran who has certain service-connected disabilities. Except as specified in paragraph (a)(2) of this section, the disabilities referred to in §§ 5.323 through 5.333 must be service connected. The monetary rates of payment of SMC are found in 38 U.S.C. 1114 and 1115(1)(E). They are also on the Internet at *http://www.va.gov* and are available from any VA regional office. Under 38 U.S.C. 1114 and 1115(1)(E), a veteran is entitled to SMC if he or she receives disability compensation and:

(i) Needs regular aid and attendance (see § 5.320);

(ii) Is permanently bedridden;

(iii) Has certain disabilities or combinations of disabilities; or

(iv) Has a spouse who needs regular aid and attendance.

(2) *Nonservice-connected disabilities.* VA will consider certain nonservice-connected disabilities in determining entitlement to SMC. See § 5.323(c)(5) (contribution of nonservice-connected loss of use of creative organ to service-connected loss of use of creative organ); § 5.330(b) and (c) (bilateral deafness of specified severity); and § 5.331(b) (bilateral blindness as specified with bilateral deafness as specified).

(3) *Definitions.* This section defines disabilities that establish entitlement to SMC and that are not defined in other regulations.

(b) *Loss of use of a hand* means the hand functions no better than a prosthesis would function if attached to the arm at a point of amputation below the elbow. In making this determination, VA will consider the actual remaining function of the hand, including, but not limited to, whether the hand can perform acts such as grasping or manipulation with the same proficiency as an amputation stump with prosthesis. Complete ankylosis of two major joints of an upper extremity is an example of a situation that will constitute loss of use of the hand. The major joints of the upper extremity are the shoulder, elbow, and wrist.

(c) *Loss of use of a foot* means the foot functions no better than a prosthesis would function if attached to the leg at a point of amputation below the knee. In making this determination, VA will consider the actual remaining function of the foot, including, but not limited to, whether the foot can perform acts such as balance or propulsion with the same proficiency as an amputation stump with prosthesis. Examples of situations that will constitute loss of use of a foot include:

(1) Extremely unfavorable complete ankylosis of the knee, that is, the knee fixed in flexion at an angle of 45 degrees or more;

(2) Complete ankylosis of two major joints of the lower extremity, that is, of the hip, knee, or ankle;

(3) Shortening of the lower extremity of 3.5 inches or more; and

(4) Complete paralysis of the external popliteal nerve (common peroneal) and resulting foot drop, accompanied by characteristic organic changes including trophic and circulatory disturbances and other concomitants that confirm complete paralysis of the nerve.

(d) *Natural elbow or knee action prevented when a prosthesis is in place* means that the veteran is unable to use a prosthesis that requires the natural use of the elbow or knee joint. If there is no movement of the joint (as in complete ankylosis or complete paralysis) and a prosthesis is not used, VA will determine entitlement to SMC based on prevented natural elbow or knee action as if a prosthesis were in place.

(e) *Use of prosthesis prevented* means that the veteran's disability prevents the use of prosthesis. This can establish the veteran's entitlement to SMC in two circumstances:

(1) *Anatomical loss near the shoulder.* A veteran meets the requirements for SMC based on anatomical loss of the upper extremity (arm) near the shoulder if the anatomical loss prevents the use of a prosthesis, and reamputation at a higher level that permits the use of a prosthesis is not possible. However, if the veteran cannot wear a prosthesis at the present level of amputation of the arm but could wear a prosthesis if there were a reamputation at a higher level, VA will consider the veteran eligible only for SMC based on anatomical loss or loss of use of the arm with factors preventing natural elbow action with a prosthesis in place (see paragraph (d) of this section).

(2) *Anatomical loss near the hip.* A veteran meets the requirements for SMC based on anatomical loss of the lower extremity (leg) near the hip if the anatomical loss prevents the use of a prosthesis, and reamputation at a higher level that permits the use of a prosthesis is not possible. However, if the veteran cannot wear a prosthesis at the present level of amputation of the leg but could wear a prosthesis if there were a re-amputation at a higher level, VA will consider the veteran eligible only for SMC based on anatomical loss or loss of use of the leg with factors preventing natural knee action with a prosthesis in place (see paragraph (d) of this section).

(f) *Visual acuity of 5/200 or less.* If the veteran has actual visual acuity better than 5/200 but is nevertheless assigned a disability rating under the Schedule for Rating Disabilities in part 4 of this chapter based on visual acuity of 5/200, the veteran is not considered to have visual acuity of 5/200 or less for purposes of eligibility for SMC. See § 4.79 of this chapter.

(g) *Loss of use or blindness of one eye, having only light perception* means that the veteran is unable to recognize test letters at 1 foot and cannot perceive objects or hand movements, or count fingers, at a distance of 3 feet. A veteran is eligible for SMC under this paragraph (g) if he or she meets the criteria in the

preceding sentence, even if the veteran can perceive objects or hand movements, or can count fingers, at distances of less than 3 feet. See § 4.79 of this chapter.

(Authority: 38 U.S.C. 501(a), 1114)

Special Monthly Compensation: Specific Statutory Bases

§ 5.323 Special monthly compensation under 38 U.S.C. 1114(k).

(a) *Basic entitlement.* Special monthly compensation (SMC) under 38 U.S.C. 1114(k) is payable to a veteran who has the following disabilities:

(1) Anatomical loss or loss of use of one hand;

(2) Anatomical loss or loss of use of one foot;

(3) Anatomical loss or loss of use of both buttocks;

(4) Anatomical loss or loss of use of one or more creative organs;

(5) Blindness of one eye having only light perception;

(6) Deafness of both ears having absence of air and bone conduction;

(7) Complete organic aphonia with constant inability to communicate by speech; or

(8) In the case of a female veteran, either of the following factors:

(i) Anatomical loss of 25 percent or more of tissue from a single breast or both breasts in combination (including, but not limited to, loss by mastectomy or partial mastectomy); or

(ii) Treatment of breast tissue with radiation (''treatment'' includes therapeutic procedures but not diagnostic procedures).

Cross References: §§ 5.322(b) and (c), respectively (criteria to determine anatomical loss or loss of use of a hand or of a foot); 5.322(g) (criteria to determine loss of use or blindness of one eye, having only light perception).

(b) *Limitations*—(1) *Combining ratings under 38 U.S.C. 1114(k) with ratings under 38 U.S.C. 1114(a) through (j), or (s).* SMC under 38 U.S.C. 1114(k) is payable in addition to the disability compensation authorized by 38 U.S.C. 1114(a) through (j), or (s), subject to the following limitation: The combined rate of disability compensation must not exceed the monthly rate provided by 38 U.S.C. 1114(*l*) when authorized in conjunction with any of the rates provided by 38 U.S.C. 1114(a) through (j), or (s).

(2) *Combining ratings under 38 U.S.C. 1114(k) with ratings under 38 U.S.C. 1114(l) through (n), or (p).* (i) If the veteran has entitlement under 38 U.S.C. 1114(*l*) through (n), or (p), SMC under 38 U.S.C. 1114(k) is payable for each anatomical loss or loss of use in addition to the losses used to establish entitlement under 38 U.S.C. 1114(*l*) through (n), or (p), as long as the combined monthly disability compensation does not exceed the monthly rate provided by 38 U.S.C. 1114(*o*).

(ii) A disability for which SMC is paid under 38 U.S.C. 1114(k) may not be a basis for a higher level of SMC under 38 U.S.C. 1114(*l*) through (n). However, VA will pay SMC under 1114(k) concurrently with SMC under 1114(l) through (n) as long as the same disability is not the basis for SMC under both 1114(k) and either (l), (m), or (n). The total combined rate of SMC cannot exceed the amount set forth in 38 U.S.C. 1114(*o*).

(3) *Exclusion.* The additional allowance for regular aid and attendance or a higher level of care provided by 38 U.S.C. 1114(r) is not subject to the limitations of paragraph (b) of this section regarding maximum monthly disability compensation payable under 38 U.S.C. 1114(k) in combination with other rates.

(c) *Creative organ.* (1) *Definition. Creative organ* means an organ directly involved in reproduction.

(2) *Anatomical loss.* Anatomical loss of a creative organ exists in any of the following circumstances:

(i) Acquired absence of one or both testicles (other than undescended testicles);

(ii) Acquired absence of one or both ovaries; or

(iii) Acquired absence of other creative organs.

(3) *Loss of use.* Loss of use of a creative organ exists in any of the following circumstances:

(i) The diameters of the affected testicle are reduced to one-third of the corresponding diameters of the normal testicle;

(ii) The diameters of the affected testicle are reduced to one-half or less of the corresponding normal testicle with changes in consistency of the affected testicle (harder or softer) when compared to the normal testicle;

(iii) Absence of spermatozoa proven by biopsy performed with the informed consent of the veteran; or

(iv) Medical evidence shows that, due to injury or disease, reproduction is not possible without medical intervention. This could occur if the veteran has:

(A) In the case of paired creative organs, the loss of function of at least one such organ; or

(B) In the case of an unpaired creative organ, loss of function.

(4) *SMC for erectile dysfunction.* SMC under 38 U.S.C. 1114(k) is payable for erectile dysfunction as the loss of use of a creative organ even if the veteran uses prescription medications or mechanical devices to treat the erectile dysfunction. This rule applies regardless of whether such treatment is effective.

(5) *SMC for anatomical loss.* SMC under 38 U.S.C. 1114(k) is payable for a service-connected anatomical loss of a creative organ even if it is preceded by a nonservice-connected loss of use. Examples of this include, but are not limited to, the following factors:

(i) The veteran had a vasectomy before military service with the anatomical loss or loss of use of one testicle during military service;

(ii) The veteran had a vasectomy following military service with a subsequent prostatectomy as a result of service-connected prostate cancer;

(iii) The veteran had impotence as a result of a nonservice-connected psychiatric condition with subsequent prostatectomy due to service-connected prostate cancer; or

(iv) The veteran had a tubal ligation before service with a subsequent oophorectomy due to service-connected injury or disease.

(6) *SMC for loss due to elective surgery.* SMC under 38 U.S.C. 1114(k) is not payable when anatomical loss or loss of use of a creative organ resulted from elective surgery performed after military service. However, if the elective surgery after service was necessary to correct an injury caused by surgery during military service, SMC under 38 U.S.C. 1114(k) is payable. Surgery performed based on sound medical advice for relief of a pathological condition or to prevent possible future pathological consequences is not considered to be elective surgery.

(7) *Atrophy.* Atrophy resulting from mumps followed by orchitis in service is presumed service connected. Because atrophy is usually perceptible no later than 1 to 6 months after infection subsides, an examination more than 6 months after the remission of orchitis demonstrating a normal genitourinary system will be considered in determining if the presumption is rebutted.

(d) *Determining loss of use of both buttocks.* (1) *General rule.* Loss of use of both buttocks exists if there is severe damage by injury or disease to muscle group XVII, bilaterally, (see §§ 4.56 and 4.73 of this chapter) and additional disability making it impossible for the person, without assistance, to rise from a seated position and from a stooped position (fingers to toes position) and to maintain postural stability (pelvis upon head of femur). The cited assistance may be provided by the person's hands

or arms, and, in the matter of postural stability, by a special appliance.

(2) *With SMC for lower extremities.* The receipt of SMC for anatomical loss or loss of use of both lower extremities under 38 U.S.C.1114 (*l*) through (n) does not prevent the receipt of SMC under 38 U.S.C. 1114(k) for loss of use of both buttocks if appropriate tests clearly substantiate there is such additional loss of use.

(e) *Deafness.* Deafness of both ears, having absence of air and bone conduction, exists if an authorized VA audiology examination shows bilateral hearing loss equal to or greater than the bilateral hearing loss required for a maximum rating under the Schedule for Rating Disabilities in part 4 of this chapter.

(f) *Aphonia.* Complete organic aphonia exists if a person has a disability of the speech organs that constantly prevents communication by speech.

(Authority: 38 U.S.C. 1114(k))

§ 5.324 Special monthly compensation under 38 U.S.C. 1114(l).

Special monthly compensation (SMC) under 38 U.S.C. 1114(*l*) is payable to a veteran who has any of the following disabilities:

(a) Anatomical loss or loss of use of both feet.

(b) Anatomical loss or loss of use of one hand and one foot.

(c) Each eye having either:

(1) Blindness with visual acuity of 5/200 or less under § 5.322(f); or

(2) Concentric contraction of the visual field to 5 degrees or less.

(d) Disability or disabilities causing the veteran to be permanently bedridden, which means evidence shows that the veteran must remain in bed and that the confinement to bed will continue throughout his or her lifetime.

(e) Disability or disabilities establishing the veteran's need for regular aid and attendance under § 5.320. Unless the veteran is entitled to additional SMC under 38 U.S.C. 1114(r) (see § 5.332), VA will award SMC under 38 U.S.C. 1114(*l*) based on permanently bedridden status if the veteran is permanently bedridden (see paragraph (d) of this section) rather than on the need for regular aid and attendance.

(Authority: 38 U.S.C. 1114(*l*))

Cross References: See §§ 5.320(b), Person is bedridden; 5.322(b), (c), Special monthly compensation: general information and definitions of disabilities; 5.330, Special monthly compensation under 38 U.S.C. 1114(*o*) (combining awards made under §§ 5.324, 5.326, or 5.328).

§ 5.325 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(l) and (m).

VA will pay special monthly compensation at the intermediate rate between 38 U.S.C. 1114(*l*) and (m) for any of the combinations of disabilities listed in paragraphs (a) through (d) of this section. The intermediate rate is the arithmetic mean between the rates for 38 U.S.C. 1114(*l*) and (m), rounded down to the next lower dollar.

(a) Anatomical loss or loss of use of one leg with factors preventing natural knee action with prosthesis in place and anatomical loss or loss of use of the other foot.

(b) Anatomical loss or loss of use of one arm with factors preventing natural elbow action with prosthesis in place and anatomical loss or loss of use of one foot.

(c) Anatomical loss or loss of use of one leg with factors preventing natural knee action with prosthesis in place and anatomical loss or loss of use of one hand.

(d) Blindness of one eye with visual acuity of 5/200 or less, or concentric contraction of the visual field to 5 degrees or less of one eye; and blindness of the other eye, having only light perception.

(Authority: 38 U.S.C. 1114(p))—

Cross Reference: § 5.322, Special monthly compensation: General information and definitions of disabilities (criteria for the disabilities listed in § 5.325).

§ 5.326 Special monthly compensation under 38 U.S.C. 1114(m).

Special monthly compensation under 38 U.S.C. 1114(m) is payable for any of the following combinations of disabilities:

(a) Anatomical loss or loss of use of both hands.

(b) Anatomical loss or loss of use of both legs with factors preventing natural knee action with prosthesis in place.

(c) Anatomical loss of one leg with factors preventing the use of a prosthetic appliance and anatomical loss or loss of use of the other foot.

(d) Anatomical loss or loss of use of one arm with factors preventing the use of a prosthetic appliance and anatomical loss or loss of use of one foot.

(e) Anatomical loss or loss of use of one arm with factors preventing natural elbow action with prosthesis in place and anatomical loss or loss of use of one leg with factors preventing natural knee action with prosthesis in place.

(f) Anatomical loss of one leg with factors preventing the use of a prosthetic appliance and anatomical loss or loss of use of one hand.

(g) Blindness in both eyes having only light perception.

(h) Blindness of one eye with visual acuity of 5/200 or less or with concentric contraction of the visual field to 5 degrees or less; and

(1) Anatomical loss of the other eye; or

(2) Blindness without light perception of the other eye.

(i) Blindness in both eyes leaving the veteran so significantly disabled as to need regular aid and attendance. If the veteran has visual acuity of 5/200 or less in both eyes or concentric contraction of the visual field to 5 degrees or less in both eyes, then entitlement to compensation at the 38 U.S.C. 1114(m) rate will be determined on the facts in the individual case.

(Authority: 38 U.S.C. 1114(m), (p))

Cross References: §§ 5.320, Determining need for regular aid and attendance; 5.322, Special monthly compensation: general information and definitions of disabilities (criteria for the disabilities listed in § 5.326); 5.330, Special monthly compensation under 38 U.S.C. 1114(*o*) (combining awards made under §§ 5.324, 5.326, or 5.328). See also § 4.76 of this chapter, Examination of field [of] vision (criteria for blindness based on concentric contraction of the visual field).

§ 5.327 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n).

VA will pay special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n) for any of the combinations of disabilities listed in paragraphs (a) through (e) of this section. The intermediate rate is the arithmetic mean between the rates for 38 U.S.C. 1114(m) and (n), rounded down to the nearest dollar.

(a) Anatomical loss or loss of use of one arm with factors preventing natural elbow action with prosthesis in place and anatomical loss or loss of use of the other hand.

(b) Anatomical loss or loss of use of one leg with factors preventing natural knee action with prosthesis in place and anatomical loss of the other leg with factors preventing the use of a prosthetic appliance.

(c) Anatomical loss of one arm with factors preventing the use of a prosthetic appliance and anatomical loss or loss of use of one leg with factors preventing natural knee action with prosthesis in place.

(d) Anatomical loss or loss of use of one arm with factors preventing natural elbow action with prosthesis in place and anatomical loss of one leg with

factors preventing the use of a prosthetic appliance.

(e) Blindness of one eye, having only light perception; and

(1) Anatomical loss of the other eye; or

(2) Blindness without light perception of the other eye.

(Authority: 38 U.S.C. 1114(p))

Cross References: §§ 5.322, Special monthly compensation: General information and definitions of disabilities; 5.326, Special monthly compensation under 38 U.S.C. 1114(m).

§ 5.328 Special monthly compensation under 38 U.S.C. 1114(n).

VA will pay special monthly compensation under 38 U.S.C. 1114(n) for any of the combinations of disabilities listed in paragraphs (a) through (e) of this section.

(a) Anatomical loss or loss of use of both arms with factors preventing natural elbow action with prosthesis in place.

(b) Anatomical loss of one arm with factors preventing the use of a prosthetic appliance and anatomical loss or loss of use of one hand.

(c) Anatomical loss of both legs with factors preventing the use of prosthetic appliances.

(d) Anatomical loss of one arm with factors preventing the use of a prosthetic appliance and anatomical loss of one leg with factors preventing the use of a prosthetic appliance.

(e) Anatomical loss of both eyes, blindness without light perception in both eyes, or anatomical loss of one eye and blindness without light perception in the other eye.

(Authority: 38 U.S.C. 1114(n), (p))

Cross References: §§ 5.322, Special monthly compensation: General information and definitions of disabilities; 5.326, Special monthly compensation under 38 U.S.C. 1114(m); 5.327, Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n) (criteria for the disabilities listed in § 5.328); 5.330, Special monthly compensation under 38 U.S.C. 1114(*o*) (combining awards made under §§ 5.324, 5.326, or 5.328).

§ 5.329 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(n) and (o).

VA will pay special monthly compensation at the intermediate rate between 38 U.S.C. 1114(n) and (*o*) for anatomical loss or loss of use of one arm with factors preventing natural elbow action with prosthesis in place and anatomical loss of the other arm with factors preventing the use of a prosthetic appliance. The intermediate rate is the arithmetic mean between the rates for 38 U.S.C. 1114(n) and (*o*), rounded down to the next lower dollar.

(Authority: 38 U.S.C. 1114(p))

Cross References: §§ 5.322, Special monthly compensation: General information and definitions of disabilities; 5.328, Special monthly compensation under 38 U.S.C. 1114(n) (criteria for the disabilities listed in § 5.329).

§ 5.330 Special monthly compensation under 38 U.S.C. 1114(o).

VA will pay special monthly compensation (SMC) under 38 U.S.C. 1114(*o*) for any of the following combinations of disabilities:

(a) Anatomical loss of both arms with factors preventing the use of prosthetic appliances.

(b) Bilateral deafness rated at 60 percent or more disabling, even if the hearing impairment in one ear is nonservice connected, in combination with blindness with bilateral visual acuity of 20/200 or less.

(c) Total deafness in one ear, or bilateral deafness rated at 40 percent or more disabling, even if the hearing impairment in one ear is nonservice connected, in combination with service-connected blindness of both eyes having only light perception or less vision.

(d) Loss of use of both lower extremities together with loss of anal and bladder sphincter control. VA will consider that the requirement of loss of anal and bladder sphincter control is met even though incontinence has been overcome under a strict regimen of rehabilitation training and/or other auxiliary measures.

(e) Disabilities entitling the veteran to two or more of the monetary rates provided in 38 U.S.C. 1114(*l*) through (n), without considering any disabilities twice.

(1) *Separate and distinct disabilities.* Entitlement under this paragraph (e) must be based on separate, distinct disabilities.

(2) *Common cause.* A common cause of disabilities that are otherwise separate and distinct will not preclude entitlement to SMC under this paragraph (e). For example, a veteran with anatomical loss or loss of use of both hands and both feet resulting from a common cause would nevertheless be entitled to SMC.

(Authority: 38 U.S.C. 1114(*o*))

Cross References: §§ 5.320, Determining need for regular aid and attendance; 5.322, Special monthly compensation: General information and definitions of disabilities; 5.328, Special monthly compensation under 38 U.S.C. 1114(n); 5.329 Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(n) and (*o*); 5.332, Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2) (criteria based in part on the disabilities listed in § 5.330).

§ 5.331 Special monthly compensation under 38 U.S.C. 1114(p).

(a) *Intermediate or next higher level of special monthly compensation.* In the event the veteran's disabilities exceed the requirements for any of the rates prescribed under §§ 5.324 through 5.329, VA will pay special monthly compensation (SMC) under 38 U.S.C. 1114(p) as provided in paragraphs (b) through (f) of this section. However, the payment cannot exceed the rate under 38 U.S.C. 1114(*o*). An intermediate rate authorized by this section is the arithmetic mean between the two rates of SMC, rounded down to the next lower dollar.

(b) *Bilateral blindness in combination with deafness.* (1) *Total deafness of one ear.* Blindness in both eyes meeting the criteria of § 5.324(c), § 5.325(d), or § 5.326(h) or (i), with service-connected total deafness in one ear, entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114.

(2) *Bilateral deafness rated 10 or 20 percent disabling.* Blindness in both eyes meeting the criteria of § 5.326(g), § 5.327(e), or § 5.328(e), with bilateral deafness rated at 10 percent or 20 percent disabling (even if the hearing impairment in one ear is nonservice connected) entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114.

(3) *Bilateral deafness rated at least 30 percent disabling.* Blindness in both eyes, meeting the criteria of § 5.324(c), § 5.325(d), § 5.326(g), (h), or (i), § 5.327(e), or § 5.328(e), with bilateral deafness rated 30 percent or more disabling (even if the hearing impairment in one ear is nonservice connected) entitles the veteran to the next higher rate under 38 U.S.C. 1114. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher intermediate rate.

(c) *Bilateral blindness in combination with anatomical loss or loss of use of a hand or foot.* Blindness in both eyes,

meeting the criteria of § 5.324(c), § 5.325(d), § 5.326(g), (h), or (i), § 5.327(e), or § 5.328(e), combined with any of the disabilities described in this paragraph (c)).

(1) *Anatomical loss or loss of use of hand.* Anatomical loss or loss of use of one hand entitles the veteran to the next higher statutory rate under 38 U.S.C. 1114. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher intermediate rate.

(2) *Anatomical loss or loss of use of foot rated at least 50 percent disabling.* Anatomical loss or loss of use of one foot which by itself or in combination with another compensable disability would be rated at 50 percent or more disabling, entitles the veteran to the next higher rate under 38 U.S.C. 1114. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher intermediate rate.

(3) *Anatomical loss or loss of use of foot rated less than 50 percent disabling.* Anatomical loss or loss of use of one foot which is rated less than 50 percent disabling and which is the only compensable disability other than bilateral blindness, entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114.

(d) *Additional independent disability or disabilities rated 50 percent or more disabling.* (1) *General rule.* If a veteran is entitled to SMC under one of the rates payable under §§ 5.324 through 5.329 and also has a permanent disability, or combination of permanent disabilities, which are independently rated at 50 percent or more disabling, VA will award the veteran SMC at the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, VA will award the next higher rate under 38 U.S.C. 1114. This benefit may not be paid concurrently with the 100 percent rate pursuant to 38 U.S.C. 1114(p) under § 5.331(e).

(2) *Independently rated* means that the additional disability or disabilities rated at 50 percent or more disabling are separate and distinct, and involve different anatomical segments or bodily systems, from the disability or disabilities establishing entitlement under §§ 5.324 through 5.329. If the bases for the additional disability or disabilities and the basis for entitlement to SMC under §§ 5.324 through 5.329 are caused by the same injury or disease, VA cannot pay the next higher intermediate rate unless the additional disability or disabilities would be rated 50 percent or more disabling without regard to the basis for entitlement to SMC under §§ 5.324 through 5.329.

(3) *Permanent residuals of tuberculosis.* Permanent residuals of tuberculosis, and not the graduated ratings for arrested tuberculosis, may serve as the basis for the independent 50 percent disability rating.

(e) *Additional independent disability rated 100 percent.* (1) *General rule.* If a veteran is entitled to SMC at one of the rates payable under §§ 5.324 through 5.329 and has a single permanent disability that is independently rated 100 percent disabling, VA will award the veteran the next higher rate under 38 U.S.C. 1114. If the veteran is receiving SMC at an intermediate rate, VA will award to the next higher intermediate rate. The single permanent disability must be independently rated 100 percent disabling without regard to individual unemployability. The rate payable under this paragraph (e) cannot be paid concurrently with the 50 percent-or-more rate payable under paragraph (d) of this section.

(2) *Independently rated.* For the definition of ''independently rated'', see paragraph (d)(2) of this section.

(3) *Permanent residuals of tuberculosis.* Permanent residuals of tuberculosis, and not the graduated ratings for arrested tuberculosis, may serve as the basis for the independent 100 percent disability rating.

(f) *Three extremities.* Anatomical loss, loss of use, or a combination of anatomical loss and loss of use of three extremities entitles the veteran to the next higher intermediate rate. If the veteran is already entitled to an intermediate rate, the veteran will be entitled to the next higher rate under 38 U.S.C. 1114. VA will combine the anatomical loss or loss of use of whichever two extremities will provide the veteran with the highest level of SMC before combining the third anatomical loss or loss of use of an extremity to award the next higher rate. When there is entitlement for triple extremity or blindness with extremity, it will be in addition to any entitlement under 38 U.S.C. 1114(k) or (p) for the 50 or 100 percent elevations for the same extremity.

(Authority: 38 U.S.C. 1114(p))

§ 5.332 Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2).

(a) *General rule.* The additional allowance that 38 U.S.C. 1114(r) authorizes is payable whether the need for regular aid and attendance or for a higher level of care is a partial basis for entitlement to the maximum rate under 38 U.S.C. 1114(*o*) or (p), or to the intermediate rate between 38 U.S.C. 1114(n) and (*o*) plus the rate under 38 U.S.C. 1114(k), or is based on an independent factual determination.

(b) *Criteria for additional allowance under 38 U.S.C. 1114(r)(1).* A veteran is entitled to an additional allowance under 38 U.S.C. 1114(r)(1) when all of the following conditions are met:

(1) The veteran is entitled to the maximum rate under 38 U.S.C. 1114(*o*) or (p), or to the intermediate rate between 38 U.S.C. 1114(n) and (*o*) plus the rate under 38 U.S.C. 1114(k);

(2) The veteran needs regular aid and attendance under § 5.320; and

(3) The veteran is not hospitalized at U.S. Government expense.

(c) *Criteria for additional allowance under 38 U.S.C. 1114(r)(2)*—(1) *General criteria.* A veteran is entitled to an additional allowance under 38 U.S.C. 1114(r)(2), instead of the allowance under 38 U.S.C. 1114(r)(1), when all of the following conditions are met:

(i) The veteran is entitled to the maximum rate under 38 U.S.C. 1114(*o*) or (p), or to the intermediate rate between 38 U.S.C. 1114(n) and (*o*) plus the rate under 38 U.S.C. 1114(k);

(ii) The veteran needs regular aid and attendance under § 5.320;

(iii) The veteran needs a ''higher level of care'' (as defined in paragraph (c)(2) of this section);

(iv) Without the higher level of care, the veteran would require hospitalization, nursing home care, or other residential institutional care; and

(v) The veteran is not hospitalized at U.S. Government expense.

(2) *Higher level of care.* For purposes of this paragraph (c), a veteran needs a ''higher level of care'' whenever the veteran requires personal health-care services provided on a daily basis in the veteran's residence by a person who is licensed to provide these services or who provides these services under the regular supervision of a licensed health-care professional.

(3) *Personal health-care services.* For purposes of this section, ''personal health-care services'' include, but are not limited to, physical therapy, administration of injections, placement of indwelling catheters, the changing of sterile dressings, or similar functions, the performance of which requires professional health-care training or the regular supervision of a trained health-care professional.

(4) *Licensed health-care professional.* For purposes of this section, a ''licensed health-care professional'' includes, but is not limited to, a doctor of medicine or osteopathy, a registered nurse, a

licensed practical nurse, or a physical therapist licensed to practice by a State or a political subdivision of a State.

(5) *Under the regular supervision of a licensed health-care professional.* For purposes of this section, the term *under the regular supervision of a licensed health-care professional* means that an unlicensed person performing personal health-care services is following a regimen of personal health-care services prescribed by a health-care professional, and that the health-care professional consults with the unlicensed person providing the health-care services at least once each month to monitor the prescribed regimen. The consultation need not be in person; a telephone call is sufficient.

(6) *Care may be provided by a relative of the veteran or a member of the veteran's household.* A relative of the veteran or a member of the veteran's household may perform the necessary personal health-care services. However, such a person must be a licensed health-care professional or provide the necessary personal health-care services under the regular supervision of a licensed health-care professional.

(7) *Traumatic brain injury.* Subject to § 5.720(c)(1) and (f)(1), if any veteran, as the result of service-connected disability, needs regular aid and attendance for the residuals of traumatic brain injury, is not eligible for compensation under paragraph (c)(1) of this section, and in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other residential institutional care, VA will pay the veteran, in addition to any other compensation under §§ 5.320 through 5.334, a monthly aid and attendance allowance equal to the rate in 38 U.S.C. 1114(r)(2), which for purposes of 38 U.S.C. 1134 will be considered additional compensation payable for disability. An allowance authorized under this paragraph (c)(7) will be paid in place of any allowance authorized by paragraph (b) of this section.

(Authority: 38 U.S.C. 1114(r), (t))

Cross Reference: § 5.1, for the definition of ''State''.

§ 5.333 Special monthly compensation under 38 U.S.C. 1114(s).

Special monthly compensation under 38 U.S.C. 1114(s) is payable to a veteran who has a single disability rated 100 percent disabling under subpart B of the Schedule for Rating Disabilities in part 4 of this chapter, or a disability that is the sole basis for a rating of total disability based on individual unemployability (TDIU) under § 4.16 of this chapter, and either:

(a) Has an additional disability, or combination of disabilities, rated 60 percent disabling, without consideration of the single disability that was either rated 100 percent or served as the basis for a TDIU rating; or

(b) Is permanently housebound as a result of disability or disabilities, including the single disability that was either rated 100 percent or served as the basis for a TDIU rating. For purposes of this paragraph (b), a veteran is permanently housebound if he or she is substantially confined to his or her residence (ward or clinical areas, if institutionalized) and immediate premises because of a disability or disabilities, and it is reasonably certain that such disability or disabilities will remain throughout the veteran's lifetime.

(Authority: 38 U.S.C. 1114(s))

§ 5.334 Special monthly compensation tables.

(a) *Purpose of tables.* The tables in this section are meant as aids to summarize the statutory or intermediate rate of special monthly compensation (SMC) payable to veterans under 38 U.S.C. 1114 for certain combinations of disabilities. The regulatory text in §§ 5.323 through 5.333 describes these benefits in more detail. No additional rights or benefits are conferred by this section. The tables are informative only and will not be used as a basis to grant or deny benefits in a particular case.

(b) *Symbols.* The following list defines the symbols used in the tables in this section:

L = the rate under 38 U.S.C. 1114(*l*).
L ½ = the intermediate rate between 38 U.S.C. 1114(*l*) and (m).
M = the rate under 38 U.S.C. 1114(m).
M ½ = the intermediate rate between 38 U.S.C. 1114(m) and (n).
N = the rate under 38 U.S.C. 1114(n).
N ½ = the intermediate rate between 38 U.S.C. 1114(n) and (*o*).
O = the rate under 38 U.S.C 1114(*o*).

(c) *Usage.* In Tables 1 through 4, the columns and rows are labeled with specific disabilities or combinations of disabilities. The point where a column and row intersect represents the rate or intermediate rate of SMC payable for the specified combination of disabilities. For example, in Table 1, a veteran who has the anatomical loss or loss of use of one leg with factors preventing natural knee action with prosthesis in place and anatomical loss of one arm with factors preventing the use of a prosthetic appliance is entitled to the intermediate rate of SMC between 38 U.S.C. 1114(m) and (n) (symbol M ½).

(d) *Table 1.* To determine the level of SMC payable when there are varying degrees of anatomical loss or loss of use of two extremities, identify the proper degree of loss for one extremity along the top row of Table 1 and the proper degree of loss for the other extremity down the left column. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it. This table does not confer any substantive rights.

TABLE 1—SMC—EXTREMITIES ONLY

Extremities	Anatomical loss or loss of use: One foot	Anatomical loss or loss of use: One hand	Anatomical loss or loss of use: One leg & no knee action	Anatomical loss or loss of use: One arm & no elbow action	Anatomical loss of one leg: Near hip	Anatomical loss of one arm: Near shoulder
Anatomical loss or loss of use: One foot	L § 5.324(a)	L § 5.324(b)	L½ § 5.325(a)	L½ § 5.325(b)	M § 5.326(c)	M § 5.326(d)
Anatomical loss or loss of use: One hand	L § 5.324(b)	M § 5.326(a)	L½ § 5.325(c)	M½ § 5.327(a)	M § 5.326(f)	N § 5.328(b)
Anatomical loss or loss of use: One leg & no knee action	L½ § 5.325(a)	L½ § 5.325(c)	M § 5.326(b)	M § 5.326(e)	M½ § 5.327(b)	M½ § 5.327(c)
Anatomical loss or loss of use: One arm & no elbow action	L½ § 5.325(b)	M½ § 5.327(a)	M § 5.326(e)	N § 5.328(a)	M½ § 5.327(d)	N½ § 5.329
Anatomical loss of one leg: Near hip	M § 5.326(c)	M § 5.326(f)	M½ § 5.327(b)	M½ § 5.327(d)	N § 5.328(c)	N § 5.328(d)

TABLE 1—SMC—EXTREMITIES ONLY—Continued

Extremities	Anatomical loss or loss of use: One foot	Anatomical loss or loss of use: One hand	Anatomical loss or loss of use: One leg & no knee action	Anatomical loss or loss of use: One arm & no elbow action	Anatomical loss of one leg: Near hip	Anatomical loss of one arm: Near shoulder
Anatomical loss of one arm: Near shoulder	M § 5.326(d)	N § 5.328(b)	M½ § 5.327(c)	N½ § 5.329	N § 5.328(d)	O § 5.330(a)

(e) *Table 2.* To determine the level of SMC payable when there are varying degrees of blindness in both eyes, identify the proper degree of blindness for one eye down the left column of Table 2 and the proper degree of blindness for the other eye along the top row. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it. This table does not confer any substantive rights.

TABLE 2—SMC BASED ON BILATERAL BLINDNESS

Vision in one eye	Vision in other eye				
	Visual acuity of 5/200 or less	Visual field contraction to 5° or less	Light perception only	No light perception	Anatomical loss of eye
Visual acuity of 5/200 or less	L § 5.324(c)	L § 5.324(c)	L½ § 5.325(d)	M § 5.326(h)	M § 5.326(h)
Visual field contraction to 5° or less	L § 5.324(c)	L § 5.324(c)	L½ § 5.325(d)	M § 5.326(h)	M § 5.326(h)
Light perception only	L½ § 5.325(d)	L½ § 5.325(d)	M § 5.326(g)	M½ § 5.327(e)	M½ § 5.327(e)
No light perception	M § 5.326(h)	M § 5.326(h)	M½ § 5.327(e)	N § 5.328(e)	N § 5.328(e)
Anatomical loss of eye	M § 5.326(h)	M § 5.326(h)	M½ § 5.327(e)	N § 5.328(e)	N § 5.328(e)

(f) *Table 3.* To determine the level of SMC when there is bilateral blindness together with anatomical loss or loss of use of an extremity, identify the level of SMC for bilateral blindness from Table 3 and locate it along the top row. Then identify the proper extremity loss down the left column. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it. This table does not confer any substantive rights.

TABLE 3—SMC—BILATERAL BLINDNESS WITH ANATOMICAL LOSS OR LOSS OF USE OF EXTREMITY

Additional disability	SMC for bilateral blindness alone				
	"L"	"L½"	"M"	"M½"	"N"
Service-connected anatomical loss or loss of use of one foot rated less than 50%, and it is the only compensable disability other than blindness.	L½ + K, § 5.331(c)(3); § 5.323(b)(2).	M + K, § 5.331(c)(3); § 5.323(b)(2).	M½ + K, § 5.331(c)(3); § 5.323(b)(2).	N + K, § 5.331(c)(3); § 5.323(b)(2).	N½ + K, § 5.331(c)(3); § 5.323(b)(2)
Service-connected anatomical loss or loss of use of one foot rated 50% or more, either alone or in combination with another disability.	M + K, § 5.331(c)(2); § 5.323(b)(2).	M½ + K, § 5.331(c)(2); § 5.323(b)(2).	N + K, § 5.331(c)(2); § 5.323(b)(2).	N½ + K, § 5.331(c)(2); § 5.323(b)(2).	O § 5.331(c)(2)
Service-connected anatomical loss or loss of use of one hand.	M + K § 5.331(c)(1); § 5.323(b)(2).	M½ + K, § 5.331(c)(1); § 5.323(b)(2).	N + K, § 5.331(c)(1); § 5.323(b)(2).	N½ + K, § 5.331(c)(1); § 5.323(b)(2).	O, § 5.331(c)(1)

(g) *Table 4.* To determine the level of SMC when there is bilateral blindness together with deafness, identify the level of SMC for bilateral blindness from Table 4 and locate it along the top row. Then identify the proper degree of deafness down the left column. The square where the column and row intersect contains the symbol for the level of SMC payable and the regulatory citation that supports it. This table does not confer any substantive rights.

TABLE 4—SMC—BILATERAL BLINDNESS WITH DEAFNESS

Additional disability	SMC for bilateral blindness alone					
	"L"	"L½"	"M" under § 5.326(h) or (i)	"M" under § 5.326(g)	"M½"	"N"
Service-connected (SC) total deafness in one ear.	L½, § 5.331(b)(1).	M, § 5.331(b)(1)	M½, § 5.331(b)(1).	O, § 5.330(c)	O, § 5.330(c)	O, § 5.330(c)
Bilateral deafness rated 10% or 20% (one or both ears SC).	No additional SMC.	No additional SMC.	No additional SMC.	M½, § 5.331(b)(2).	N, § 5.331(b)(2)	N½, § 5.331(b)(2)
Bilateral deafness rated 30% (one or both ears SC).	M, § 5.331(b)(3)	M½, § 5.331(b)(3).	N, § 5.331(b)(3)	N, § 5.331(b)(3)	N½, § 5.331(b)(3).	O, § 5.331(b)(3)
Bilateral deafness rated 40% or 50% (one or both ears SC).	M, § 5.331(b)(3)	M½, § 5.331(b)(3).	N, § 5.331(b)(3)	O, § 5.330(c)	O, § 5.330(c)	O, § 5.330(c)
Bilateral deafness rated 60% or more (one or both ears SC).	O, § 5.330(b)	O, § 5.330(b)	O, § 5.330(b)	O, § 5.330(b)	O, § 5.330(b)	O, § 5.330(b)

(Authority: 38 U.S.C. 1114)

Special Monthly Compensation: Effective Dates

§ 5.335 Effective dates: special monthly compensation under §§ 5.332 and 5.333.

(a) *General rule.* Except as provided in § 5.312 (regarding effective dates of increased disability compensation), and paragraph (b) of this section, the effective date of an award of special monthly compensation (SMC) under § 5.332 or § 5.333 will be the date of receipt of the claim or the date entitlement arose, whichever is later.

(b) *Retroactive award of SMC.* When VA awards disability compensation, based on an original or reopened claim, for a retroactive period, VA will also award SMC for all or any part(s) of that retroactive period during which the veteran met the eligibility requirements for SMC.

(Authority: 38 U.S.C. 5110(a), (b))

§ 5.336 Effective dates: additional compensation for regular aid and attendance payable for a veteran's spouse under § 5.321.

(a) *Award of regular aid and attendance.* (1) The effective date of an award of additional compensation payable to a veteran because the veteran's spouse's needs regular aid and attendance will be the date of receipt of the claim or the date entitlement arose, whichever is later.

(2) When VA awards disability compensation based on an original or reopened claim retroactive to an effective date that is earlier than the date of receipt of the claim, VA will also award additional compensation for any part of the retroactive period during which the spouse needed regular aid and attendance.

(b) *Discontinuance of additional compensation.* If the veteran's spouse no longer needs regular aid and attendance, VA will discontinue additional compensation effective the end of the month in which VA takes the award action to discontinue.

(Authority: 38 U.S.C. 501(a), 5110(b)(1), (2))

§§ 5.337–5.339 [Reserved]

Tuberculosis

§ 5.340 Pulmonary tuberculosis shown by X-ray in active military service.

(a) *Active disease.* X-ray evidence alone may be adequate for grant of direct service connection for pulmonary tuberculosis. When under consideration, all available service department films and subsequent films will be secured and read by specialists at designated stations who should have a current examination report and X-ray. Resulting interpretations of service films will be accorded the same consideration for service connection purposes as if clinically established, however, a compensable rating will not be assigned prior to establishment of an active condition by approved methods.

(b) *Inactive disease.* Where the veteran was examined at the time of entrance into active military service but no X-ray was made, or if made, is not available and there was no notation or other evidence of active or inactive re-infection type pulmonary tuberculosis existing prior to such entrance, it will be assumed that the condition occurred during service and direct service connection will be in order for inactive pulmonary tuberculosis shown by X-ray evidence during service in the manner prescribed in paragraph (a) of this section, unless lesions are first shown so soon after entry on active military service as to compel the conclusion, on the basis of sound medical principles, that they existed prior to entry on active military service.

(c) *Primary lesions.* Healed primary type tuberculosis shown at the time of entrance into active military service will not be taken as evidence to rebut direct or presumptive service connection for active re-infection type pulmonary tuberculosis.

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

§ 5.341 Presumption of service connection for tuberculous disease; wartime and service after December 31, 1946.

(a) *Pulmonary tuberculosis.*—(1) *General rule.* Evidence of activity on comparative study of X-ray films showing pulmonary tuberculosis within the 3-year presumptive period provided by § 5.261(c), will be taken as establishing service connection for active pulmonary tuberculosis subsequently diagnosed by approved methods but service connection and rating may be assigned only from the date of such diagnosis or other evidence of clinical activity.

(2) *Notation of inactive tuberculosis.* A notation of inactive tuberculosis of the re-infection type at induction or enlistment prevents the grant of service connection under § 5.261 for active tuberculosis, regardless of the fact that it was shown within the appropriate presumptive period.

(b) *Pleurisy with effusion without obvious cause.* Pleurisy with effusion with evidence of diagnostic studies ruling out obvious nontuberculosis causes will qualify as active tuberculosis. The requirements for presumptive service connection will be the same as those for tuberculosis pleurisy.

(c) *Tuberculosis pleurisy and endobronchial tuberculosis.* Tuberculosis pleurisy and endobronchial tuberculosis fall within the category of pulmonary tuberculosis for purpose of service connection on a presumptive basis. Either will be held incurred in service when initially manifested within the 3-year presumptive period provided by § 5.261(c).

(d) *Miliary tuberculosis.* Service connection for miliary tuberculosis involving the lungs is to be determined in the same manner as for other active pulmonary tuberculosis.

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

§ 5.342 Initial grant following inactivity of tuberculosis.

When service connection is granted initially on an original or reopened claim for pulmonary or nonpulmonary tuberculosis and there is satisfactory evidence that the condition was active previously but is now inactive (arrested), it will be presumed that the disease continued to be active for 1 year after the last date of established activity, provided there is no evidence to establish activity or inactivity in the intervening period. For a veteran entitled to receive disability compensation on August 19, 1968, the beginning date of graduated ratings will commence at the end of the 1-year period. For a veteran who was not receiving or entitled to receive disability compensation on August 19, 1968, ratings will be assigned in accordance with the Schedule for Rating Disabilities in part 4 of this chapter. This section is not applicable to running award cases.

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

§ 5.343 Effect of diagnosis of active tuberculosis.

(a) *Service diagnosis.* Service department diagnosis of active pulmonary tuberculosis will be accepted unless a board of medical examiners, a Clinic Director, or Chief, Outpatient Service certifies, after considering the evidence, including the evidence favoring or opposing tuberculosis and activity, that such diagnosis was incorrect. Doubtful cases may be referred to the Under Secretary for Health in Central Office for a medical opinion.

(b) *Department of Veterans Affairs diagnosis.* Diagnosis of active pulmonary tuberculosis by the medical authorities of VA as the result of examination, observation, or treatment will be accepted for rating purposes. In a case where there is no such diagnosis, but there is evidence that the veteran has tuberculosis, the case will be referred to the Clinic Director or Chief, Outpatient Service, and, if necessary, to the Under Secretary for Health in Central Office for a medical opinion.

(c) *Private physician's diagnosis.* Diagnosis of active pulmonary tuberculosis by private physicians based on their examination, observation, or treatment will not be accepted to show the disease was initially manifested within the presumptive period after discharge from active military service unless confirmed by acceptable clinical, X-ray or laboratory studies, or by findings of active tuberculosis based upon acceptable hospital observation or treatment.

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

§ 5.344 Determination of inactivity (complete arrest) of tuberculosis.

(a) *Pulmonary tuberculosis.* A veteran shown to have had pulmonary tuberculosis will be held to have reached a condition of ''complete arrest'' when a diagnosis of inactive tuberculosis is made.

(b) *Nonpulmonary disease.* Determination of complete arrest of nonpulmonary tuberculosis requires absence of evidence of activity for 6 months. If there are two or more foci of such tuberculosis, one of which is active, the condition will not be considered to be inactive until the tuberculosis process has reached arrest in its entirety.

(c) *Arrest following surgery.* Where there has been surgical excision of the lesion or organ, the date of complete arrest will be the date of discharge from the hospital, or 6 months after the date of excision, whichever is later.

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

§ 5.345 Changes from activity in pulmonary tuberculosis pension cases.

A permanent and total disability rating in effect during hospitalization will not be discontinued before hospital discharge based on a change in classification from active. At hospital discharge, the permanent and total rating will be discontinued unless the medical evidence does not support a finding of complete arrest (see § 5.344) or where complete arrest is shown but the medical authorities recommend that employment not be resumed or be resumed only for short hours (not more than 4 hours a day for a 5-day week). If either of the two aforementioned conditions is met, discontinuance will be deferred pending examination in 6 months. Although complete arrest may be established upon that examination, the permanent and total rating may be extended for a further period of 6 months provided the veteran's employment is limited to short hours as recommended by the medical authorities (not more than 4 hours a day for a 5-day week). Similar extensions may be granted under the same conditions at the end of 12- and 18-month periods. At the expiration of 24 months after hospitalization, the case will be considered under § 5.280 if continued short hours of employment are recommended or if other evidence warrants submission.

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

§ 5.346 Tuberculosis and compensation under 38 U.S.C. 1114(q) and 1156.

(a) *General rule.* Any veteran who, on August 19, 1968, was receiving or entitled to receive disability compensation for active or inactive (arrested) tuberculosis may receive special monthly compensation (SMC) under 38 U.S.C. 1114(q) and 1156 as in effect before August 20, 1968.

(b) *SMC under 38 U.S.C. 1114(q) for inactive tuberculosis (complete arrest)*—(1) *Receiving or entitled to receive special monthly compensation for tuberculosis on August 19, 1968.* (i) For a veteran who was receiving or entitled to receive SMC for tuberculosis on August 19, 1968, the minimum monthly rate is $67. This minimum SMC is not to be combined with or added to any other disability compensation. The rating criteria for determining inactivity of tuberculosis are set out in § 5.344, Determination of inactivity (complete arrest) of tuberculosis.

(ii) The effective date of SMC under paragraph (b)(1)(i) of this section will be the date the graduated rating of the disability or compensation for that degree of disablement combined with other service-connected disabilities provides compensation payable at a rate less than $67.

(2) *Not receiving or entitled to receive SMC for tuberculosis on August 19, 1968.* For a veteran who was not receiving or entitled to receive SMC for tuberculosis on August 19, 1968, the SMC authorized by paragraph (b)(1) of this section is not payable.

(Authority: 38 U.S.C. 501(a); Pub. L. 90–493, 82 Stat. 809)

§ 5.347 Continuance of a total disability rating for service-connected tuberculosis.

In service-connected cases, ratings for active or inactive tuberculosis will be governed by the Schedule for Rating Disabilities in part 4 of this chapter. Where in the opinion of the agency of original jurisdiction the veteran, at the expiration of the period during which a total rating is provided, will not be able to maintain inactivity of the disease process under the ordinary conditions of life, the case will be considered under § 5.280.

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

Cross Reference: § 5.1, for the definition of ''agency of original jurisdiction''.

§§ 5.348–5.349 [Reserved]

Injury or Death Due to Hospitalization or Treatment

§ 5.350 Benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.

(a) *General rule.* (1) Except as provided in paragraph (a)(2) of this section, and subject to paragraphs (c) through (f) of this section, VA will pay disability compensation or dependency and indemnity compensation for an injury, disease, death, or for the aggravation of an existing injury or disease that occurs as a result of an examination, medical or surgical treatment, hospitalization, participation in vocational rehabilitation, or participation in compensated work therapy (CWT) under any law VA administers, as if it were service connected.

(2) VA will not pay the benefits described in paragraph (a)(1) of this section if the injury, disease, death, or the aggravation of an existing injury or disease was the result of the veteran's willful misconduct.

(b) *Determining whether a veteran has an additional disability.* To determine whether a veteran has an additional disability, VA will compare the veteran's condition immediately before the beginning of the hospital care, medical or surgical treatment, examination, training and rehabilitation services, or CWT program upon which the claim is based to the veteran's condition after such care, treatment, examination, services, or program has stopped. VA considers each involved body part or system separately.

(c) *Establishing the cause of additional disability or death.* Claims based on additional disability or death due to hospital care, medical or surgical treatment, or examination must meet the causation requirements of this paragraph (c) and paragraph (d)(1) or (2) of this section. Claims based on additional disability or death due to training and rehabilitation services or CWT program must meet the causation requirements of paragraph (d)(3) of this section.

(1) *Actual causation required.* To establish causation, the evidence must show that the hospital care, medical or surgical treatment, or examination resulted in the veteran's additional disability or death. Merely showing that a veteran received care, treatment, or examination and that the veteran has an additional disability or died does not establish cause.

(2) *Continuance or natural progress of injury or disease.* Hospital care, medical or surgical treatment, or examination cannot cause the continuance or natural progress of injury or disease for which the care, treatment, or examination was furnished unless VA's failure to timely diagnose and properly treat the injury or disease proximately caused the continuance or natural progress. The provision of training and rehabilitation services or CWT program cannot cause the continuance or natural progress of injury or disease for which the services were provided.

(3) *Veteran's failure to follow medical instructions.* Additional disability or death caused by a veteran's failure to follow properly given medical instructions is not caused by hospital care, medical or surgical treatment, or examination.

(d) *Establishing the proximate cause of additional disability or death.* The proximate cause of disability or death is the action or event that directly caused the disability or death, as distinguished from a remote contributing cause.

(1) *Care, treatment, or examination.* To establish that carelessness, negligence, lack of proper skill, error in judgment, or a similar instance of VA fault in furnishing hospital care, medical or surgical treatment, or examination proximately caused a veteran's additional disability or death, the evidence must show that the hospital care, medical or surgical treatment, or examination caused the veteran's additional disability or death (as explained in paragraph (c) of this section); and

(i) VA failed to exercise the degree of care that would be expected of a reasonable health-care provider; or

(ii) VA furnished the hospital care, medical or surgical treatment, or examination without the veteran's or, in appropriate cases, the veteran's representative's informed consent. To determine whether there was informed consent, VA will consider whether the health-care providers substantially complied with the requirements of § 17.32 of this chapter. Minor deviations from the requirements of § 17.32 of this chapter that are immaterial under the circumstances of a case will not defeat a finding of informed consent. Consent may be express (that is, given orally or in writing) or implied under the circumstances specified in § 17.32(b) of this chapter, as in emergency situations.

(2) *Events not reasonably foreseeable.* Whether the proximate cause of a veteran's additional disability or death was an event not reasonably foreseeable is to be determined in each claim based on what a reasonable health-care provider would have foreseen. The event need not be completely unforeseeable or unimaginable but must be one that a reasonable health-care provider would not have considered an ordinary risk of the treatment provided. In determining whether an event was reasonably foreseeable, VA will consider whether the risk of that event was the type of risk that a reasonable health-care provider would have disclosed in connection with the informed consent procedures of § 17.32 of this chapter.

(3) *Training and rehabilitation services or compensated work therapy program.* To establish that the provision of training and rehabilitation services or a CWT program proximately caused a veteran's additional disability or death, the evidence must show that the veteran's participation in an essential activity or function of the training, services, or CWT program provided or authorized by VA proximately caused the disability or death. The veteran must have been participating in such training, services, or CWT program provided or authorized by VA as part of an approved rehabilitation program under 38 U.S.C. chapter 31 or as part of a CWT program under 38 U.S.C. 1718. It need not be shown that VA approved that specific activity or function, as long as the activity or function is generally accepted as being a necessary component of the training, services, or CWT program that VA provided or authorized.

(e) *Department employees and facilities.*—(1) A *Department employee* is a person:

(i) Who is appointed by the Department in the civil service under title 38, United States Code, or title 5, United States Code, as an employee as defined in 5 U.S.C. 2105;

(ii) Who is engaged in furnishing hospital care, medical or surgical treatment, or examinations under authority of law; and

(iii) Whose day-to-day activities are subject to supervision by the Secretary of Veterans Affairs.

(2) A *Department facility* is a facility over which the Secretary of Veterans Affairs has direct jurisdiction.

(f) *Activities that are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility.* The following activities are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility within the meaning of 38 U.S.C. 1151(a):

(1) Hospital care or medical services furnished under a contract made under 38 U.S.C. 1703;

(2) Nursing home care furnished under 38 U.S.C. 1720; and

(3) Hospital care or medical services, including, but not limited to, examination, provided under 38 U.S.C. 8153, in a facility over which the Secretary does not have direct jurisdiction.

(Authority: 38 U.S.C. 1151)

Cross Reference: § 5.1, for the definition of ''nursing home,'' ''proximately caused,'' and ''willful misconduct''.

§ 5.351 Effective dates of awards of benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.

The effective date of an award of disability compensation under 38 U.S.C. 1151(a) (see § 5.350) will be one of the following:

(a) *Disability.* Date injury or aggravation was suffered if a claim is received no later than 1 year after that date; otherwise, date of receipt of the claim.

(b) *Death.* First day of the month in which the veteran's death occurred, if a claim is received no later than 1 year after the date of death; otherwise, date of receipt of the claim.

(Authority: 38 U.S.C. 5110(c))

§ 5.352 Effect of Federal Tort Claims Act compromises, settlements, and judgments entered after November 30, 1962, on benefits awarded under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.

(a) *Offset of a veterans' awards of compensation.* If a veteran's disability is the basis of a judgment awarded under 28 U.S.C. 1346(b), or of a settlement or compromise entered under 28 U.S.C. 2672 or 2677, after November 30, 1962, the entire amount of the veteran's share of the judgment, settlement, or compromise, including the veteran's proportional share of attorney fees, will be offset from any compensation awarded under 38 U.S.C. 1151(a).

(b) *Offset of survivors' awards of dependency and indemnity compensation.* If a veteran's death is the basis of a judgment awarded under 28 U.S.C. 1346(b), or of a settlement or compromise entered under 28 U.S.C. 2672 or 2677, after November 30, 1962, only the amount of the judgment, settlement, or compromise the survivor receives (in an individual capacity, or as distribution from the decedent veteran's estate) of sums included in the judgment, settlement, or compromise representing damages for the veteran's death to compensate for harm the survivor suffered, plus the survivor's proportional share of attorney fees, is to be offset from any dependency and indemnity compensation awarded under 38 U.S.C. 1151(a).

(c) *Offset of structured settlements.* This paragraph applies if a veteran's disability or death is the basis of a structured settlement or structured compromise under 28 U.S.C. 2672 or 2677 entered after November 30, 1962.

(1) *The amount to be offset.* The amount to be offset from benefits awarded under 38 U.S.C. 1151(a) is the veteran's or survivor's proportional share of the cost to the U.S. of the settlement or compromise, including the veteran's or survivor's proportional share of attorney fees.

(2) *When the offset begins.* The offset of benefits awarded under 38 U.S.C. 1151(a) begins the first month after the structured settlement or structured compromise has become final that such benefits would otherwise be paid.

(d) *Offset of award of benefits under 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39.* (1) VA will reduce the amount of an award of benefits under 38 U.S.C. chapter 21 or 39 by the amount received in a judgment, settlement, or compromise covered in paragraphs (a) through (c) of this section that became final after December 9, 2004, if it included an amount that was specifically designated for a purpose for which benefits are provided under 38 U.S.C. chapters 21 or 39, and VA awards chapter 21 or chapter 39 benefits after the date the judgment, settlement, or compromise becomes final,

Cross References: (§§ 5.604, Specially adapted housing under 38 U.S.C. 2101(a); 5.605, Special Home Adaptation Grants under 38 U.S.C. 2101(b); § 5.603, Financial assistance to purchase a vehicle or adaptive equipment.

(2) If the amount described in paragraph (d)(1) of this section is greater than the amount of an award under 38 U.S.C. chapters 21 or 39, VA will offset the excess amount received under the judgment, settlement, or compromise against benefits otherwise payable under 38 U.S.C. chapter 11.

(Authority: 38 U.S.C. 1151)

§ 5.353 Effect of Federal Tort Claims Act administrative awards, compromises, settlements, and judgments finalized before December 1, 1962, on benefits awarded under 38 U.S.C. 1151(a).

If a veteran's disability or death was the basis of an administrative award under 28 U.S.C. 1346(b) made, or a settlement or compromise under 28 U.S.C. 2672 or 2677 finalized, before December 1, 1962, VA may not award benefits under 38 U.S.C. 1151(a) for any period after such award, settlement, or compromise was made or became final. If a veteran's disability or death was the basis of a judgment under 28 U.S.C. 1346(b) that became final before December 1, 1962, VA may award benefits under 38 U.S.C. 1151(a) for the disability or death unless the terms of the judgment provide otherwise.

(Authority: 38 U.S.C. 1151)

§§ 5.354–5.359 [Reserved]

Ratings for Health-Care Eligibility Only

§ 5.360 Service connection of dental conditions for treatment purposes.

(a) *General principles.* (1) *Service connection of dental conditions for treatment purposes* means VA has determined that a veteran meets the basic eligibility requirements of § 17.161 of this chapter and is eligible for treatment of a dental condition.

(2) VA's Veterans Benefits Administration (VBA) will adjudicate a claim for service connection of a dental condition for treatment purposes after the Veterans Health Administration (VHA) determines a veteran meets the basic eligibility requirements of § 17.161 of this chapter and VHA requests that VBA make a determination on questions that include, but are not limited to any of the following:

i. Former Prisoner of War status;

ii. Whether the veteran has a compensable or non-compensable service-connected dental condition or disability;

iii. Whether the dental condition or disability is a result of combat wounds;

iv. Whether the dental condition or disability is a result of service trauma; or

v. Whether the veteran is totally disabled due to a service-connected disability.

(b) *Establishing service connection.* VBA will determine service connection for establishing eligibility for outpatient dental treatment using the following principles:

(1) VBA will consider the condition of teeth and periodontal tissues at the time of entry into active duty.

(2) VBA will consider each defective or missing tooth and each disease of the teeth and periodontal tissue separately to determine whether the condition was incurred or aggravated in line of duty during active military service.

(c) *Conditions service connected for treatment purposes.* (1) VA will service connect any of the following dental

conditions solely for purpose of providing treatment, but will not pay disability compensation for any of the following dental conditions:

(i) Treatable carious teeth.

(ii) Replaceable missing teeth.

(iii) Dental or alveolar abscesses.

(iv) Periodontal disease.

(2) VBA will grant service connection for treatment purposes under this section if the evidence of record shows that the dental condition meets the requirements of paragraph (d) of this section.

(3) These conditions and other dental conditions or disabilities that are noncompensably rated under § 4.150 of this chapter may be service connected for purposes of Class II or Class II (a) dental treatment under § 17.161 of this chapter.

(d) *Aggravation.* Notations of conditions made at entry into service and treatment of such conditions during service (including, but not limited to, fillings, extractions, and placement of a prosthesis) are not evidence of aggravation unless additional pathology developed 180 days or more after entry into active military service.

(1) Teeth noted as normal at entry will be service connected for treatment purposes if they were filled or extracted 180 days or more after entry into active military service.

(2) Teeth noted as filled at entry will be service connected for treatment purposes if they were extracted, or if the existing filling was replaced, 180 days or more after entry into active military service.

(3) Teeth noted as carious but restorable at entry will not be service connected for treatment purposes on the basis that they were filled during service. Service connection may be established for treatment purposes if new caries developed 180 days or more after such teeth were filled.

(4) Teeth noted as carious but restorable at entry will be service connected for treatment purposes if extraction was required 180 days or more after entry into active military service.

(5) Third molars will not be service connected for treatment purposes unless disease or pathology of the tooth developed 180 days or more after entry into active military service.

(6) Impacted or malposed teeth and other developmental defects will not be service connected for treatment purposes unless disease or pathology of the teeth developed 180 days or more after entry into active military service.

(7) Teeth extracted because of chronic periodontal disease will be service connected for treatment purposes if they were extracted 180 days or more after entry into active military service.

(e) *Conditions not service connected for treatment purposes.* The following conditions will not be service connected for treatment purposes:

(1) Teeth noted at entry as nonrestorable, regardless of treatment during service.

(2) Teeth noted as missing at entry, regardless of treatment during service.

(3) Calculus.

(Authority: 38 U.S.C. 1712)

Cross Reference: § 17.161 Authorization of outpatient dental treatment; § 5.140, Determining former prisoner of war status, for the definition of ''former prisoner of war''.

§ 5.361 Health-care eligibility of a person administratively discharged under other-than-honorable conditions.

(a) *General rule.* VA will provide health-care and related benefits authorized by chapter 17 of title 38 U.S.C. to certain former servicemembers with administrative discharges under other-than-honorable conditions for any disability incurred or aggravated during active military service in the line of duty.

(b) *Eligibility criteria.* VA will use the same eligibility criteria that are applicable to determinations of incurrence in service and of incurrence in the line of duty when there is no character of discharge bar to determine a claimant's health-care eligibility.

(c) *Characterization of discharge.* VA will not furnish health-care and related benefits for any disability incurred in or aggravated during a period of service discontinued by a bad-conduct discharge or when one of the character of discharge bars listed in § 5.31(c) applies.

(Authority: Pub. L. 95–126, 91 Stat. 1106)

§ 5.362 Presumption of service incurrence of active psychosis for purposes of hospital, nursing home, domiciliary, and medical care.

(a) *Presumption of service incurrence for active psychosis.* For purposes of determining eligibility for hospital, nursing home, domiciliary, and medical care under chapter 17 of title 38, United States Code, VA will presume that the veteran incurred any active psychosis developed under the circumstances described in paragraph (b) of this section in active military service.

(b) *Requirements.* For purposes of this section, a veteran's active psychosis is presumed incurred in active military service if he or she served during one of the periods of war specified in the following table and developed the psychosis no later than 2 years after discharge from active military service and before the date specified in the following table that corresponds to the period of war during which the veteran served.

Veteran who served during:	Must have developed active psychosis no later than 2 years after discharge from active military service and before:
World War II	July 26, 1949.
Korean conflict	February 1, 1957.
Vietnam era	May 8, 1977.
Persian Gulf War	The end of 2-year period beginning on the last day of the Persian Gulf War.

(Authority: 38 U.S.C. 101(16), 105, 501(a), 1702)

Cross References: §§ 5.1, for the definitions of ''nursing home'' and ''psychosis''; 5.20, Dates of periods of war.

§ 5.363 Determination of service connection for a former member of the Armed Forces of Czechoslovakia or Poland.

For purposes of entitlement to VA medical care under 38 U.S.C. 109(c), the agency of original jurisdiction will determine whether a former member of the Armed Forces of Czechoslovakia or Poland has a service connected disability. This determination will be made using the same criteria that apply to determinations of service connection based on service in the Armed Forces of the U.S.

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

Cross Reference: § 5.1, for the definition of ''agency of original jurisdiction''.

§ 5.364 [Reserved]

Miscellaneous Service-Connection Regulations

§ 5.365 Claims based on the effects of tobacco products.

(a) *General rule.* Except as provided in paragraph (b) of this section, a disability or death will not be service connected on any basis, including secondary service connection under § 5.246 or § 5.247, if it resulted from injury or disease attributable to the veteran's use during service of tobacco products, such as cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco.

(b) *Exceptions.* Paragraph (a) of this section does not prohibit service connection if any of the following is true:

(1) The disability or death can be service connected on some basis other than the veteran's use of tobacco products during service; or

(2) The disability became manifest or death occurred during service; or

(3) The disability or death resulted from injury or disease that manifested to the required degree of disability within any applicable presumptive period under §§ 5.260 through 5.268, § 5.270, or § 5.271; or

(4) Service connection is established for ischemic heart disease or other cardiovascular disease under § 5.248 as secondary to a disability not caused by the use of tobacco products during service.

(Authority: 38 U.S.C. 501(a), 1103)

§ 5.366 Disability due to impaired hearing.

VA will consider impaired hearing to be a disability when any of the following three criteria is satisfied:

(a) The auditory threshold in any of the frequencies of 500, 1000, 2000, 3000, or 4000 Hertz is 40 decibels or greater;

(b) The auditory thresholds for at least three of the frequencies of 500, 1000, 2000, 3000, or 4000 Hertz are 26 decibels or greater; or

(c) Speech recognition scores using the Maryland CNC Test are less than 94 percent.

(Authority: 38 U.S.C. 1110)

§ 5.367 Civil service preference ratings for employment in the U.S. government.

For certifying civil service disability preference for purpose of employment by the U.S. government, a service-connected disability may be assigned a rating of less than 10 percent disabling. Any directly or presumptively service-connected disability resulting in actual impairment will qualify the veteran for the civil service preference. For disabilities incurred in combat, however, no actual impairment is required.

(Authority: 38 U.S.C. 501(a), 5 U.S.C. 2108(2)).

§ 5.368 Basic eligibility determinations: home loan and education benefits.

(a) *Loans*—(1) *Scope.* A veteran identified in paragraph (a)(3) of this section is eligible for a loan under 38 U.S.C. chapter 37 if

(i) He or she was discharged or released because of a service-connected disability; or

(ii) The official service department records show that he or she had a service-connected disability at the time of separation from service that in VA's medical judgment would have warranted a discharge for disability.

(2) The determinations in paragraph (a)(1)(i) and (ii) of this section are subject to the presumptions of soundness under §§ 5.244(a) and 5.245. This paragraph is also applicable, in determining eligibility to the maximum period of entitlement based on discharge or release for a service-connected disability, regardless of length of service. See § 5.39.

(3) *Veterans affected.* This paragraph applies to:

(i) A veteran of World War II, the Korean conflict, or the Vietnam era who served for less than 90 days; or

(ii) A veteran who served less than 181 days on active duty as defined in §§ 36.4301 and 36.4501, and whose dates of service were:

(A) After July 25, 1947, and before June 27, 1950;

(B) After January 31, 1955, and before August 5, 1964; or

(C) After May 7, 1975.

(Authority: 38 U.S.C. 3702, 3707)

(b) *Veterans' educational assistance.*—(1) *Requirements for active duty servicemembers.* VA will determine whether a veteran was discharged or released from active duty (as defined in § 5.22) because of a service-connected disability, or whether the official service department records show that the veteran had a service-connected disability at time of separation from service which in VA's medical judgment would have warranted discharge for disability, if either of the following circumstances exist:

(i) The veteran applies for benefits under 38 U.S.C. chapter 32, the minimum active duty service requirements of 38 U.S.C. 5303A apply to him or her, and the veteran would be eligible for such benefits only if:

(A) He or she was discharged or released from active duty for a disability incurred or aggravated in the line of duty; or

(B) He or she has a disability that VA has determined to be compensable under 38 U.S.C. chapter 11; or

(ii) The veteran applies for benefits under 38 U.S.C. chapter 30; and

(A) The evidence of record does not clearly show either that the veteran was discharged or released from active duty for disability or that the veteran's discharge or release from active duty was unrelated to disability; and

(B) The veteran is eligible for basic educational assistance except for the minimum length of active duty service requirements of § 21.7042(a) or § 21.7044(a) of this chapter.

(2) *Requirements for Selected Reserve servicemembers.* VA will determine whether a veteran was discharged or released from service in the Selected Reserve for a service-connected disability or for a medical condition that preexisted the veteran's membership in the Selected Reserve and that VA determines is not service connected when the veteran applies for benefits under 38 U.S.C. chapter 30; and

(i) The veteran would be eligible for basic educational assistance under that chapter only if he or she was discharged from the Selected Reserve for a service-connected disability or for a medical condition that preexisted the veteran's having become a member of the Selected Reserve and which VA finds is not service connected; or

(ii) The veteran is entitled to basic educational assistance and would be entitled to receive it at the rates stated in § 21.7136(a) or § 21.7137(a) of this chapter only if he or she was discharged from the Selected Reserve for a service-connected disability or for a medical condition which preexisted the veteran's having become a member of the Selected Reserve and which VA finds is not service connected.

(3) *Requirements for reservists.* VA will determine whether a reservist has been unable to pursue a program of education due to a disability that has been incurred in or aggravated by service in the Selected Reserve when:

(i) The reservist is otherwise entitled to educational assistance under 10 U.S.C. chapter 1606; and

(ii) He or she applies for an extension of his or her eligibility period.

(4) The determinations required by paragraphs (b)(1) through (3) of this section are subject to the presumptions of soundness under §§ 5.244(a) and 5.245, based on service rendered after May 7, 1975.

(Authority: 10 U.S.C. 16133(b); 38 U.S.C. 3011(a)(1)(A)(ii), 3012(b)(1), 3202(1)(A))

Cross Reference: § 5.1, for the definition of ''reservist''. See 38 CFR part 21, for further information on veterans educational assistance.

§ 5.369 [Reserved]

Subpart F—Nonservice-Connected Disability Pensions and Death Pensions

Improved Pension Requirements: Veteran, Surviving Spouse, and Surviving Child

§ 5.370 Definitions for Improved Pension.

(a) *Adjusted annual income* means countable annual income minus deductions described in § 5.413, rounded down to the nearest dollar.

(b) *Annual Improved Pension amount* means the annual amount of Improved Pension payable to a beneficiary, calculated as the maximum annual pension rate minus adjusted annual income.

(c) *Countable annual income* means payments of any kind from any source that are not specifically excluded under § 5.410, § 5.411, or § 5.412.

(d) *Improved Pension* means the nonservice-connected disability and death pension programs available to a new claimant beginning on January 1, 1979. It is a benefit payable to an eligible and entitled veteran as ''Improved Disability Pension;'' to a veteran's surviving spouse or surviving child as ''Improved Death Pension;'' or to any of those beneficiaries as ''special monthly pension.'' Improved Pension is paid monthly or as provided in § 5.425, at rates set forth in §§ 5.390, 5.391, and 5.400.

(e) *Improved Pension payment amount* is the monthly payment calculated under § 5.421(a).

(f) *Maximum annual pension rate* means the amount of Improved Pension payable to a beneficiary whose adjusted annual income is zero. The maximum annual pension rates are established by law. Maximum annual pension rates are described in § 5.400.

(g) *Net worth* means the value of real and personal property, as calculated under § 5.414.

(h) *Payments* are cash and cash equivalents (such as checks and other negotiable instruments), and the fair market value of personal services, goods, or room and board received in lieu of other forms of payment.

(i) *Special monthly pension* is a type of Improved Pension with higher maximum annual pension rates than the rates for Improved Pension and is payable to a claimant who is eligible for Improved Pension and who meets additional criteria in § 5.390 or § 5.391. References to Improved Disability Pension or Improved Death Pension also apply to special monthly pension, when such regulations set forth eligibility or entitlement requirements.

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

§ 5.371 Eligibility and entitlement requirements for Improved Pension.

(a) *General rule.* VA can only pay Improved Pension benefits, including, but not limited to, special monthly pension, to a beneficiary who is eligible and entitled to receive Improved Pension under this section.

(b) *Eligibility requirements for Improved Disability Pension.* A veteran is eligible for Improved Disability Pension if the veteran:

(1) Had wartime service under § 5.372; and

(2) Is either:

(i) Age 65 or older; or

(ii) Permanently and totally disabled under § 5.380.

(c) *Eligibility requirements for Improved Death Pension.* A surviving spouse or surviving child may be eligible for Improved Death Pension regardless of whether the veteran's death is service-connected. Eligibility is determined as follows:

(1) A surviving spouse is eligible for Improved Death Pension if the deceased veteran had wartime service under § 5.372. For the requirements to establish status as a surviving spouse, see §§ 5.200 and 5.430.

(2) A surviving child is eligible for Improved Death Pension if the deceased veteran had wartime service under § 5.372 and the child is not in the custody of a surviving spouse eligible to receive Improved Death Pension. For the requirements to establish status as a child and the custody rules for Improved Pension, see §§ 5.220(b) and 5.417.

(d) *Entitlement requirements for Improved Disability or Death Pension.* In addition to the eligibility requirements of paragraphs (b) and (c) of this section, a claimant or beneficiary must meet the following income and net worth requirements to be entitled or to continue to be entitled to Improved Pension:

(1) *Income.* Adjusted annual income cannot be greater than the applicable maximum annual pension rate.

(2) *Net worth.* Net worth must not bar payment of Improved Disability or Death Pension, as provided in § 5.414.

(Authority: 38 U.S.C. 1513, 1521, 1522, 1541, 1542, 5303A)

§ 5.372 Wartime service requirements for Improved Pension.

(a) *Wartime periods for Improved Pension.* For dates of the periods of war, see § 5.20.

(b) *Wartime service requirement for Improved Disability Pension.* A veteran has ''wartime service'' for Improved Disability Pension purposes if he or she served in the active military service for one or more of the following periods:

(1) A period of 90 consecutive days or more, at least 1 day of which was during a period of war.

(2) 90 nonconsecutive days or more during a period of war. Separate periods of service within the same period of war can be added together to meet the 90-day requirement.

(3) A total of 90 days or more in 2 or more separate periods of service during more than 1 period of war.

(4) Any period of time during a period of war if:

(i) The veteran was discharged or released for a disability that VA later determines to be service-connected without presumptive provisions of law; or

(ii) Official service records show that the veteran had such a service-connected disability at the time of discharge that would have justified discharge.

(c) *Wartime service requirement for Improved Death Pension.* For Improved Death Pension claims, the veteran met the wartime service requirement if either of the following factors is true:

(1) The veteran had wartime service as specified in paragraph (b) of this section; or

(2) The veteran was, at the time of his or her death, receiving or entitled to receive disability compensation or military retired pay for a service-connected disability based on service during a period of war.

(Authority: 38 U.S.C. 1521(j), 1541(a), 1542)

§ 5.373 Evidence of age in Improved Pension claims.

Where the age of a veteran or surviving spouse is material to an Improved Pension claim, VA will accept as true the veteran's or surviving spouse's statement of age where it is consistent with all other statements of age in the record. If the record contains inconsistent statements of age, VA will use the youngest age of record unless the veteran or surviving spouse can file documentation of an older age in one of the ways outlined in § 5.229.

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

§§ 5.374–5.379 [Reserved]

Improved Disability Pension: Disability Determinations and Effective Dates

§ 5.380 Disability requirements for Improved Disability Pension.

(a) *General rule.* Unless a veteran has attained age 65, he or she must be permanently and totally disabled under this section in order to be eligible for Improved Disability Pension. In determining whether a veteran is permanently and totally disabled for Improved Pension purposes, VA will combine the disability ratings assigned to the veteran's nonservice-connected disability or disabilities with the ratings assigned to the veteran's service-connected disability or disabilities in the manner prescribed by the Schedule for Rating Disabilities in part 4 of this chapter.

(b) *Presumption of permanent and total disability for certain veterans.* A veteran is presumed permanently and totally disabled for Improved Disability Pension purposes if the veteran is:

(1) A patient in a nursing home for long-term care because of disability; or

(2) Determined disabled by the Commissioner of Social Security for purposes of any benefits administered by the Commissioner.

(c) *Factual determination that a veteran is permanently and totally disabled.* Permanent and total disability ratings for Improved Disability Pension purposes are authorized for single disabilities, or combinations of disabilities, that are not the result of the veteran's willful misconduct, whether or not they are service connected. In addition to the criteria for determining total disability and permanency of total disability contained in § 5.284, the following special considerations apply in Improved Disability Pension cases:

(1) *Congenital, developmental, hereditary, and familial conditions.* A permanent and total disability pension rating will be authorized for a congenital, developmental, hereditary, or familial condition, if the other requirements for such a rating are met.

(2) *Effective date.* The permanence of total disability will be established as of the earliest date that is shown by the evidence. In cases where the claimant has been hospitalized, apply the following principles:

(i) The need for hospitalization lasting any period of time may be a proper basis for determining permanence. If VA cannot determine whether a disability was permanent before the beginning of a period of hospitalization, but evidence shows that the disability was permanent at some time during the hospitalization and has not improved after such time, VA will establish permanence beginning on the date of admission into the hospital. In other cases, permanence will be established on the earliest date that it is shown by the evidence.

(ii) In cases involving disabilities that require hospitalization for indefinite periods not otherwise established as permanently and totally disabling, VA will establish that the disability was permanent as of the date of admission into the hospital if the claimant is hospitalized for at least 6 months without improvement. In other cases, permanence will be established on the earliest date that it is shown by the evidence.

(iii) In cases involving active pulmonary tuberculosis not otherwise established as permanently and totally disabling, VA will establish that the disability was permanent as of the date of admission into the hospital if the claimant is hospitalized for at least 6 months without improvement. If such active pulmonary tuberculosis improves after 6 months of hospitalization, but is still diagnosed as active after 12 months of hospitalization, permanence will also be established as of the date of admission into the hospital. In other cases, permanence will be established on the earliest date that it is shown by the evidence.

(3) *Veteran under age 40.* In the case of a veteran under 40 years of age, permanence of total disability requires a finding that the end result of rehabilitation (that is, treatment for and adjustment to residual handicaps) will be permanent disability precluding more than marginal employment. Severe diseases and injuries, including, but not limited to, multiple fractures or the amputation of a single extremity, should not be taken to establish permanent and total disability until it is shown that the veteran, after treatment and convalescence, has been unable to secure or follow employment because of the disability and through no fault of the veteran.

(4) *Evidence of employability.* The following elements will not be considered as evidence of employability:

(i) Employment as a member-employee or similar employment obtained only in competition with disabled persons; and

(ii) Participation in, or the receipt of a distribution of funds as a result of participation in, a therapeutic or rehabilitation activity under 38 U.S.C. 1718.

(5) *Extra-schedular basis for Improved Pension.* Where a veteran who fails to meet the disability requirements based on the percentage standards of the Schedule for Rating Disabilities in part 4 of this chapter is found to be unemployable due to disability, age, occupational background, and other related factors (such as level of education or vocational training), VA may approve on an extra-schedular basis a permanent and total disability rating for Improved Pension purposes.

(Authority: 38 U.S.C. 501(a), 1502(a), 1513, 1521(a), 1523(a), 1718(g))

Cross Reference: § 5.1, for the definitions of ''nursing home'' and ''willful misconduct''.

§§ 5.381–5.382 [Reserved]

§ 5.383 Effective dates of awards of Improved Disability Pension.

(a) *General effective date provisions.* Except as provided in paragraph (b) or (c) of this section, the effective date of an award of Improved Disability Pension will be the later of either:

(1) The date of receipt of claim; or

(2) The date the veteran became eligible (by attaining age 65 or by becoming permanently and totally disabled) and entitled (by meeting the income and net worth requirements).

(b) *Previously denied claims.* If pension was previously claimed but was denied because the veteran's adjusted annual income was greater than the maximum annual pension rate, the effective date of an award of Improved Disability Pension will be the appropriate date under § 5.424.

(c) *Retroactive award.* The effective date of a retroactive award of Improved Disability Pension will be the date the veteran became permanently and totally disabled or the date of receipt of the pension claim, whichever is to the veteran's advantage, if all of the following elements are established:

(1) The veteran specifically requests a retroactive award;

(2) VA receives the claim for a retroactive award not more than 1 year after the date the veteran became permanently and totally disabled; and

(3) Due to disability, the veteran was unable to file a claim for at least the first 30 days after the date that the veteran became permanently and totally disabled. The disability preventing the veteran from filing a claim need not be the same disability that made the veteran permanently and totally disabled, and need not require extensive hospitalization, but a disability that requires extensive hospitalization is a disability that would prevent a veteran from filing a claim. A veteran will not be found to have been unable to file a claim due to disability if the disability resulted from the veteran's willful misconduct.

(Authority: 38 U.S.C. 5110(a) and (b)(3))

Cross Reference: § 5.1, for the definition of ''willful misconduct''.

§§ 5.384–5.389 [Reserved]

Special Monthly Pension Eligibility for a Veteran and Surviving Spouse

§ 5.390 Special monthly pension for a veteran or surviving spouse based on the need for regular aid and attendance.

A veteran or surviving spouse who is eligible for Improved Pension may receive special monthly pension based on the need for regular aid and attendance if the claimant:

(a) Has 5/200 visual acuity or less in both eyes with corrective lenses;

(b) Has concentric contraction of the visual field to 5 degrees or less in both eyes;

(c) Is a patient in a nursing home because of mental or physical incapacity; or

(d) Establishes a factual need for regular aid and attendance under § 5.320.

(Authority: 38 U.S.C. 1502(b), 1521(d), 1541(d))

Cross Reference: § 5.1, for the definition of ''nursing home''.

§ 5.391 Special monthly pension for a veteran or surviving spouse at the housebound rate.

A veteran who is eligible for Improved Pension may receive special monthly pension at the housebound rate if he or she does not need regular aid and attendance and meets the criteria of paragraph (a) of this section. A surviving spouse who is eligible for Improved Pension may receive special monthly pension at the housebound rate if he or she does not need regular aid and attendance and meets the criteria of paragraph (b) of this section.

(a) *Veteran with permanent and total disability.* The veteran has a single, permanent disability rated 100 percent disabling under the Schedule for Rating Disabilities in part 4 of this chapter (determinations of unemployability under § 4.17 of this chapter do not qualify), and either:

(1) Has an additional disability or disabilities independently rated at 60 percent or more disabling under VA's Schedule for Rating Disabilities in part 4 of this chapter. The additional disability or disabilities must be separate and distinct from the disability rated 100 percent disabling and must involve different anatomical segments or bodily systems than the disability rated 100 percent disabling; or

(2) Is ''permanently housebound'' because of disability or disabilities. *Permanently housebound* means that the veteran is substantially confined to his or her residence (ward or clinical areas, if institutionalized) and immediate premises because of a disability or disabilities, and it is reasonably certain that such disability or disabilities will not improve during the veteran's lifetime.

(b) *Surviving spouse.* The surviving spouse is permanently housebound because of a disability or disabilities. The meaning of ''permanently housebound'' for a surviving spouse is the same as its meaning for a veteran in paragraph (a)(2) of this section.

(Authority: 38 U.S.C. 1502(c), 1513, 1521(e), 1541(e))

§ 5.392 Effective dates of awards of special monthly pension.

(a) The effective date of an award of special monthly pension will be the later of either:

(1) The effective date of the award of Improved Pension under § 5.383 or the award of Improved Death Pension under § 5.431; or

(2) The date entitlement to special monthly pension arose.

(b) *Concurrent receipt of Improved Pension and Improved Death Pension.* A veteran can receive Improved Pension in his or her own right and also be entitled to receive Improved Death Pension based on the need for aid and attendance as a surviving spouse. However, special monthly pension based on the need for regular aid and attendance is not payable to the surviving spouse while he or she is receiving hospital care as a veteran. VA will resume special monthly pension based on the need for regular aid and attendance effective the day that he or she was discharged or released from hospital care. See §§ 5.725 and 5.761.

(Authority: 38 U.S.C. 5110)

§§ 5.393–5.399 [Reserved]

Maximum Annual Pension Rates

§ 5.400 Maximum annual pension rates for a veteran, surviving spouse, or surviving child.

The maximum annual rates of Improved Pension for the following categories of beneficiaries are the amounts specified in 38 U.S.C. 1521, 1541, and 1542. The rates are higher if a veteran has a spouse or dependent child, or if a surviving spouse has custody of the child of the deceased veteran. To see the maximum annual rate for each category, see the authority citation under paragraphs (a) through (h) of this section. Current and historical maximum annual rates can be found on the Internet at *http://www.va.gov* or are available from any Veterans Service Center or Pension Management Center. Whenever there is an increase in the rates listed in this section, VA will publish notice in the **Federal Register**.

(a) A veteran who is permanently and totally disabled or age 65 or older.

(Authority: 38 U.S.C. 1521(b) or (c))

(b) A veteran who is housebound.

(Authority: 38 U.S.C. 1521(e))

(c) A veteran who needs regular aid and attendance.

(Authority: 38 U.S.C. 1521(d))

(d) Two veterans who are married to one another; combined rates.

(Authority: 38 U.S.C. 1521(f))

(e) A surviving spouse.

(Authority: 38 U.S.C. 1541(b) or (c))

(f) A surviving spouse who is housebound.

(Authority: 38 U.S.C. 1541(e))

(g) A surviving spouse who needs regular aid and attendance.

(Authority: 38 U.S.C. 1541(d))

(h) A surviving child of a deceased veteran, when the child has no custodian or is in the custody of an institution.

(Authority: 38 U.S.C. 1542)

Cross Reference: § 5.1, for the definition of ''custody of a child''.

§ 5.401 Automatic adjustment of maximum annual pension rates.

(a) *Pension rates increase when Social Security benefits increase.* VA will increase each maximum annual pension rate whenever there is a cost-of-living increase in Social Security benefit amounts under title II of the Social Security Act (42 U.S.C. 415(i)), which pertains to the Federal Old-Age, Survivors, and Disability Insurance Benefits program. VA will increase the maximum annual pension rates by the same percentage as the Social Security increase, and the increase will be effective on the same date as the Social Security increase.

(b) *New rates are published in the* ***Federal Register***. Whenever the maximum annual pension rates increase, VA will publish the new rates in the ''Notices'' section of the **Federal Register**.

(Authority: 38 U.S.C. 5312(a))

§§ 5.402–5.409 [Reserved]

Improved Pension Income, Net Worth, and Dependency

§ 5.410 Countable annual income.

(a) *Time of receipt of income.*—(1) *Improved Disability Pension.* For

purposes of calculating countable annual income for Improved Disability Pension, VA does not include income received before the effective date of the veteran's award.

(2) *Improved Death Pension.* For purposes of calculating countable annual income for Improved Death Pension, VA does not include income received before the date of the veteran's death or income received before the effective date of the surviving spouse's or surviving child's award.

(b) *Whose income is countable*?—(1) *Improved Disability Pension for a veteran.* The income of a veteran includes the veteran's income and that of the veteran's dependent spouse, regardless of whether the spouse's income is available to the veteran. It also includes the income of each dependent child, subject to § 5.411.

(2) *Improved Death Pension for a surviving spouse.* The income of a surviving spouse includes the surviving spouse's income and the income of each dependent child of the deceased veteran in the surviving spouse's custody, subject to § 5.411.

(3) *Improved Death Pension for a surviving child.* The income of a surviving child includes the surviving child's income and may include the income of that child's custodian and the income of other surviving children, as described in § 5.435.

Cross Reference: See § 5.416, Persons considered as dependents for Improved Pension.

(c) *Categories and counting of income.* If there is more than one way to categorize income under paragraphs (c)(1) through (3) of this section, it will be categorized in the way that is most favorable to the claimant or beneficiary. Payments of any kind from any source will be counted as income during the reporting period in which it was received unless specifically excluded under this section, or § 5.411 or § 5.412. See § 5.420.

(1) *Recurring income.* Recurring income is income received or expected to be received in equal amounts and at regular intervals (for example, weekly, monthly, quarterly, etc.). There are two categories of recurring income:

(i) *Long-term.* Long-term recurring income continues for an entire reporting period. VA will count such income during the reporting period in which it was received. If the initial payment was received after the beginning of the reporting period, VA will count such income as received during the 12 month period starting on the first of the month after the initial payment was received. Thereafter, VA will count such income during the reporting period in which it is received.

(ii) *Short-term.* Short-term recurring income stops before it has been received for at least one full reporting period. VA will count such income as received during the 12 month period starting on the first of the month after the initial payment was received.

(2) *Nonrecurring income.* Nonrecurring income is income received or expected to be received on a one-time basis (for example, an inheritance). VA will count such income as received during the 12 month period starting on the first of the month after it was received.

(3) *Irregular income.* Irregular income is income received or expected to be received in unequal amounts or at different intervals during a reporting period. Irregular income is counted as follows:

(i) *General rule.* VA will count the first installment of irregular income as received during the 12 month period starting on the first of the month after it was received. Thereafter, VA will count irregular income for 12 months from the beginning of the reporting period in which it is received.

(ii) *Overlapping irregular income.* VA will count the lower amount of irregular income from the same source during any overlapping periods. However, if the irregular income for the calendar year is zero, then VA will count the irregular income for the full 12 month period.

(d) *Waived income.* If a person waives income that cannot be excluded under § 5.412, VA must count the waived income. However, if the person withdraws a claim for Social Security benefits in order to maintain eligibility for unreduced Social Security benefits upon reaching a particular age, VA will not regard this potential income as having been waived and will therefore not count it.

(e) *Salary.* Income from a salary is not determined by ''take-home'' pay. VA counts as income the gross salary (earnings or wages) without any deductions. However, an employer's contributions to health and hospitalization plans are not included in gross salary.

(f) *Income-producing property.* Income from real or personal property counts as income of the property's owner. This includes, but is not limited to, property acquired through purchase, gift, or inheritance.

(1) *Proof of ownership.* VA will consider the terms of the recorded deed or other evidence of title as proof of ownership.

(2) *Income from jointly-owned property.* Where a person owns property jointly with others, including, but not limited to, partnership property, VA will only count that portion of income produced by the property that represents the person's share of the ownership of the property.

Note to paragraph (f)(2): If a beneficiary's income includes that of his or her spouse, and both the beneficiary and spouse are co-owners of a property that produces income, then income representing both co-owned shares is included as income to the beneficiary.

(3) *Transfer of ownership with retention of income.* If a person transfers ownership of property to another person or legal entity, but retains the right to income, the income will be counted.

(g) *Gambling income and losses.* VA will deduct from gambling gross winnings any gambling losses to arrive at net gambling income. Only net gambling income is countable.

(Authority: 38 U.S.C. 501(a), 1503, 1521, 1541, 1542)

§ 5.411 Counting a child's income for Improved Pension payable to a child's parent.

(a) *General rule.* VA counts as income to the parent-beneficiary (that is, the veteran or surviving spouse receiving Improved Pension), the annual income of every child of the veteran who is in the parent-beneficiary's custody. However, the parent-beneficiary may file a claim to exclude all or part of the child's income. Upon receipt of such a claim, VA will provide the parent-beneficiary (claimant) with the proper application used to calculate the exclusion. The bases for exclusion are set forth in paragraphs (b) and (c) of this section.

(b) *All or part of the child's income is not considered available for expenses necessary for reasonable family maintenance*—(1) *General rule.* The parent-beneficiary may establish that all or part of the child's adjusted annual income is not available to meet the parent-beneficiary's expenses necessary for reasonable family maintenance. These expenses include food, clothing, health-care, shelter, and other expenses necessary to support a reasonable quality of life and cannot include expenses for items such as luxuries, gambling, and investments.

(2) *Examples.* The following are examples of common ways that a parent-beneficiary may establish that a child's income is not considered available. This is not an exclusive list:

(i) The child's income is being saved in an account for the child's education;

(ii) The child did not reside in the parent-beneficiary's household for all or part of the year;

(iii) The child's income is automatically routed into a trust account under a court order; or

(iv) The child lives with the parent-beneficiary, but the child's income is being received by someone outside of that parent's household.

(c) *Counting a child's income would create a hardship.* The parent-beneficiary may establish that counting all or part of the child's countable annual income, less any amount that is not available to the parent-beneficiary under paragraph (b) of this section, would result in hardship. The formula to calculate the amount of any hardship exclusion follows:

(1) *Calculate the annual expenses necessary for reasonable family maintenance.* Calculate the annual expenses necessary for reasonable family maintenance in accordance with paragraph (b)(1) of this section. The parent-beneficiary's annual expenses necessary for reasonable family maintenance cannot include expenses already deducted in determining the parent-beneficiary's or the child's adjusted annual income.

(2) *Subtract the parent-beneficiary's adjusted annual income.* Subtract from the annual expenses (paragraph (c)(1) of this section), the parent-beneficiary's adjusted annual income, as calculated under this part.

Note to paragraph (c)(2): This number will include the child's adjusted annual income, because such income is countable to the parent-beneficiary with custody of such child under paragraph (a) of this section.

(3) *Subtract any of the child's income that is not considered available.* Subtract from the number calculated under paragraph (c)(2) of this section any of the child's income that was not reasonably available under paragraph (b) of this section.

(4) *Subtract the annual Improved Pension amount.* Subtract the parent-beneficiary's annual Improved Pension amount, which is the applicable maximum annual pension rate less the parent-beneficiary's adjusted annual income as calculated in paragraph (c)(2) of this section.

(5) *The amount of hardship exclusion.* (i) The amount of the hardship exclusion is the lesser of:

(A) The resulting amount in paragraph (c)(4) of this section; or

(B) The amount of the child's income that is considered available to the parent-beneficiary, that is, the child's adjusted annual income minus any amount calculated under paragraph (b) of this section.

(ii) If the amount of the hardship exclusion is zero or a negative number, then no hardship exclusion is permitted.

(6) *Effective date of exclusion.* The effective date of a hardship exclusion claim is determined in the same way as the effective date of pension awards under § 5.424.

(Authority: 38 U.S.C. 1503(a)(10), 1521, 1541)

Cross Reference: § 5.1, for the definition of ''custody of a child''.

§ 5.412 Income exclusions for calculating countable annual income.

VA will not count income from the following sources when calculating countable income for Improved Pension:

(a) *Items related to a child's earned income.* A dependent child or a surviving child's earned income, which is current work income received during the reporting period, is countable for VA purposes. VA will deduct from such earned income the following amounts:

(1) The least amount of gross income for which an unmarried person must file a Federal Income Tax return if the person is not a surviving spouse or a head of household. For the law regarding this amount, see 26 U.S.C. 6012. For the definitions of the terms ''unmarried person'', ''surviving spouse'', and ''head of household'' for purposes of this paragraph (c), see 26 U.S.C. 2(a) and (b), 7703. See also *http://www.irs.gov*.

(2) The amount that the child pays for educational expenses, if the child is pursuing post-secondary education or vocational rehabilitation, including, but not limited to, tuition, fees, books, and materials.

(Authority: 38 U.S.C. 1503(a)(10))

(b) *Donations received.* Donations received from public or private relief or welfare organizations, including, but not limited to:

(1) The value of maintenance furnished by a relative, friend, or a civic or governmental charitable organization, including, but not limited to, money paid to an institution for care due to a person's impaired health or advanced age. However, if the maintenance is excluded as income under this provision, VA cannot deduct it as an unreimbursed medical expense under § 5.413.

(2) Benefits received under means-tested programs, for example, Supplementary Security Income payments.

(3) Payments from the VA Special Therapeutic and Rehabilitation Activities Fund for participating in VA-approved therapy or rehabilitation under 38 U.S.C. 1718, or in a program of rehabilitation which is conducted by a VA-approved State home and which conforms to the requirements of 38 U.S.C. 1718.

(Authority: 38 U.S.C. 1503(a)(1), 1718(g)(3))

(c) *Certain VA benefit payments.* The following VA benefit payments:

(1) VA nonservice-connected disability or death pension payments, including, but not limited to, accrued benefits.

(2) The veteran's month-of-death rate paid to a surviving spouse under § 5.695.

(Authority: 38 U.S.C. 1503(a)(2), 5310(b))

(d) *Casualty loss reimbursement.* Reimbursements of any kind (including insurance settlement payments) for expenses related to the repayment, replacement, or repair of equipment, vehicles, items, money, or property resulting from (1) any accident (as defined by the Secretary), but the amount excluded under this subclause shall not exceed the greater of the fair market value or reasonable replacement value of the equipment or vehicle involved at the time immediately preceding the accident;

(2) Any theft or loss (as defined by the Secretary), but the amount excluded under this subclause shall not exceed the greater of the fair market value or reasonable replacement value of the item or the amount of the money (including legal tender of the United States or of a foreign country) involved at the time immediately preceding the theft or loss; or

(3) Any casualty loss (as defined by the Secretary), but the amount excluded under this subclause shall not exceed the greater of the fair market value or reasonable replacement value of the property involved at the time immediately preceding the casualty loss.

(Authority: 38 U.S.C. 1503(a)(5))

(e) *Profit from sale of non-business property.* Profit realized from the disposition of real or personal property other than in the course of a business. However, any amounts received in excess of the sales price, such as interest payments on deferred sales, will be counted as income. If payments are received in installments, the installments received will not begin to count as income until the total of installments received is equal to the sales price. The following exceptions apply:

(1) *Bonds.* If the redemption of a bond issued by a federal, state, municipal or other political entity is required for the payment of accrued interest, then the

accrued interest payable is excluded from income.

(2) *Life insurance.* If the surrender of a life insurance policy is required to obtain the proceeds, then the interest received is excluded from income.

(Authority: 38 U.S.C. 1503(a)(6))

(f) *Joint accounts.* Amounts in joint accounts in banks or similar financial institutions acquired because of the death of the other joint owner.

(Authority: 38 U.S.C. 1503(a)(7))

(g) *Survivor benefit annuity.* Payments made by the Department of Defense to a qualified surviving spouse of a veteran who died before November 1, 1953. (This does not include Survivor Benefit Plan (SBP) annuity payments or SBP Minimum Income Widow(er)'s Annuity Plan payments, which count as income.)

(Authority: 10 U.S.C. 1448 note; Sec. 653(d), Pub. L. 100–456, 102 Stat. 1991)

(h) *Radiation Exposure Compensation Act payments.* Payments made under section 6 of the Radiation Exposure Compensation Act of 1990.

(Authority: 42 U.S.C. 2210 (note))

(i) *Ricky Ray Hemophilia Relief Fund payments.* Payments made under section 103(c) and excluded under 103(h)(2) of the Ricky Ray Hemophilia Relief Fund Act of 1998.

(Authority: 42 U.S.C. 300c–22 (note))

(j) *Energy Employees Occupational Illness Compensation Program payments.* Payments made under the Energy Employees Occupational Illness Compensation Program.

(Authority: 42 U.S.C. 7385e(2))

(k) *Payments to Aleuts.* Payments made to certain Aleuts under 50 U.S.C. app. 1989c–5.

(Authority: 50 U.S.C. app. 1989c–5(d)(2))

(l) *Other amounts.* The following incomes are excluded because VA does not consider them as ''payments'':

(1) Dividends from commercial insurance policies and cash surrender of life insurance to the extent that they represent return of premiums. However, interest earned is considered a payment.

(2) Income tax refunds.

(3) Interest on Individual Retirement Accounts that cannot be withdrawn without incurring a penalty.

(4) Interest on prepaid burial plans that is added to the value of the policy and is not available to the policy holder.

(5) Royalties received for extracting minerals.

(6) School scholarships and grants earmarked for specific educational purposes to the extent they are used for those purposes.

(7) Benefits payable but withheld, such as Social Security withheld to recoup an overpayment. This does not apply to VA benefits withheld to recoup an overpayment.

(8) Lump-sum proceeds of any life insurance policy on a veteran.

(m) Payments listed in § 5.706.

(n) State compensation for veterans. Payment of a monetary amount of up to $5,000 to a veteran from a State or municipality that is paid as a veterans benefit due to injury or disease.

(Authority: 38 U.S.C. 1503)

§ 5.413 Income deductions for calculating adjusted annual income.

(a) *General rule.* Except as otherwise provided in paragraph (c)(2)(iv) of this section, expenses and losses are deducted for the initial reporting period or the annual reporting period during which the expense was paid, regardless of when the expense was incurred. For the definitions of ''initial reporting period'' and ''annual reporting period'', see § 5.420.

(b) *Unreimbursed (out-of-pocket) medical expenses.* VA will deduct from countable annual income unreimbursed (out-of-pocket) medical expenses (identified in paragraph (b)(2) of this section) that were paid within the reporting period, regardless of when the beneficiary incurred the debt, as specified in paragraph (b)(1) of this section. See § 5.707. For purpose of authorizing prospective Improved Pension payments, VA will accept a clear and reasonable estimate of expected future medical expenses, but such future expenses may be adjusted based on receipt of an amended estimate or of a medical expense report. Improved Pension beneficiaries must report any change in medical expenses if they are claiming any medical expense deductions under this section.

(1) *Amount of deductible unreimbursed medical expenses.* VA will deduct unreimbursed (out-of-pocket) medical expenses that exceed 5 percent of the beneficiary's maximum annual pension rate that is in effect for the period(s) during which VA deducts the expenses. The maximum annual pension rate that VA uses for this calculation includes the maximum annual pension rates for an established dependent but does not include the maximum annual pension rates based on the need for regular aid and attendance or housebound status.

(2) *Deductible unreimbursed medical expenses.* In no case will VA deduct as a medical expense any ''final expense'' defined in paragraph (c) of this section. Subject to paragraph (b)(1) of this section, the following medical expenses are deductible:

(i) *Improved Disability Pension.* Amounts paid by the veteran or the veteran's dependent spouse for the unreimbursed medical expenses of the veteran; the veteran's dependent spouse; and any or all of the following persons who are also members or constructive members of the veteran's or dependent spouse's household: A child, a parent, or another relative for whom there is a moral or legal obligation of support.

(ii) *Improved Death Pension: surviving spouse beneficiary.* Amounts paid by the surviving spouse for both the surviving spouse's unreimbursed medical expenses and those of any or all of the following persons who are also members or constructive members of the surviving spouse's household: A child, a parent, or another relative for whom there is a moral or legal obligation of support.

(iii) *Improved Death Pension: surviving child beneficiary.* Amounts paid by a surviving child for the surviving child's unreimbursed medical expenses and those of a parent, brother, or sister.

(Authority: 38 U.S.C. 1503(a)(8))

(c) *Final expenses.*—(1) *Definitions.*—(i) *Final expenses.* For purposes of this section, ''final expenses'' are expenses paid by an Improved Pension beneficiary for a veteran's, spouse's, or child's last illness and burial. In Improved Death Pension cases, final expenses also include a veteran's just debts.

(ii) *Last illness.* For purposes of this section, *last illness* means the medical condition that was the primary or secondary cause of a person's death as indicated on the person's death certificate.

(iii) *Veteran's just debts.* For purposes of this section, a veteran's ''just debts'' are those debts that the veteran incurred or those debts that the veteran and spouse incurred jointly during the veteran's life. The term ''just debts'' does not include any debt that is secured by real or personal property.

(2) *Final expenses that VA will deduct from countable annual income.*—(i) *Veteran awards.* VA will deduct amounts paid by a veteran for the last illness and burial of the veteran's spouse or child, and amounts paid by a veteran's spouse for the last illness and burial of the veteran's child.

(ii) *Surviving child awards.* VA will deduct amounts paid by a surviving child for the veteran's final expenses.

(iii) *Surviving spouse awards.* VA will deduct amounts paid by a surviving

spouse for the final expenses of the veteran or the veteran's child.

(iv) *Surviving spouse's prior payments of veteran's last illness expenses.* VA will deduct amounts reported during the surviving spouse's initial reporting period if:

(A) The amounts were paid by the surviving spouse before the veteran's death for the veteran's last illness;

(B) The surviving spouse made the payments no earlier than 1 year before the veteran died; and

(C) VA received the surviving spouse's Improved Death Pension claim no later than 1 year after the veteran's death.

(3) *Final expenses that VA will not deduct from countable annual income.* VA will not deduct final expenses from a beneficiary's countable annual income if:

(i) The expenses are reimbursed under 38 U.S.C. chapter 23 (see subpart J of this part concerning VA burial benefits); or

(ii) The expenses of a veteran's last illness were allowed as a medical expense deduction on the veteran's pension or parents' dependency and indemnity compensation (DIC) account during the veteran's lifetime.

(Authority: 38 U.S.C. 1503(a)(3), (4))

(d) *Educational expenses.* VA will deduct educational expenses from a veteran's or surviving spouse's countable annual income. *Educational expenses* means payments a veteran or surviving spouse makes for his or her course of education, vocational rehabilitation, or training. It includes, but is not limited to, tuition, fees, books, and materials. If the veteran or surviving spouse needs regular aid and attendance, it also includes unreimbursed unusual transportation expenses associated with the pursuit of the course of education, vocational rehabilitation, or training. VA considers transportation expenses ''unusual'' if they are greater than the amount a person without a disability would reasonably spend on an appropriate means of transportation (public transportation, if reasonably available). Educational expenses that are reimbursed by scholarships or grants are not deductible.

See also § 5.412(a)(2) (concerning deducting a child's educational expenses from his or her earned income).

(Authority: 38 U.S.C. 1503(a)(9))

(e) *Expenses and awards or settlements for death or disability.* VA will deduct from income received based on an award or settlement for death or disability any medical, legal, or other expenses that are incident to such death or disability or are incident to the collection or recovery of such an award or settlement. However, medical expenses cannot be deducted under this paragraph (e) if they are paid after the date that the award or settlement payment was received. Medical expenses paid after that date may be deducted under paragraph (b) of this section as unreimbursed medical expenses. VA will not deduct the same medical expenses under paragraph (b) of this section that it deducts under this paragraph (e). For purposes of this paragraph (e), the award or settlement may be received from any of the following sources:

(1) Commercial insurance proceeds (disability, accident, life, or health);

(2) The Office of Workers' Compensation Programs of the U.S. Department of Labor;

(3) The Social Security Administration;

(4) The Railroad Retirement Board;

(5) Any worker's compensation or employer's liability statute; or

(6) Legal damages collected for personal injury or death.

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

(f) *Business, farm, or professional practice*—(1) *Necessary operating expenses.* VA will deduct from income produced by a business, farm, or professional practice the necessary operating expenses (such as the cost of goods sold and payments for rent, taxes, upkeep, repairs, and replacements) of that business, farm, or professional practice. Only the net of such income is countable. The value of an increase in stock inventory of a business is not income.

(2) *Depreciation.* Depreciation of a business, farm, or professional practice is not deductible from income produced by that business, farm, or professional practice.

(3) *Business and investment losses.* Losses sustained in operating a business, farm, or professional practice, or from transactions involving investment property, may be deducted only from income derived from the source that sustained the loss.

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

§ 5.414 Net worth determinations for Improved Pension.

(a) *How to calculate net worth*—(1) *General formula.* For Improved Pension purposes, net worth is the market value of all real and personal property owned by the claimant or beneficiary or listed under paragraph (c) of this section, minus mortgages or other encumbrances on such property.

(2) *Establishing ownership of an asset.* VA will consider the terms of the recorded deed or other evidence of title to be proof of ownership of a particular asset.

(i) *Property given to a relative.* If a claimant or beneficiary gives property to a relative living in the same household, VA will include the value of the property as part of the claimant's or beneficiary's net worth. This also applies if the claimant or beneficiary sells the property to a relative in the same household at such a low price that it amounts to a gift.

(ii) *Property given to a non-relative.* If a claimant or beneficiary gives property to someone other than a relative living in the same household, VA will include the value of the property as net worth unless the claimant or beneficiary has given up all rights of ownership, including, but not limited to, the right to control the property.

(b) *Property excluded from net worth.* Net worth does not include the following elements:

(1) *Value of the primary residence (single-family unit),* which also includes a reasonably sized lot. The primary residence will not be included as net worth simply because the veteran has moved into a nursing home.

(i) *Personal mortgage not deductible from net worth.* Because the value of a primary residence is not considered, VA will not subtract from net worth under paragraph (a) of this section the amount of any mortgages or encumbrances on such property.

(ii) *Reasonably sized lot defined.* VA will evaluate a ''reasonably sized lot'' by considering the size of other residential lots in the vicinity. If the residential lot is larger than other such lots in the vicinity, VA will exclude only the value of the reasonably sized lot and include the value of the rest of the lot as part of net worth. If the real property is a farm, VA will exclude the value of a reasonably sized lot, including the residence area, and consider the rest of the farm as part of net worth.

(2) *Value of personal effects suitable to and consistent with a reasonable mode of life,* such as appliances and family transportation vehicles.

(3) *Child educational exclusion.* When calculating a child's net worth, whether as a dependent or as a claimant (surviving child), VA will exclude reasonable amounts for actual or estimated future educational or vocational expenses. VA will exclude only the amount needed to cover the child's educational or vocational expenses until he or she reaches age 23.

(4) *Radiation Exposure Compensation Act payments.* Payments made under Section 6 of the Radiation Exposure Compensation Act of 1990.

(Authority: 42 U.S.C. 2210 (note))

(5) *Ricky Ray Hemophilia Relief Fund payments.* Payments made under section 103(c) and excluded under 103(h)(2) of the Ricky Ray Hemophilia Relief Fund Act of 1998.

(Authority: 42 U.S.C. 300c–22 (note))

(6) *Energy Employees Occupational Illness Compensation Program payments.* Payments made under the Energy Employees Occupational Illness Compensation Program.

(Authority: 42 U.S.C. 7385e(2))

(7) *Payments to Aleuts.* Payments made to certain Aleuts under 50 U.S.C. App. 1989c–5.

(Authority: 50 U.S.C. App. 1989c–5(d)(2))

(8) *Other payments.* Other payments excluded from net worth listed in § 5.706.

(c) *Net worth of relatives of the claimant or beneficiary counted as net worth.*

(1) *Veteran.* The veteran's net worth includes the net worth of his or her spouse.

(2) *Surviving spouse.* The surviving spouse's net worth only includes the net worth of the surviving spouse.

(3) *Surviving child*—(i) *Surviving child without a custodian or institutionalized.* If a surviving child has no custodian or is in the custody of an institution, VA will consider only the child's net worth and adjusted annual income when determining whether net worth is a bar to Improved Death Pension under paragraph (d) of this section.

(ii) *Surviving child living with a custodian.* If the surviving child has a custodian other than an institution, the child's net worth includes that person's net worth. If the child is in joint custody as provided in § 5.417(b), the child's net worth includes both custodians' net worth.

(d) *How net worth bars an award of Improved Pension.*—(1) *General rule.* VA cannot pay Improved Pension if it is reasonable to expect that part of the claimant's or beneficiary's net worth, as calculated under this section, should be used for the claimant's living expenses. This applies to new claims for, and to ongoing entitlement to, Improved Pension. Generally, when net worth is $80,000 or more, it is reasonable to expect that part of the net worth should be used for living expenses. Generally, when net worth is less than $80,000, it is not reasonable to expect that part of the net worth should be used for living expenses. However, there may be exceptions to the guidelines stated in this paragraph (d) based on the facts of each case.

(2) *Relevant factors.* The following factors are considered in determining whether it is reasonable to expect that part of the net worth should be used for the claimant's or beneficiary's living expenses:

(i) The adjusted annual income and the adjusted annual income of any person whose net worth is considered part of the claimant's or beneficiary's net worth.

(ii) Living expenses. However, in considering the claimant's or beneficiary's living expenses, VA cannot consider expenses it excluded or deducted in determining adjusted annual income.

(iii) The average life expectancy for a person of the same age as the claimant or beneficiary and the potential rate of depletion of net worth.

(iv) The value of liquid assets (assets that the claimant or beneficiary can readily convert into cash).

(v) The number of family members (as defined in § 5.300) who depend on the claimant or beneficiary for support.

(e) *How a veteran's child's net worth affects an Improved Pension award to a parent who has custody of that child.* A veteran's child's net worth affects an Improved Pension award to a parent who has custody of that child. If a child's net worth is such that under all circumstances, including consideration of the veteran's or surviving spouse's adjusted annual income, it is reasonable to expect that part of the child's net worth be consumed for the child's maintenance, such a child will not be considered a dependent for Improved Pension.

(Authority: 38 U.S.C. 1522, 1543)

Cross Reference: § 5.1, for the definition of ''custody of a child''.

§ 5.415 Effective dates of changes in Improved Pension benefits based on changes in net worth.

(a) *Effective date of reduction or discontinuance of Improved Pension award when net worth increases*—(1) *Beneficiary.* If an increase in a beneficiary's net worth requires VA to discontinue Improved Pension, VA will discontinue the Improved Pension award effective the first day of the year after the year that net worth increased.

(2) *Child.* If an increase in a child's net worth requires VA to reduce or discontinue that child's dependency under § 5.414(e), VA will adjust the payment amount effective the first day of the year after the year that net worth increased.

(Authority: 38 U.S.C. 5112(b)(4)(B))

(b) *Claims previously denied or awards previously discontinued because of net worth.* When a claim for Improved Pension has been denied, or an award of Improved Pension has been reduced or discontinued, due to excessive net worth, a claimant or former beneficiary may reapply for Improved Pension if there is a reduction in net worth. See § 5.414(d). If net worth ceases to be a bar before the previous denial or discontinuance has become final, the effective date of resumption of pension benefits will be the date that net worth ceased to be a bar. If net worth ceases to be a bar after the previous denial or discontinuance has become final, the effective date of resumption of pension benefits will be assigned under § 5.383 or § 5.431.

(Authority: 38 U.S.C. 5110(a))

Cross Reference: § 5.57, Claims definitions.

§ 5.416 Persons considered as dependents for Improved Pension.

(a) *Factors for a veteran's dependent spouse.* A veteran's spouse is a dependent spouse for Improved Disability Pension purposes if at least one of the following factors applies:

(1) The veteran lives with the spouse;

(2) The veteran and the spouse live apart but are not estranged; or

(3) The veteran and the spouse live apart and are estranged, but the veteran provides reasonable contributions to the spouse's support. Whether support contributions are reasonable is a factual matter that VA determines.

(b) *Factors for a dependent child.* Unless paragraph (c) of this section applies, a child is a dependent child for Improved Pension purposes if at least one of the following factors applies:

(1) The child is in the veteran's or surviving spouse's custody; or

(2) The veteran provides reasonable contributions to the child's support. Whether support contributions are reasonable is a factual matter that VA determines.

(c) *When a child's net worth bars dependency status.* If a child's net worth is a bar, under § 5.414(e), to payment of additional Improved Pension for that child, then that child is not a dependent child for Improved Pension purposes.

(Authority: 38 U.S.C. 1521, 1522(b), 1541, 1543(a)(2))

Cross Reference: § 5.1, for the definition of ''custody of a child''.

§ 5.417 Child custody for purposes of determining dependency for Improved Pension.

For purposes of Improved Pension:

(a) *Presumption of custody.* A child's natural or adoptive parent, or a person or institution with legal responsibility for that child, is presumed to be the child's custodian unless there has been a legal determination removing custody.

(b) *Presumption of joint custody.* If a child's natural or adoptive parent is married to someone other than the child's other natural or adoptive parent, the child is presumed to be in the joint custody of the natural or adoptive parent and stepparent unless:

(i) The child's stepparent and natural or adoptive parent are estranged and living apart; or

(ii) Custody is legally removed from the natural or adoptive parent.

(c) *Custody retained after the age of majority.* A child over age 18 is presumed to remain in the custody of the person whose custody the child was in before attaining age 18, unless custody is legally removed. This applies without regard to whether a child has reached the age of majority under applicable State law. This also applies without regard to whether the child was eligible for pension before age 18, or whether increased pension was payable to a veteran or surviving spouse for the child before the child's 18th birthday.

(d) *Successor custodian after the age of majority.* If a child's custodian dies after the child's 18th birthday, VA will presume that the child is in the custody of a successor custodian, but if there is no successor custodian, the child may be eligible for benefits in his or her own right.

(Authority: 38 U.S.C. 501(a), 1521, 1541)

Cross Reference: § 5.1, for the definitions of ''custody of a child'' and ''State''. § 5.220(b)(2), Status as a child for benefit purposes, (enumerating situations in which a person is recognized as a child after attaining age 18).

§§ 5.418–5.419 [Reserved]

Improved Pension: Income Reporting Periods, Payments, Effective Dates, and Time Limits

§ 5.420 Reporting periods for Improved Pension.

When calculating adjusted annual income, VA counts income that is reported by a claimant or beneficiary during a ''reporting period.'' A ''reporting period'' is a time period established by VA during which a claimant or beneficiary must report to VA all income, net worth, and adjustments to income. However, the claimant or beneficiary may report a change in income or net worth when the change occurs. There are two types of reporting periods: The initial reporting period and the annual reporting period.

(a) *Initial reporting period*—(1) *General rule.* Except as provided in paragraphs (a)(2) and (3) of this section, the initial reporting period begins on the latest of the following dates:

(i) The date VA receives a pension claim;

(ii) The date VA receives an election under § 5.460 or § 5.463; or

(iii) The date the claimant becomes eligible to receive Improved Pension.

(2) *Retroactive awards.* For Improved Pension claims where an effective date before the date of claim is assigned pursuant to § 5.383(b), the initial reporting period begins on the date the veteran became permanently and totally disabled if that would be to the veteran's advantage. If it would not be to the veteran's advantage, then the initial reporting period begins on the date of the pension claim.

(3) *Improved Death Pension claim received no later than 1 year after date of veteran's death.* When VA receives an Improved Death Pension claim no later than 1 year after the date of the veteran's death, the initial reporting period begins on the day that the veteran died. This is true even though the effective date under § 5.695 is the first day of the month of death. See § 5.431 for effective dates and rule applicability.

(4) *End of period.* The initial reporting period ends 1 year after the last day of the month in which the period began.

(b) *Annual reporting period.* For Improved Pension purposes, the annual reporting period is each calendar year. The first annual reporting period is the calendar year in which the initial reporting period ends.

(Authority: 38 U.S.C. 1506, 1521, 1541, 1542)

§ 5.421 How VA calculates an Improved Pension payment amount.

(a) *How VA calculates a monthly Improved Pension payment amount.* To calculate the monthly Improved Pension payment amount, VA divides the annual Improved Pension amount by 12 and rounds down to the nearest whole dollar.

(b) *Changes in maximum annual pension rate.* When there is a change in a beneficiary's maximum annual pension rate (because of a cost-of-living adjustment or some other reason), VA recalculates the annual Improved Pension amount using the new maximum annual pension rate and the amount of adjusted annual income on the effective date that the maximum annual pension rate changes. VA then determines the new monthly payment amount as specified in paragraph (a) of this section.

(c) *Changes in adjusted annual income.* If a beneficiary's adjusted annual income increases or decreases, VA recalculates the annual Improved Pension amount using the new adjusted annual income amount. VA then determines the new monthly payment amount as specified in paragraph (a) of this section. See § 5.422.

(Authority: 38 U.S.C. 1521, 1541, 1542, and 5123)

§ 5.422 Effective dates of changes to annual Improved Pension payment amounts due to a change in income.

(a) *Effective dates of changes to payment amounts due to a change in income*—(1) *Increased annual Improved Pension amount.* If an income change requires an increased annual Improved Pension amount, the effective date of the increased amount is the date that the income changes, subject to § 5.424. However, VA generally cannot pay an increased amount of Improved Pension based on a change in income until the first day of the month after such an income change. See § 5.693 (concerning dates for increased payments and exceptions).

(2) *Reduced annual Improved Pension amount or discontinuance of Improved Pension.* If an income change requires a reduction of an annual Improved Pension amount or the discontinuance of Improved Pension, the effective date of the reduced amount or discontinuance is the first day of the month after the income change.

(b) *Effective dates for counting income of a dependent.*—(1) *Dependent removed from Improved Pension award.* VA will stop counting a dependent's income on the same date it removes the dependent from the Improved Pension award.

(2) *Added dependent increases Improved Pension award.* If a beneficiary gains a dependent and this results in an increased annual Improved Pension amount, the effective date of the increase will be the date of the addition of the dependent if the evidence showing the dependency is received no later than 1 year after the addition of the dependent. If such evidence is not received within 1 year after the addition of the dependent, then the effective date will be the date such evidence is received.

(3) *Loss of a dependent increases Improved Pension award.* If a beneficiary loses a dependent and this results in an increased annual Improved

Pension amount, the effective date of the increase will be the date VA receives notice of the loss of the dependent if the evidence showing the loss of a dependent is received no later than 1 year after of the loss of the dependent. If such evidence is not received within 1 year after the loss of the dependent, then the effective date will be the date such evidence is received.

(Authority: 38 U.S.C. 501(a), 5110, 5112)

Cross Reference: § 5.177(g), Effective dates for reducing or discontinuing a benefit payment or for severing service connection, (concerning reducing or discontinuing pension payments because of a change in disability or employability status).

§ 5.423 Improved Pension determinations when expected annual income is uncertain.

(a) *Uncertain expected annual income.* Expected annual income is the annual income a claimant or beneficiary anticipates receiving during a given reporting period. If a claimant or beneficiary is uncertain about the amount of his or her expected annual income or if there is evidence indicating more expected annual income than the amount reported by the claimant or beneficiary, VA will take all of the following actions:

(1) Count the greatest amount of expected annual income the claimant or beneficiary estimates or that is indicated by the evidence and adjust or pay benefits based on that amount. If that amount is greater than the maximum annual pension rate, Improved Pension will not be paid;

(2) Send notice to the claimant or beneficiary concerning the time limit provisions of § 5.424; and

(3) Adjust or pay benefits when complete income information is received, according to the provisions of § 5.424.

(b) *Uncertain dependent information.* If a dependent's expected annual income is greater than the difference between the increased maximum annual pension rate based on the addition of the dependent and the maximum annual pension rate without the dependent, but the claimed dependent's relationship has not yet been established by required evidence, VA will take the following actions:

(1) Determine the maximum annual pension rate without consideration of the claimed dependent;

(2) Count the claimed dependent's income as income of the claimant or beneficiary for purposes of determining entitlement to Improved Pension and determining the annual Improved Pension amount; and

(3) Adjust the annual Improved Pension amount using the applicable maximum annual pension rate when evidence necessary to establish the dependent's relationship has been received. (For the evidence necessary to establish dependency, see Subpart D of this part.)

(Authority: 38 U.S.C. 501(a), 1503)

§ 5.424 Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income.

(a) *Scope.* If a claimant (including any former beneficiary) or beneficiary submits additional evidence within the time limits in this section, then VA may award or increase benefits for prior periods as set forth in this section.

(b) *Expected or actual income*—(1) *Pension not paid.* When VA does not award pension based on actual or expected adjusted annual income during the initial reporting period, the claimant may submit evidence that supports entitlement for all or part of that period. If the claimant submits additional evidence on or before December 31 of the calendar year after the calendar year in which the initial reporting period ends, VA may award benefits effective from the beginning of the initial reporting period, subject to the provisions of § 5.383 or § 5.431. If the claimant does not submit evidence of entitlement within this time limit, VA may only pay benefits effective from the date it receives a new claim.

(2) *Pension paid at a lower amount or discontinued.* When VA pays pension at a lower amount or discontinues pension benefits for all or part of a reporting period based on the claimant's or beneficiary's actual or expected adjusted annual income, the claimant (including any former beneficiary) or beneficiary may submit evidence that supports entitlement or increased entitlement for all or part of that period. If the claimant or beneficiary submits additional evidence on or before December 31 of the calendar year after the calendar year in which the reporting period ends, VA may award, resume, or increase benefits effective from the date entitlement arose but not earlier than the beginning of the reporting period. If the claimant or beneficiary does not submit evidence of entitlement within this time limit, VA may only pay or increase benefits effective from the date it receives a new claim, except as provided in paragraph (c) or (d) of this section.

(c) *Payment following nonentitlement for one reporting period.* This paragraph (c) applies if the claimant (including any former beneficiary) or beneficiary's adjusted annual income does not permit payment for the initial reporting period or requires VA to discontinue payment for an entire reporting period. In such cases, VA may award Improved Pension effective the date entitlement arose but not earlier than the beginning of the next reporting period (the new initial reporting period), if the claimant or beneficiary submits evidence before that reporting period ends. If the claimant or beneficiary does not submit evidence of entitlement within this time limit, VA may only pay benefits effective the date it receives a new claim, except as provided in paragraph (d) of this section.

(d) *No time limit to submit income evidence to reduce overpayment.* Solely for purpose of reducing an overpayment, there is no time limit to submit income evidence, including, but not limited to, deductible expenses. However, the evidence submitted must relate to the initial or annual reporting period for which the overpayment was created.

(Authority: 38 U.S.C. 501(a), 5110(h))

§ 5.425 Frequency of payment of Improved Pension benefits.

VA issues payments of Improved Pension as provided in this section. Except as provided in paragraph (e) of this section, a beneficiary may choose to receive monthly payments if other Federal benefits would be denied because pension payments are issued less frequently than monthly.

(a) *Monthly if $228 or more.* VA will make a payment every month if the annual Improved Pension amount is $228 or more.

(b) *Every 3 months if at least $144 but less than $228.* VA will make a payment every 3 months if the annual Improved Pension amount is at least $144 but less than $228. Payment dates will be on or about March 1, June 1, September 1, and December 1.

(c) *Every 6 months if at least $72 but less than $144.* VA will make a payment every 6 months if the annual Improved Pension amount is at least $72 but less than $144. Payment dates will be on or about June 1 and December 1.

(d) *Once a year if less than $72.* VA will make a payment once a year if the annual Improved Pension amount is less than $72. The payment date will be on or about June 1.

(e) *Payments of less than one dollar are not made.* VA will not make a payment of less than one dollar.

(Authority: 38 U.S.C. 1508)

§§ 5.426–5.429 [Reserved]

Improved Death Pension Marriage Date Requirements and Effective Dates

§ 5.430 Marriage date requirements for Improved Death Pension.

A surviving spouse may qualify for Improved Death Pension if the marriage to the veteran occurred before or during his or her service or, if the marriage meets one of the following criteria:

(a) The veteran and surviving spouse were married for 1 year or more (multiple marriage periods may be added together to meet the 1-year requirement).

(b) A veteran of one of the following wartime periods and the surviving spouse were married before one of the following delimiting dates:

(1) World War II: January 1, 1957.

(2) Korean Conflict: February 1, 1965.

(3) Vietnam Era: May 8, 1985.

(4) Persian Gulf War: January 1, 2001.

(c) A child was born of the marriage or born to them before the marriage.

(Authority: 38 U.S.C. 103(b), 1541(f))

Cross Reference: § 5.1(j), for the definition of ''child born of the marriage'' and ''child born before the marriage''.

§ 5.431 Effective dates of Improved Death Pension.

(a) *Nonservice-connected death after separation from service*—(1) *Claim received no later than 1 year after the date of death.* If VA awards Improved Death Pension based on a claim received no later than 1 year after the date of the veteran's death, the effective date of the award is the first day of the month in which the death occurred.

(2) *Claim received more than 1 year after the date of the veteran's death.* If VA awards Improved Death Pension based on a claim received more than 1 year after the date of the veteran's death, the effective date of the award is the date VA received the claim.

(b) *Death in service.* The following effective dates apply for Improved Death Pension awards based upon a veteran's death in service:

(1) *Claim received no later than 1 year after death.* If VA receives a claim for Improved Death Pension no later than 1 year after the date of death fixed by the veteran's service branch's report or finding of actual or presumed death, the effective date is the first day of the month that the Secretary concerned establishes as the date of death.

(2) *Claim received later than 1 year after death.* If VA receives the claim later than 1 year after the date of death provided in paragraph (b)(1) of this section, the effective date is the date VA receives the claim.

(3) *Death benefits not to be paid concurrently with military benefits.* VA will not pay benefits to a claimant on a report of actual death for periods that the claimant has received, or was entitled to receive, any of the following military entitlements of the veteran:

(i) An allowance;

(ii) An allotment; or

(iii) Service pay.

(Authority: 38 U.S.C. 5110(a), (d), (j))

§ 5.432 Deemed valid marriages and contested claims for Improved Death Pension.

(a) *Definition of contested claim.* For purposes of this section, a claim is a ''contested claim'' when claims are filed both by a claimant seeking recognition as a deemed valid surviving spouse under § 5.201, and by a surviving spouse eligible for Improved Death Pension.

(b) *VA adjudication of contested claims.* VA will take the following steps in adjudicating a contested claim:

(1) Develop the claims of both the surviving spouse and the claimant seeking recognition as the surviving spouse; then

(2) Afford each claimant the applicable time period provided in § 5.424(b) to show his or her adjusted annual income is less than the maximum annual pension rate; and then

(3) If the surviving spouse does not establish entitlement to Improved Death Pension before the end of the applicable time limit under § 5.424(b), VA will recognize the claimant seeking recognition as a surviving spouse of a deemed valid marriage and award Improved Death Pension if that claimant meets eligibility and entitlement requirements. If the surviving spouse later claims Improved Death Pension and establishes entitlement, VA will then process the claim under § 5.433.

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

§ 5.433 Effective date of discontinuance of Improved Death Pension payments to a beneficiary no longer recognized as the veteran's surviving spouse.

(a) *Purpose.* This section applies when VA is paying Improved Death Pension to a surviving spouse (identified in this section as ''former surviving spouse'') and another claimant (identified in this section as ''new surviving spouse'') establishes that he or she is the true surviving spouse eligible to receive Improved Death Pension.

(b) *Effective date of discontinuance of payments to former surviving spouse*—(1) *Discontinuance date of the award to the former surviving spouse where the award to the new surviving spouse is effective before the date VA received the new surviving spouse's claim.* If benefits are payable to the new surviving spouse from a date before the date VA received the new surviving spouse's claim, VA will discontinue the award to the former surviving spouse effective the date of the award to the new surviving spouse.

(2) *Discontinuance date of the award to the former surviving spouse where award to the new surviving spouse is effective the date VA received the new surviving spouse's claim.* If benefits are payable to the new surviving spouse from the date VA received the new surviving spouse's claim, VA will discontinue the award to the former surviving spouse effective the later of the following dates:

(i) The date of receipt of the new surviving spouse's claim; or

(ii) The first day of the month after the month VA last paid benefits.

(3) *Exception where discontinuances are due to a change in, or change in interpretation of, the law or an administrative issue.* When VA must discontinue payments to a former surviving spouse because of a change in the law or an administrative issue or because of a change in the interpretation of the law or an administrative issue, VA will discontinue the award to the former surviving spouse effective the first day of the month after the end of the 60-day notice period to the former surviving spouse concerning the discontinuance.

(Authority: 38 U.S.C. 5112(a), (b)(6))

§ 5.434 Award or discontinuance of award of Improved Death Pension to a surviving spouse where Improved Death Pension payments to a child are involved.

(a) *Custodian of child establishes eligibility as surviving spouse.* When VA finds Improved Death Pension eligibility for the custodian of a child receiving Improved Death Pension, VA will award Improved Death Pension to the surviving spouse and discontinue the child's eligibility for Improved Death Pension as follows:

(1) *Annual Improved Pension amount for surviving spouse higher than amount for child.*—(i) *Effective date.* If the surviving spouse is entitled to a higher Improved Pension payment amount than the child was receiving, the surviving spouse's pension award is effective the date provided by § 5.431.

(ii) *Initial amount payable.* The initial pension amount payable to the surviving spouse is the difference between the child's Improved Pension payment amount and the surviving spouse's Improved Pension payment amount. VA will pay to the surviving spouse the full Improved Pension

payment amount effective the first day of the month after the month VA last paid benefits to the child. VA will discontinue the child's pension award effective that same day.

(2) *Annual Improved Pension amount for surviving spouse equal to or less than amount for child.* When the child is receiving an Improved Death Pension payment amount equal to or higher than the Improved Death Pension payment amount that the surviving spouse is entitled to receive, VA will pay Improved Death Pension to the surviving spouse effective the first day of the month after the month VA last paid benefits to the child, and discontinue the child's pension award effective that same day. Section 5.693 does not apply in such a situation.

(3) *Discontinuance of child's pension award when the surviving spouse is not entitled to payments.* When a surviving spouse establishes eligibility for Improved Death Pension but is not entitled because his or her adjusted annual income is greater than the maximum annual pension rate or because his or her net worth bars entitlement, VA will discontinue the child's pension award effective the first day of the month after the month VA last paid benefits to the child.

(b) *Child establishes eligibility but surviving spouse has received Improved Death Pension payments after his or her eligibility ended.* If a surviving spouse continued to receive Improved Pension payments after becoming ineligible for Improved Pension, and that surviving spouse has custody of a child who establishes eligibility for Improved Pension payments, VA will award Improved Pension to the child and discontinue the surviving spouse's eligibility as follows:

(1) *Improved Pension payment amount for the child is lower than the payment amount for the former surviving spouse.* If the surviving spouse receives Improved Pension after his or her eligibility ends, and his or her custodial child is entitled to a reduced Improved Pension payment, then VA will take the following actions:

(i) *Amend the award to surviving spouse.* VA will amend the award to the surviving spouse for the period before the award to the child is effective by reducing the Improved Pension payment amount to the amount that would have been paid to the child, establishing a debt owed by the surviving spouse to VA. The surviving spouse's reduced payment is effective the date the Improved Pension payment to the spouse should have been discontinued.

(ii) *Award Improved Pension to child.* VA will award Improved Pension at the reduced rate to the child effective the first day of the month after the month VA last paid benefits to the surviving spouse, discontinuing the surviving spouse's pension award effective that same day. Section 5.693 does not apply in such a situation.

(2) *The Improved Pension payment amount for the child is equal to or higher than the former surviving spouse's amount.* If the surviving spouse receives Improved Pension after his or her eligibility ends, and his or her custodial child is entitled to an equal or increased pension payment then VA will take the following actions:

(i) *Partial payment to the child.* VA will pay the child the difference between the child's pension payment amount and the surviving spouse's pension payment amount. The effective date of the child's benefits is the date VA should have discontinued the surviving spouse's pension benefits.

(ii) *Full payment to the child.* VA will grant Improved Pension at the equal or increased rate to the child effective the first day of the month after the month VA last paid benefits to the surviving spouse, discontinuing the surviving spouse's pension award effective that same day.

(Authority: 38 U.S.C. 501(a), 5110(a), 5112(a))

Cross Reference: § 5.1, for the definition of ''custody of a child''.

§ 5.435 Calculating annual Improved Pension amounts for a surviving child.

(a) *Surviving child not in custody or in the custody of an institution.* If a surviving child has no custodian, or a surviving child is in the custody of an institution, VA calculates the surviving child's annual Improved Pension amount by subtracting the surviving child's adjusted annual income from the surviving child's maximum annual pension rate.

(b) *Surviving child in the custody of a person legally responsible for the child's support*—(1) *One surviving child in the custody of a person legally responsible for the child's support.* If the surviving child has a custodian, the surviving child's annual Improved Pension amount is the lesser of:

(i) The maximum annual pension rate for a surviving spouse and one dependent surviving child, reduced by the adjusted annual income of the surviving child and that of the surviving child's custodian; or

(ii) The maximum annual pension rate for a surviving child alone, reduced by the surviving child's adjusted annual income.

(2) *More than one surviving child in the custody of a person legally responsible for the child's support.* If multiple surviving children have the same custodian and any surviving child has adjusted annual income equal to or greater than the maximum annual pension rate for one surviving child, that surviving child (and the surviving child's income) is not included in the calculation of the annual Improved Pension amount. The remaining surviving child's annual Improved Pension amount is the lesser of:

(i) The maximum annual pension rate for a surviving spouse and the number of remaining surviving children, reduced by the total adjusted annual income of the remaining surviving children and that of the custodian; or

(ii) The maximum annual pension rate for a surviving child alone times the number of remaining surviving children, reduced by the total adjusted annual income of the remaining surviving children.

(3) *Income of natural or adoptive parent includes that of natural or adoptive parent's spouse.* If the custodian listed in paragraph (b)(1) or (2) of this section is a natural or adoptive parent of a surviving child who is in joint custody as provided in § 5.417(b), the income of that natural or adoptive parent includes the income of that natural or adoptive parent's spouse.

(Authority: 38 U.S.C. 1542)

Cross Reference: § 5.1, for the definition of ''custody of a child''.

§§ 5.436–5.459 [Reserved]

Choosing Improved Pension Over Other VA Pension Programs

§ 5.460 Definitions of certain VA pension programs.

(a) *Section 306 Pension* means the nonservice-connected disability and death pension programs available to a new claimant during the period beginning on July 1, 1960, and ending on December 31, 1978.

(b) *Old-Law Pension* means the nonservice-connected disability and death pension programs available to a new claimant before July 1, 1960.

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

§§ 5.461–5.462 [Reserved]

§ 5.463 Effective dates of Improved Pension elections.

An election to receive Improved Pension is effective on the date VA receives the election.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.464 Multiple pension benefits not payable.

If a veteran is entitled to Improved Pension on the basis of his or her service and is also entitled to pension under any other VA pension program based on another person's service, VA will pay only the greater benefit.

(Authority: 38 U.S.C. 1521(i))

§§ 5.465–5.469 [Reserved]

Continuing Entitlement to Old-Law Pension or Section 306 Pension

§ 5.470 Reasons for discontinuing or reducing Old-Law Pension or Section 306 Pension.

(a) *Discontinuances.* Old-Law Pension or Section 306 Pension will be discontinued for any one of the following reasons:

(1) A veteran pension beneficiary ceases to be permanently and totally disabled;

(2) A surviving spouse pension beneficiary no longer meets the definition of ''surviving spouse'', as provided in § 5.200;

(3) A child pension beneficiary no longer meets the definition of ''child'', as provided in § 5.220;

(4) A pension beneficiary's income exceeds the annual income limit; or

(5) A Section 306 Pension beneficiary has a net worth of such value that it is reasonable that some part of it be consumed for the beneficiary's maintenance. Rating of net worth will be made under § 5.476.

(b) *Finality of discontinuance.* Discontinuance of Old-Law Pension or Section 306 Pension for one of the reasons listed in paragraph (a) of this section means that a pension beneficiary is no longer entitled to receive Old-Law Pension or Section 306 Pension benefits. Any new entitlement that may be established would be to Improved Pension.

(c) *Reduction and finality of reduction.* If a beneficiary of Old-Law Pension or Section 306 Pension loses a dependent for whom the beneficiary was receiving additional pension before January 1, 1979, VA must reduce the beneficiary's pension by the additional amount payable based on that dependent. Such reductions are final and rates do not increase. VA must discontinue pension as provided in paragraph (a)(4) of this section if a veteran or surviving spouse no longer has any dependents and his or her annual income exceeds the annual income limit for a veteran or surviving spouse alone.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.471 Annual income limits and rates for Old-Law Pension and Section 306 Pension.

(a) *Where to find the annual income limits and pension rates.* When annual income limits are adjusted as provided in paragraph (b) of this section, VA will publish the new limits in the ''Notices'' section of the **Federal Register**. Current and historical annual income limits and historical pension rates for Old-Law Pension and Section 306 Pension can be found on the internet at *http://www.va.gov*, and are available from any Veterans Service Center or Pension Management Center.

(b) *When annual income limits are adjusted.* Whenever there is a cost-of-living increase in Social Security benefit amounts under the Federal Old-Age, Survivors, and Disability Insurance Benefits section of the Social Security Act (42 U.S.C. 415(i)), VA will increase the following incomes by the same percentage effective the same date:

(1) The annual income limits applicable to continued receipt of Old-Law Pension and Section 306 Pension; and

(2) The dollar amount of the spousal income not counted under § 5.473(b)(2)(ii)(A) in determining the income of a veteran for Section 306 Pension purposes.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.472 Rating of income for Old-Law Pension and Section 306 Pension.

(a) *Scope.* This section provides rules for determining how to count income for Old-Law Pension and Section 306 Pension purposes. This section also applies to counting spousal income as part of the veteran's income for Section 306 Pension purposes.

(b) *Countable income*—(1) *All payments counted as income.* VA counts all payments of any kind from any source in determining the income of a pension beneficiary, except certain payments that are not counted as income as provided in this section or under § 5.473.

(2) *Payments.* For purposes of this section, ''payments'' are cash and cash equivalents (such as checks and other negotiable instruments), and the fair market value of personal services, goods, or room and board received in lieu of other forms of payment.

(i) *Section 306 Pension.* For Section 306 Pension purposes, VA counts as income retirement benefits (pension or retirement payments).

(ii) *Old-Law Pension.* For Old-Law Pension purposes, retirement benefits from the following sources are not counted as income if the benefits have been waived pursuant to Federal statute:

(A) Civil Service Retirement and Disability Fund;

(B) Railroad Retirement Board;

(C) District of Columbia for firemen, policemen, or public school teachers; and

(D) Former U.S. Lighthouse Service.

(3) *Countable income is rounded down.* VA rounds countable income down to the nearest whole dollar. For Section 306 Pension, VA rounds down after subtracting any authorized deductible expenses specified in § 5.474.

(4) *Income considered for year of receipt.* VA calculates income for the calendar year in which it is received and considers income for the calendar year. However, when VA discontinues Old-Law Pension or Section 306 Pension benefits based on income that exceeds the limit, it does so effective January 1 of the following calendar year as provided in § 5.477.

(c) *Deductions from specific income sources*—(1) *Expenses of a business or profession.* Necessary business operating expenses such as the cost of goods sold and payments for rent, taxes, upkeep, repairs, and replacements are deductible from income from a business or profession. Depreciation is not a deductible expense. Losses sustained in operating a business or profession may not be deducted from income that is derived from any other source. For purposes of this section, ''business'' includes the operation of a farm and transactions involving investment property.

(2) *Expenses associated with disability, accident, or health insurance recoveries.* VA will deduct from sums recovered under disability, accident, or health insurance medical, legal, or other expenses incident to the insured injury or illness. However, VA will not then deduct the same medical expenses as unusual medical expenses under § 5.474.

(3) *Salary deductions and employer contributions.* Income from a salary is not determined by ''take-home'' pay. Generally, the salary counted as income is the gross salary before any deductions. However, an employer's contributions to health and hospitalization plans will not be counted as part of gross salary.

(d) *Income-producing property and income from property sales*—(1) *Scope.* This paragraph (d) provides rules for determining whether income from income-producing property and property sales will be counted as a pension beneficiary's income. The provisions of this paragraph (d) apply to all property, real or personal, in which a pension beneficiary has an interest,

whether acquired through purchase, bequest, or inheritance.

(2) *Proof of ownership.* In determining whether to count income from real or personal property or property sales, VA will consider the terms of the recorded deed or other evidence of title. In the absence of evidence showing otherwise, VA will accept the beneficiary's statement as proof of the terms of ownership.

(3) *Transfer of ownership with retention of income.* If a pension beneficiary transfers ownership of property to another person or legal entity, but retains the right to income, the income will be counted.

(4) *Income from jointly-owned property.* If a pension beneficiary owns property jointly with others, including, but not limited to, partnership property, each person will be considered as receiving an equal share of the income from that property in the absence of evidence showing otherwise.

(5) *Property sales for Old-Law Pension.* (i) *General rule.* Net profit from the sale of real or personal property counts as income unless the profit is from the sale of the beneficiary's principal residence.

(ii) *Property owned before date of entitlement.* In determining net profit from the sale of property owned before the date of entitlement, VA will compare the value of the property at the time entitlement began with the selling price.

(iii) *Payments received in installments.* If payments are received in installments, the entire amount of installment payments received (including, but not limited to, principal and interest) will not be counted as income until the total of installments received is equal to the cost of the residence, or if paragraph (d)(5)(ii) of this section applies, equal to the value of the property on the date pension entitlement was established. The entire amount of any installment received thereafter will be counted as income.

(6) *Profit from sale of principal residence for Old-Law Pension.*—(i) *General rule.* Net profit realized from the sale of an Old-Law Pension beneficiary's principal residence is not counted to the extent that it is applied to the purchase price of a subsequent principal residence for the beneficiary in either the calendar year of the sale or the following year.

(ii) *Exception.* This rule does not apply where the net profit is applied to the price of a residence purchased before the calendar year preceding the calendar year of the sale of the old residence.

(iii) *Reporting requirement.* To qualify for this rule, the application of the net profit from the sale of the old residence to the purchase of the replacement residence must be reported to VA no later than 1 year after the date it was so applied.

(7) *Profit from sale of non-business property for Section 306 Pension.* Profit realized from the disposition of real or personal property other than in the course of a business does not count as income for Section 306 Pension. However, amounts received in excess of the sales price, such as interest payments, do count. If payments are received in installments, the installments received will not begin to count as income until the total of installments received is equal to the sales price. The following exceptions apply:

(i) *Bonds.* If the redemption of a bond issued by a federal, state, municipal or other political entity is required for the payment of accrued interest, then the accrued interest payable is excluded from income.

(ii) *Life insurance.* If the surrender of a life insurance policy is required to obtain the proceeds, then the interest received is excluded from income.

(e) *VA benefits*—(1) *Old-Law Pension.* No VA benefits are not counted as income for Old-Law Pension.

(2) *Section 306 Pension.* Only the following VA benefits count as income for Section 306 Pension:

(i) Subsistence allowance under 38 U.S.C. 3100 through 3121;

(ii) Special allowance under 38 U.S.C. 1312(a);

(iii) Accrued benefits, unless paid as a reimbursement; and

(iv) World War I adjusted disability compensation.

(f) *Income not counted for Old-Law Pension or Section 306 Pension.* VA will not count payments from the sources listed in this paragraph (f) when calculating income for Old-Law Pension or Section 306 Pension. Paragraph (g) of this section lists additional sources of income that are not counted for Section 306 Pension.

(1) *Maintenance.* The value of maintenance furnished by a relative, friend, or a civic or governmental charitable organization, in addition to money paid to an institution for the care of the beneficiary due to impaired health or advanced age. However, if the maintenance is paid to the beneficiary and not counted as income under this provision, VA cannot also deduct it as an unusual medical expense under § 5.474.

(2) *Survivor benefit annuity.* Annuities paid by the Department of Defense under the authority of Public Law 100–456, Sec. 653, 102 Stat. 1991, to qualified surviving spouses of veterans who died before November 1, 1953.

(3) *Death gratuity.* Death gratuity payments under 10 U.S.C. 1475 through 1480.

(4) *State service bonuses.* Payments of a bonus or similar cash gratuity by any State based upon service in the Armed Forces.

(5) *Payment for civic obligations.* Payments received for performance of jury duty or other obligatory civic duties.

(6) *Fire loss reimbursement.* Proceeds from fire insurance.

(7) *Certain life insurance payments.* Payments under policies of Servicemembers' Group Life Insurance, U.S. Government Life Insurance, Veterans' Group Life Insurance, or National Service Life Insurance.

(8) *Rental value of beneficiary's property.* The rental value of a beneficiary's use of his or her real property, such as the rental value of the beneficiary's personal residence.

(9) *Increased inventory value of a business.* The value of an increase of stock inventory of a business.

(10) *Commercial insurance dividends.* Dividends from commercial insurance.

(11) *Employer contributions for a retired employee.* Contributions a public or private employer makes to either of the following programs:

(i) Public or private health or hospitalization plan for a retired employee; or

(ii) Retired employee as reimbursement for premiums for supplementary medical insurance benefits under the Social Security program.

(12) *Income from retirement plans and similar plans and programs.* 10 percent of the amount of payments under public or private retirement, annuity, endowment, or similar plans is not counted as income. This rule includes, but is not limited to, payments received from any of the following sources:

(i) Annuities or endowments paid under a Federal, State, municipal, or private business or industrial plan.

(ii) Old age and survivor's insurance and disability insurance under title II of the Social Security Act.

(iii) Retirement benefits received from the Railroad Retirement Board. However, if the beneficiary is a veteran receiving Old-Law Pension, payments from this source do not count at all.

(iv) Payments for permanent and total disability or death received from the Office of Workers' Compensation

Programs of the U.S. Department of Labor, the Social Security Administration, or the Railroad Retirement Board, or pursuant to any worker's compensation or employer's liability statute, including, but not limited to, damages collected incident to a tort suit under an employer's liability law of the U.S. or a political subdivision of the U.S. This 10 percent income reduction is applied after any adjustments are made under paragraph (c)(2) of this section.

(v) The proceeds of commercial annuity, endowment, or life insurance.

(vi) The proceeds of disability, accident, or health insurance. This 10 percent income reduction applies after the income from the specified payments is reduced by the deductions described in paragraph (c)(2) of this section.

(13) *Other payments.* Other payments listed in § 5.706.

(g) *Income not counted for Section 306 Pension.* In addition to the payments listed in paragraph (f) of this section, VA will not count payments from the following sources as income for Section 306 Pension:

(1) *Donations received.* Donations from public or private relief or welfare organizations, in addition to benefits received under noncontributory programs such as Supplemental Security Income payments.

(2) *Social Security death payments.* Lump sum death payments under title II of the Social Security Act.

(3) *Money acquired from joint accounts because of death.* Money that a death pension beneficiary acquires because of the death of a co-owner of a joint account in a bank or similar financial institution.

(h) *Donations are income for Old-Law Pension.* If an Old-Law Pension beneficiary receives additional donations from public or private relief organizations for members of his or her family, these additional allowances may not be divided per member of the family in determining the pension beneficiary's income. The entire payment is counted as income.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

Cross Reference: § 5.1, for the definitions of ''political subdivision of the U.S.'' and ''State''.

§ 5.473 Counting a dependent's income for Old-Law Pension and Section 306 Pension.

(a) *Old-Law Pension for veterans.* VA will not count the separate income of a veteran's spouse or child in computing income for a veteran Old-Law Pension beneficiary.

(b) *Section 306 Pension for a veteran*—(1) *Child's income.* VA will not count the separate income of a veteran's child in computing income for a veteran Section 306 Pension beneficiary.

(2) *Spousal income*—(i) *VA presumptions concerning spousal income.* For Section 306 Pension purposes, if a veteran and his or her spouse live together, VA presumes:

(A) That the spouse's income is available to the veteran. The veteran may rebut this presumption by filing evidence showing that all or part of the spouse's income is not available.

(B) That counting the spouse's income would not cause the veteran hardship. The veteran may rebut this presumption by filing evidence showing that there are expenses beyond the usual family requirements. Examples of such expenses include special training for a handicapped child and expenses for the prolonged illness of a family member. However, if the spouse's income is not counted because it is needed to pay for unusual medical expenses, the same medical expenses cannot be deducted as unusual medical expenses under § 5.474(b).

(ii) *Spousal income that is not counted.* Unless the spouse's income is not counted under paragraph (b)(2)(i)(A) of this section, the spouse's income will be counted as part of the veteran's income for Section 306 Pension purposes. However, VA will not count as income to the veteran the greater of the following two amounts:

(A) The amount of spousal income not counted under Public Law 95–588, section 306(a)(2)(B) (as increased by amounts published in the ''Notices'' section of the **Federal Register**); or

(B) All of the spouse's earned income.

(c) *Old-Law Pension or Section 306 Pension for a veteran*—(1) *Veteran's child not in surviving spouse's custody.* For Old-Law Pension or Section 306 Pension purposes, if a deceased veteran is survived by a spouse and a child, the annual income limits for a surviving spouse and child apply even if the child is not the surviving spouse's child and not in the surviving spouse's custody.

(2) *When a child's separate income is not counted.* (i) VA will not count a child's separate income as part of the surviving spouse's income if it is paid to the child, regardless of who has custody of the child.

(ii) If the child's income is paid or given to the surviving spouse, VA will only count as much of the child's income as remains after deducting the child's living expenses.

(d) *Child benefits*—(1) *Old-Law Pension.* Earned income of a child beneficiary counts as income for Old-Law Pension.

(2) *Section 306 Pension.* Earned income of a child beneficiary is not counted as income for Section 306 Pension.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

Cross Reference: § 5.1, for the definition of ''custody of a child''.

§ 5.474 Deductible expenses for Section 306 Pension only.

(a) *Scope.* This section applies to Section 306 Pension only. Because Section 306 Pension rates cannot increase, deductible expenses paid after December 31, 1978, can only be deducted from a pension beneficiary's income so that the beneficiary's income remains within the annual income limit and the beneficiary maintains entitlement to Section 306 Pension.

(b) *Unusual medical expenses*—(1) *Definitions*—(i) *Family member.* For Section 306 Pension purposes, a ''family member'' is a relative of the beneficiary who is a member of the beneficiary's household whom the beneficiary has a moral or legal obligation to support. This includes a relative who is physically absent from the household for a temporary purpose or for reasons beyond his or her control.

(ii) *Unusual medical expenses.* For purposes of this section, *unusual medical expenses* means unreimbursed medical expenses above 5 percent of annual income. For the definition of medical expenses that VA will deduct, see § 5.707.

(2) *Veteran or surviving spouse benefits.* VA will deduct amounts paid by a veteran or surviving spouse for the veteran's or surviving spouse's unusual medical expenses and those of family members.

(3) *Child benefits.* VA will deduct amounts paid by a child pension beneficiary for his or her unusual medical expenses and those of the child's parents, brothers, and sisters.

(4) *When expenses are deducted.* VA will deduct unusual medical expenses from income for the calendar year in which they were paid regardless of when the expenses were incurred.

(5) *Proof of expenses.* VA will accept the pension beneficiary's statement as proof of the amount and nature of such medical expenses, the date of payment, and the identity of the creditor, unless the circumstances create doubt as to the statement's credibility.

(6) *Estimates of expenses for future benefit periods.* VA will project anticipated medical expenses based on a clear and reasonable expectation that they will continue. See § 5.709 (concerning the beneficiary's

responsibility to inform VA concerning income changes).

(c) *Final expenses*—(1) *Definition.* ''Final expenses'' are amounts paid for the expenses of a deceased person's last illness and burial. The same expense cannot be deducted as both a final expense and an unusual medical expense under paragraph (b) of this section.

(2) *Final expenses paid by the veteran.* VA will deduct from a veteran's income the final expenses the veteran pays for his or her spouse or child.

(3) *Final expenses paid by a surviving spouse.* VA will deduct from a surviving spouse's income the final expenses the surviving spouse pays for the veteran's child.

(4) *Proof of expenses.* VA will accept as proof of expenses deductible under paragraph (c) of this section the pension beneficiary's statement as to the amount and nature of each expense, the date of payment, and identity of the creditor unless the circumstances create doubt as to the credibility of the statement.

(5) *When expenses are deducted.* Expenses deductible under paragraph (c) of this section are deductible for the year in which they were paid. However, if such expenses were paid during the year following the year the spouse, surviving spouse, or child died, the expenses may be deducted for the year the expenses were paid or the year of death, whichever is to the beneficiary's advantage.

(d) *Prepayment on real property mortgage after death of spouse*—(1) *Section 306 Pension: veteran beneficiaries only.* If a veteran who is receiving Section 306 Pension makes a pre-payment on a mortgage or similar type security instrument on real property after the death of his or her spouse, VA will deduct the amount of the pre-payment from the veteran's income. The real property must have been the principal residence of the veteran and spouse, and the mortgage or security instrument must have existed when the veteran's spouse died.

(2) *Time limit of pre-payment.* The pre-payment described in paragraph (d)(1) of this section must be made after the spouse's death but before the end of the year following the year of death. VA will deduct the amount of the pre-payment from the veteran's income for the year of death or the year after death, whichever is to the veteran's advantage.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.475 Gaining or losing a dependent for Old-Law Pension and Section 306 Pension.

(a) *Pension beneficiary gains a dependent*—(1) *Old-Law Pension or Section 306 Pension.* If an Old-Law Pension or Section 306 Pension beneficiary gains a dependent, VA will determine if a higher annual income limit applies. A higher limit applies if the beneficiary previously did not have a dependent.

(2) *Veteran receiving Section 306 Pension gains a spouse who has income.* If a veteran beneficiary of Section 306 Pension gains a spouse who has countable income, VA will recalculate the veteran's income for the year in which the person became the veteran's spouse. VA will then determine if the veteran is entitled to continued pension benefits or whether the recalculated income exceeds the annual income limit. VA makes the determination based on calendar year income. However, VA will not count income that the spouse received or deduct any of the spouse's expenses paid before the date the person became the veteran's spouse for VA purposes.

(b) *Pension beneficiary loses dependent*—(1) *Loss of last dependent.* When an Old-Law Pension or Section 306 Pension beneficiary loses his or her last dependent, his or her annual income limit is lowered. When this occurs, VA must determine if the beneficiary is still entitled to such pension based on the lowered income limit and recalculated income for the calendar year that the dependent was lost.

(2) *Computation of new rate if a dependent established before January 1, 1979.* If a beneficiary of Old-Law Pension or Section 306 Pension loses a dependent based upon whom the beneficiary was receiving additional pension before January 1, 1979, VA must reduce the beneficiary's pension by the additional amount payable based on that dependent. Because Old-Law Pension and Section 306 Pension rates are based on income from the year 1978 and number of dependents, VA calculates the new rate by removing the dependent and the dependent's 1978 income, if any, and using the remaining 1978 income to determine the new rate.

(i) If the recalculated rate is higher than the previous rate, VA will continue the previous rate.

(ii) If the rate payable to a surviving spouse with one child is less than the rate payable for a child alone, the surviving spouse will be paid the child's rate unless paragraph (b)(2)(i) of this section applies.

(c) *Section 306 Pension and dependency of spouse.* For Section 306 Pension purposes, the December 31, 1978, rates for a veteran with a spouse and the annual income limit for a veteran with a spouse apply as long as the veteran and spouse live together or if not living together, are not estranged. If they are estranged, the married rates and the annual income limit for a veteran with a spouse apply if the veteran is reasonably contributing to the spouse's support. VA counts spousal income only if the annual income limit for a veteran with a spouse applies. VA bases its determination of ''reasonable'' contribution on all of the circumstances of the case, including, but not limited to, a consideration of the veteran's income and net worth and the spouse's separate income and net worth. VA automatically considers the requirement of ''reasonable'' contribution met without further review if the spouse is receiving an apportionment under § 5.780.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.476 Net worth for Section 306 Pension only.

(a) *Definition.* For purposes of determining continuing entitlement to Section 306 Pension, *net worth* means the market value, minus mortgages or other encumbrances, of all real and personal property the beneficiary owns. VA excludes the beneficiary's residence (single-family unit), which also includes a reasonably sized lot, and personal effects suitable to and consistent with the beneficiary's reasonable mode of life. VA will evaluate a ''reasonably sized lot'' by considering the typical size of lots in the area. If the person lives on a farm, VA will not count the value of a reasonably sized lot, including the residence area, and consider the rest of the farm as part of net worth.

(b) *General rule.* VA only considers the net worth of the veteran, surviving spouse, or child beneficiary. In determining whether property belongs to a pension beneficiary, VA will consider the terms of the recorded deed or other evidence of title. In the absence of contradictory evidence, VA will accept the beneficiary's statement as proof of the terms of ownership. In the absence of contradictory evidence, VA will accept the beneficiary's estimate of the value of property.

(c) *How VA evaluates net worth.* In determining whether some part of a beneficiary's net worth should be used for his or her maintenance, VA considers the beneficiary's income as determined under § 5.472, along with all of the beneficiary's living expenses. In considering the beneficiary's living expenses, VA cannot consider expenses that were deducted in determining income. However, VA will also consider

the following factors in evaluating net worth:

(1) The value of liquid assets;

(2) The ability of the beneficiary to dispose of property if limited by community property laws;

(3) The number of family members (as described in § 5.474(b)(1)(i)) who depend on the beneficiary for support; and

(4) The beneficiary's average life expectancy, and the potential rate of depletion of the beneficiary's net worth.

(d) *Amounts not countable as net worth as a matter of law.* Resources not countable by statute will not be considered part of the beneficiary's net worth. For the list of such resources, see § 5.706.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.477 Effective dates of reductions and discontinuances of Old-Law Pension and Section 306 Pension.

(a) *Reductions and discontinuances based on certain events.* If required, VA will pay a reduced Old-Law Pension or Section 306 Pension rate or discontinue benefits effective January 1 of the calendar year immediately following any of these events:

(1) *Marriage, annulment, divorce, or death.* A beneficiary loses a dependent due to marriage, annulment, divorce, or death.

(2) *Increased income.* The beneficiary receives increased income that could not reasonably have been anticipated based on the amount actually received from that source the previous year.

(3) *Increased net worth.* The beneficiary's net worth increases to the extent benefits must be discontinued (Section 306 Pension only).

(b) *General effective dates apply for other reasons.* VA will use the appropriate effective dates as specified in § 5.705 for a discontinuance or reduction for any reason other than those stated in paragraph (a) of this section or in § 5.478(a).

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2508)

§ 5.478 Time limit to establish continuing entitlement to Old-Law Pension or Section 306 Pension.

(a) *Expected income appears to exceed income limit.* If it appears that an Old-Law Pension or Section 306 Pension beneficiary's income for a calendar year will be higher than the annual income limit for that calendar year, VA will discontinue pension benefits for that calendar year effective January 1 of the following year, subject to paragraph (b) of this section.

(b) *Time limit for continuing entitlement.* If VA discontinues pension benefits as described in paragraph (a) of this section because of the beneficiary's expected income for a calendar year, the beneficiary can establish continuing entitlement by filing evidence showing that income for the calendar year was below the annual income limit. The beneficiary must file the evidence before the end of the calendar year that follows the year for which VA determined the income exceeded the limit. For example, if VA determines that a beneficiary's income for the year 2005 exceeds the income limit and discontinues pension benefits effective January 1, 2006, the beneficiary has to submit evidence, such as deductible medical expenses or other information, before January 1, 2007, showing that 2005 income was within the 2005 income limit.

(c) *Finality of discontinuance.* If a beneficiary does not file income evidence as described in paragraph (b) of this section or if such evidence does not warrant continued benefits, the discontinuance described in paragraph (a) of this section is final. This means that the beneficiary is no longer entitled to receive Old-Law Pension or Section 306 Pension benefits. Any new entitlement that may be established would be to Improved Pension.

(Authority: 38 U.S.C. 5110(h))

§§ 5.479–5.499 [Reserved]

Subpart G—Dependency and Indemnity Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary

General Provisions

§ 5.500 Proof of death.

(a) *Purpose and application.* (1) This section describes evidence VA will accept to prove that a person has died in cases where the death of the person is relevant to eligibility for a benefit. It covers the most common situations. Sections 5.501 and 5.502 apply where the evidence described in this section is not available.

(2) Where more than one paragraph of this section applies, VA will accept the evidence described in any relevant paragraph as proof of death. For example, if the person died in a U.S. Government hospital located within a State, VA would accept the evidence establishing death specified in either paragraph (b) or (d) of this section.

(b) *Deaths occurring within a State.* VA will require as proof of death occurring within a State the first type of evidence listed in this paragraph (b), if obtainable. If this type of evidence is unobtainable, then the death may still be proven by the next type of obtainable evidence listed.

(1) A copy of the public record of the State or community where death occurred.

(2) A copy of a coroner's report of death, or of a verdict of a coroner's jury, from the State or community where death occurred, provided the report or verdict properly identifies the deceased.

(c) *Deaths occurring outside the U.S.* VA will require as proof of death occurring outside the U.S. the first type of evidence listed in this paragraph (c), if obtainable. If this type of evidence is unobtainable, then the death may still be proven by the next type of obtainable evidence listed.

(1) A U.S. consular report of death bearing the signature and seal of the U.S. consul.

(2) A copy of the public record of death authenticated by the U.S. consul or other agency of the State Department or which is exempt from such authentication as provided in § 5.132(c)(5) (concerning certain copies of public or church records).

(3) An official report of death of a civilian employee of the U.S. Government from the employing U.S. Government entity.

(d) *Deaths at institutions under the control of the U.S. Government.* VA will only accept as proof of death occurring in a hospital or other institution under the control of the U.S. Government the first type of evidence listed in this paragraph (d). If this type of evidence is unobtainable, then the death may still be proven by the next type of obtainable evidence listed.

(1) A death certificate signed by a medical officer.

(2) A clinical summary, or other report, signed by a medical officer showing the fact and date of death.

(e) *Deaths of members of the uniformed services.* The death of a member of the uniformed services may be established by an official report of the death from the uniformed service concerned.

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

§ 5.501 Proving death by other means.

(a) *Applicability.* This section and § 5.502 describe methods of proving that a person has died if the death of that person is relevant to eligibility for a benefit and the evidence described in § 5.500.

(b) *Required statement.* A claimant seeking to establish the fact of death under this section must file a statement explaining why none of the evidence described in § 5.500 is available.

(c) *Affidavits or certified statements of witnesses who viewed the body.* The fact

of death may be established by the affidavit or certified statement of one or more persons who have personal knowledge of the fact of death, have viewed the body of the deceased, and know it to be the body of the person whose death is being alleged. These affidavits or statements should describe all the facts and circumstances known concerning the death, including the place, date, time, and cause of death.

(d) *Other methods of establishing death.* If the claimant cannot furnish the affidavits or certified statements described in paragraph (c) of this section, the fact of death may be established by one of the following:

(1) *U.S. Government agency finding.* In the absence of evidence to the contrary, VA will accept a finding of the fact of death by another U.S. Government agency.

(2) *Body not recovered or not identifiable.* If circumstances preclude recovery or identification of the body of the deceased, the fact of death may be established by the claimant's affidavit or certified statement setting forth the circumstances under which the missing person was last seen, the known facts which led the claimant to believe that death has occurred, and one of the following, as applicable:

(i) The affidavits or certified statements of persons who witnessed the event in which the missing person is alleged to have perished, describing the event and, if applicable, why they believe the missing person perished in the event, or

(ii) If the testimony of eyewitnesses is not obtainable, the affidavits or certified statements of persons who have the most reliable information available concerning why the missing person is believed to have been at the event in which the missing person is alleged to have perished, why the missing person was in imminent peril at the time the event occurred, and the basis on which they concluded that death was caused by the event.

(3) *Finding of fact of death by authorized VA official.* An authorized VA official may make a finding of the fact of death where death is shown by competent evidence. See § 5.5 (concerning delegation of authority to make findings and decisions concerning entitlement to benefits).

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

§ 5.502 Proving death after 7 years of continuous, unexplained absence.

(a) *Evidence required.* A claimant seeking to establish the death of a person who has been absent for 7 years, where death is not established with documentary evidence described in § 5.500 or § 5.501, must produce competent, credible evidence to show that:

(1) The person has been continuously absent from home and family for at least 7 years without explanation; and

(2) A diligent search disclosed no evidence of the person's continued existence after the absence.

(b) *Finding of death conclusive.* A finding of death under this section will be conclusive and final for purposes of laws administered by VA except where suit is filed for insurance under 38 U.S.C. 1984, Suits on insurance.

(c) *Impact of findings of death made by other entities.* (1) State laws that provide for presumption of death are not applicable to claims for benefits and may not be used to establish death under this section.

(2) A finding of death by another Federal agency meeting the criteria described in paragraphs (a)(1) and (2) of this section is acceptable for VA purposes if there is no credible evidence to the contrary.

(Authority: 38 U.S.C. 108, 501(a)(1))

§ 5.503 Establishing the date of death.

(a) *Applicability.* This section applies when the fact of death is established under §§ 5.500 through 5.502, but the exact date of death is uncertain.

(b) *Date of death in cases involving a continuous, unexplained absence of seven years or more.* When the fact of death is established under § 5.502, the date of death for purposes of the laws administered by VA is 7 years after the date the person was last known to be alive.

(c) *Date of death in other cases.* If the fact of death is established by the evidence described in § 5.500 or § 5.501, VA will determine the date of death for purposes of the laws administered by VA by considering all of the known facts and circumstances surrounding the death, including, but not limited to, the condition of the body when found and any estimate of the date of death provided by a coroner or other official within the scope of that official's duties. If no identifiable body is found, the date of death will be presumed to be the date the deceased was last known to be alive in the absence of evidence to the contrary.

(Authority: 38 U.S.C. 108, 501(a))

§ 5.504 Service-connected cause of death.

(a) *Purpose.* Eligibility for several benefits for a veteran's survivors requires that the veteran's death be service connected. This section provides the rules VA uses to determine whether a veteran's death is service connected.

(b) *Definition of service-connected disability.*—(1) *General.* For purposes of this section, *service-connected disability* means:

(i) Except as provided in paragraph (b)(2) of this section, a disability that was service connected at the time of the veteran's death, or

(ii) A disability that is service connectable under the provisions of subpart E of this part, Claims for service connection and disability compensation. For purposes of this section, VA will presume that a death that occurred in line of duty was preceded by disability.

(2) *Exception.* For purposes of this section, ''service-connected disability'' does not include a disability that was service connected at the time of the veteran's death if the law in effect at the time of a survivor's claim precludes VA from establishing service connection for the cause of the veteran's death. See §§ 5.365 and 5.662(a) and (c)(2).

(c) *Determining whether a veteran's death is service connected.* A veteran's death is service connected if death resulted from a service-connected disability. Death resulted from a service-connected disability if the service-connected disability produced death or hastened death, as provided in the following paragraphs:

(1) *Service-connected disability produces death.* A service-connected disability is the cause of death if a single service-connected disability, or the combined effect of multiple service-connected disabilities, is such that death would not have occurred in the absence of the disability, or disabilities. If two or more disabilities were present at the time of death, only one of which was service connected or service connectable, and each disability by itself was sufficient to bring about death, VA will grant service connection for the cause of the veteran's death.

(2) *Contributory cause of death.* (i) Contributory cause of death is inherently one not related to the principal cause. In determining whether the service-connected disability contributed to death, it must be shown that it contributed substantially or materially; that it combined to cause death; that it aided or lent assistance to produce death. It is not sufficient to show that it casually shared in producing death, but rather it must be shown that there was a causal connection.

(ii) Generally, minor service-connected disabilities, particularly those of a static nature or not materially affecting a vital organ, would not be held to have contributed to death primarily due to unrelated disability. In

the same category there would be included service-connected disease or injuries of any evaluation (even though evaluated as 100 percent disabling) but of a quiescent or static nature involving muscular or skeletal functions and not materially affecting other vital body functions.

(iii) Service-connected diseases or injuries involving active processes affecting vital organs should receive careful consideration as a contributory cause of death, the primary cause being unrelated, from the viewpoint of whether there were resulting debilitating effects and general impairment of health to an extent that would render the person materially less capable of resisting the effects of other disease or injury primarily causing death. Where the service-connected condition affects vital organs as distinguished from muscular or skeletal functions and is evaluated as 100 percent disabling, debilitation may be assumed.

(iv) There are primary causes of death which by their very nature are so overwhelming that eventual death can be anticipated irrespective of coexisting conditions, but, even in such cases, there is for consideration whether there may be a reasonable basis for holding that a service-connected condition was of such severity as to have a material influence in accelerating death. In this situation, however, it would not generally be reasonable to hold that a service-connected condition accelerated death unless such condition affected a vital organ and was of itself of a progressive or debilitating nature.

(Authority: 38 U.S.C. 101(16), 501(a), 1121, 1141, 1310)

§§ 5.505–5.509 [Reserved]

Dependency and Indemnity Compensation—General

§ 5.510 Dependency and indemnity compensation—basic entitlement.

(a) *Definition.* Dependency and indemnity compensation (DIC) is a monthly VA payment to a veteran's survivor (surviving spouse, child, or parent) based on the veteran's death.

(b) *Bases for entitlement.* There are three ways in which a survivor may become entitled to DIC:

(1) *Service-connected death—38 U.S.C. 1310.* (i) VA will grant DIC to the survivor of a veteran when it determines that the cause of the veteran's death, whether occurring during or after service, is service connected. See 38 U.S.C. 1310, Deaths entitling survivors to dependency and indemnity compensation, and § 5.504.

(ii) DIC is not payable unless the service-connected death occurred after December 31, 1956, except in the case of certain persons receiving or eligible to receive death compensation who elect to receive DIC in lieu of death compensation. See §§ 5.742 and 5.759.

(2) *Veterans with a service-connected disability rated as totally disabling at the time of death—38 U.S.C. 1318.* VA will grant DIC to the survivor of a veteran rated totally disabled due to service-connected disability for a specified period of time at the time of death, in the same manner as if the veteran's death was service connected. See 38 U.S.C. 1318, Benefits for survivors of certain veterans rated totally disabled at time of death, and §§ 5.521 and 5.522.

(3) *Veterans whose death was due to certain VA-furnished medical, training, compensated work therapy, or rehabilitation services—38 U.S.C. 1151.* VA will grant DIC to the survivor of a veteran whose death was caused by VA-furnished hospital care, medical or surgical treatment, medical examination, training and rehabilitation services, or participation in a compensated work therapy program, in the same manner as if the veteran's death were service connected. See § 5.350.

(c) *Certain Federal Employees' Group Life Insurance beneficiaries ineligible.* VA cannot pay DIC to any surviving spouse, child or parent based on the death of a commissioned officer of the Public Health Service, the Coast and Geodetic Survey, the Environmental Science Services Administration, or the National Oceanic and Atmospheric Administration occurring after April 30, 1957, if any amounts are payable based on the same death under the Federal Employees' Group Life Insurance Act of 1954 (Pub. L. 83–598, 86 Stat. 736, as amended).

(d) *Special rules for parents' DIC.* The basis of entitlement described in paragraph (b)(2) of this section does not apply to parent's DIC, and payment of parent's DIC is subject to income limitations. See §§ 5.530 through 5.537 for special eligibility and payment rules for parent's DIC.

(Authority: 38 U.S.C. 101(14), 1151, 1304, 1310, 1315, 1318; Sec. 501(c)(2), Pub. L. 84–881, 70 Stat. 880, as amended by Sec. 13(u), Pub. L. 85–857, 72 Stat. 1266; Sec. 5, Pub. L. 91–621, 84 Stat. 1864)

§ 5.511 Special monthly dependency and indemnity compensation.

(a) *Entitlement based on need for regular aid and attendance.* A surviving spouse or parent in receipt of dependency and indemnity compensation (DIC) is entitled to special monthly DIC benefits if he or she needs regular aid and attendance. VA will make determinations of the need for aid and attendance under the criteria in § 5.320.

(b) *Automatic entitlement.* VA will automatically consider a person to need regular aid and attendance, without having to demonstrate the disability described in paragraph (a) of this section, if the person:

(1) Is blind or so nearly blind as to have corrected visual acuity of 5/200 or less in both eyes;

(2) Has concentric contraction of the visual field in both eyes to 5 degrees or less; or

(3) Is a patient in a nursing home because of mental or physical incapacity.

(c) *Entitlement based on permanent housebound status—surviving spouse.* A surviving spouse who is not entitled to special monthly DIC based on the need for regular aid and attendance, as provided in paragraphs (a) and (b) of this section, is entitled to special monthly DIC if he or she is permanently housebound. A surviving spouse will be considered permanently housebound if substantially confined to his or her home (ward or clinical areas, if institutionalized) or immediate premises because of a disability or disabilities, and it is reasonably certain that such disability or disabilities will remain throughout the surviving spouse's lifetime.

(Authority: 38 U.S.C. 1311(c), (d), 1315(g))

§ 5.512 Eligibility for death compensation or death pension instead of dependency and indemnity compensation.

(a) *General rule.* Subject to paragraph (b) of this section, VA will not pay death compensation or death pension to any person eligible for dependency and indemnity compensation (DIC) based upon a death occurring after December 31, 1956.

(b) *Right of spouse to elect death pension.* A surviving spouse eligible for DIC may elect to receive death pension instead of DIC. For effective date information, see § 5.743(a).

(Authority: 38 U.S.C. 1317)

§§ 5.513–5.519 [Reserved]

Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for Surviving Spouses and Children

§ 5.520 Dependency and indemnity compensation—time of marriage requirements for surviving spouses.

(a) *Purpose.* In addition to meeting the marriage requirements necessary to

qualify as a surviving spouse, as defined at § 5.200(a), a surviving spouse must meet certain requirements concerning the time of his or her marriage to the veteran in order to be eligible for dependency and indemnity compensation (DIC). This section sets out those requirements.

(b) *Time of marriage requirements.*—(1) *Surviving spouse eligible under § 5.510(b)(1) or (3).* A surviving spouse meets the time of marriage requirements for DIC under the bases for eligibility set out in § 5.510(b)(1) or (3) if his or her marriage to the veteran meets any of the following criteria:

(i) The surviving spouse married the veteran before or during the veteran's military service.

(ii) The surviving spouse was married to the veteran for 1 year or more. Multiple periods of marriage may be added together to meet the 1-year marriage requirement.

(iii) The surviving spouse was married to the veteran for any length of time and a child was born of the marriage or was born to them before the marriage. See § 5.1 for the definition of, child born of the marriage and child born before the marriage.

(iv) The surviving spouse married the veteran no later than 15 years after the date of termination of the period of service in which the injury or disease causing the veteran's death was incurred or aggravated. For purposes of paragraph (b)(1) of this section, *period of service* means a period of active military service from which the veteran was discharged under conditions other than dishonorable. If the surviving spouse has been married to the veteran more than once, see § 5.200, Surviving spouse: requirement of valid marriage to veteran.

(2) *Surviving spouse eligible under § 5.510(b)(2).* A surviving spouse meets the time of marriage requirements for DIC under the basis for eligibility set out in § 5.510(b)(2), concerning veterans with a service-connected disability rated as totally disabling at the time of death under 38 U.S.C. 1318, if his or her marriage to the veteran meets any of the following criteria:

(i) The surviving spouse was married to the veteran continuously for 1 year or more immediately preceding the veteran's death.

(ii) The surviving spouse was married to the veteran for any length of time and a child was born of the marriage or was born to them before the marriage. See § 5.1 for the definition of child born of the marriage and child born before the marriage.

(Authority: 38 U.S.C. 1151, 1304, 1310, 1318)

§ 5.521 Dependency and indemnity compensation benefits for survivors of certain veterans rated totally disabled at time of death.

(a) Even though a veteran died of non-service-connected causes, VA will pay death benefits to the surviving spouse or child in the same manner as if the veteran's death was service connected, if:

(1) The veteran's death was not the result of his or her willful misconduct; and

(2) At the time of death, the veteran was receiving, or was entitled to receive, compensation for service-connected disability that was:

(i) Rated by VA as totally disabling for a continuous period of at least 10 years immediately preceding death;

(ii) Rated by VA as totally disabling continuously since the veteran's release from active duty and for at least 5 years immediately preceding death; or

(iii) Rated by VA as totally disabling for a continuous period of not less than 1 year immediately preceding death, if the veteran was a former prisoner of war.

(Authority: 38 U.S.C. 1318(b))

(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 §§ 5.166 and 5.55(b), 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) of this section, 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 determined that benefits were payable under 38 U.S.C. 5309.

(c) For purposes of this section, ''rated by VA as totally disabling'' includes total disability ratings based on unemployability (§ 4.16 of this chapter).

§ 5.522 Dependency and indemnity compensation benefits for survivors of certain veterans rated totally disabled at time of death—offset of wrongful death damages.

(a) *Applicability.* This section applies when a surviving spouse or child:

(1) Is eligible for dependency and indemnity compensation (DIC) on the basis described in § 5.510(b)(2), concerning veterans with a service-connected disability rated as totally disabling at the time of death under 38 U.S.C. 1318; and

(2) Receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages for the wrongful death of the veteran whose death is the basis for such benefits.

(b) *Offset.* VA will not pay DIC on the basis described in § 5.510(b)(2), concerning veterans with a service-connected disability rated as totally disabling at the time of death under 38 U.S.C. 1318, for any month after a month in which the beneficiary receives money or property described in paragraph (a)(2) of this section until the total amount of the DIC benefits that would otherwise have been payable equals the total amount of such money and/or value of such property. This paragraph (b) does not apply to DIC benefits payable under this section for any period before the end of the month in which such money or property was received.

(c) *Amount of offset.* The following rules apply when calculating the amount to be offset in DIC cases:

(1) VA will count in the amount to be offset damages typically recoverable under wrongful death statutes, such as reimbursement for the loss of support,

services, and other contributions, which the surviving spouse or child would have received if the veteran had lived and, where allowed, reimbursement for pain, suffering or mental anguish of the survivors due to death. Damages recoverable as compensation for injuries suffered by, or economic loss sustained by, the veteran prior to death such as wages lost prior to death, medical expenses, and compensation for the veteran's pain and suffering prior to death are not counted.

(2) VA will count in the amount to be offset amounts paid to a third party to satisfy a legal obligation of the surviving spouse or child. VA will also count the payment of the claimant's proportional share of attorney's fees, court costs, and other expenses incident to the civil claim.

(3) VA will not count in the amount to be offset money or property payable to a person or entity other than the spouse or child under the terms of the judgment, settlement, or compromise agreement unless the spouse or child receives the benefit of such a payment. For example, wrongful death damages paid to a veteran's estate or into a trust or similar arrangement will be counted in the amount to be offset to the extent that they are distributed to, or available for the use and benefit of, the surviving spouse or child.

(4) VA will not count in the amount to be offset benefits received under Social Security or worker's compensation even though such benefits may have been awarded in a judicial proceeding.

(5) The value of property received is that property's fair market value at the time it is received by the claimant.

(d) *Beneficiary's duty to report receipt of money or property.* Any person entitled to DIC on the basis described in § 5.510(b)(2), concerning veterans with a service-connected disability rated as totally disabling at the time of death under 38 U.S.C. 1318, must promptly report to VA the receipt of any money or property described in paragraph (a)(2) of this section. This obligation may be satisfied by providing VA a copy of the judgment, settlement agreement, or compromise agreement awarding the money or property. Overpayments created by failure to report will be subject to recovery if not waived.

(Authority: 38 U.S.C. 1318(d))

§ 5.523 Dependency and indemnity compensation rate for a surviving spouse.

(a) *General determination of rate.* When VA grants a surviving spouse entitlement to dependency and indemnity compensation (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) *Section 1311(a)(2) increase.* The basic monthly rate under paragraph (b) of this section will 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 8 years immediately preceding death. Determinations of entitlement to this increase will 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 before 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 the section 38 U.S.C. 1311(a)(2) 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 (d) may not be increased by the section 1311(a)(2) 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 the 38 U.S.C. 1311(a)(2) increase.

(1) *Increase for a child.* If the surviving spouse has one or more children of the deceased veteran who are under age18 (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 need regular aid and attendance under the criteria in §§ 5.320, Determining need for regular aid and attendance, and 5.332(c), Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2) 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 is not entitled to the regular aid and attendance allowance but is housebound under the criteria in § 5.391(b), Special monthly pension for a veteran or surviving spouse at the housebound rate, the monthly DIC rate will be increased by the amount set forth in 38 U.S.C. 1311(d).

(4) For a 2-year period beginning on the date entitlement to DIC commenced, the DIC paid monthly to a surviving spouse with one or more children under age18 will be increased by the amount set forth in 38 U.S.C. 1311(f), regardless of the number of such children. The DIC payable under this paragraph (e) is in addition to any other DIC payable. The increase in DIC of a surviving spouse under this paragraph (e) will cease beginning with the first of the month after the month in which the youngest child of the surviving spouse has attained age 18.

(Authority: 38 U.S.C. 1311(f))

(f) *Criteria governing section 1311(a)(2) increase.* In determining whether a surviving spouse is entitled to the section 1311(a)(2) increase under paragraph (c) of this section, the following standards will apply.

(1) *Marriage requirement.* The surviving spouse must have been married to the veteran for the entire 8-year period referenced in paragraph (c) of this section.

(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 §§ 5.150(a), 5.153, and 5.166, 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 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)

§ 5.524 Awards of dependency and indemnity compensation benefits to a child when there is a retroactive award to a schoolchild.

(a) *Applicability.* Dependency and indemnity compensation (DIC) is payable to a child when there is no surviving spouse entitled to DIC. The total amount VA pays to a child depends on the number of children, and the amount that is paid to each child in equal shares. This section states an exception that applies when all of the following conditions are met:

(1) DIC is currently being paid to one or more children;

(2) DIC had previously been paid to an additional child, but payment was discontinued because that child reached age 18;

(3) DIC has been reestablished for that child because he or she is attending an approved educational institution; and

(4) The effective date of the additional child's reestablished entitlement is prior to the date VA received that child's application to reestablish entitlement.

(b) *Award to the additional child.*—(1) *Retroactive payment.* When VA approves reinstatement of DIC to an additional child, that child is entitled to retroactive payment for the time period between when the child's entitlement arose and the time VA resumed payment of the DIC award. Retroactive payment is calculated by determining the difference between the total amount payable for all children, including the additional child during the retroactive period and the total amount VA actually paid to the other children during that period. If more than one child reestablishes entitlement as described in paragraph (a) of this section, the retroactive award will be paid to each such child in equal shares.

(2) *Payment commencement date for full equal share.* The additional child will be entitled to a full equal share of DIC the first day of the month after the month in which VA approved the additional child's reestablished DIC award.

(c) *Effective date of payment of reduced shares to any other child.* The running award to any other child will be reduced to the amount of their new equal shares effective the first day of the month after the month in which VA approved the additional child's reestablished DIC award.

(Authority: 38 U.S.C. 1313(b), 5110(e), 5111)

Cross-reference: Sections 5.693 Beginning date for certain VA payments, and 5.696 Payments to or for a child pursuing a course of instruction at an approved educational institution.

§ 5.525 Awards of dependency and indemnity compensation when not all dependents apply.

Except as provided in § 5.536(e), in any case where a dependency and indemnity compensation (DIC) claim has been filed by or on behalf of at least one dependent but VA believes that other dependents may be entitled to DIC based on the death of the same veteran, the award (original or amended) to all dependents who have filed claims will be made for all periods at the rates and in the same manner as if there were no dependents other than the dependents who filed claims. However, if the file reflects that there are additional potential DIC claimants and less than 1 year has passed since the veteran's death, the award to a dependent who has filed a claim will be made at the rate which would be payable as if all dependents were receiving benefits. If, at the expiration of the 1-year period, claims have not been filed for such dependents, VA will pay the full rate to the dependents already receiving DIC. This payment will include any retroactive amounts to which they are entitled.

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

§§ 5.526–5.529 [Reserved]

Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for a Parent

§ 5.530 Eligibility for, and payment of, parent's dependency and indemnity compensation.

(a) *Basic eligibility.* A veteran's surviving parent may receive dependency and indemnity compensation (DIC) on the basis described in § 5.510(b)(1), concerning service-connected death under 38 U.S.C. 1310, and § 5.510(b)(3), concerning veterans whose death was due to certain VA-furnished medical, training, compensated work therapy, or rehabilitation services under 38 U.S.C. 1151. DIC is not payable to a parent on the basis described in § 5.510(b)(2), concerning veterans with a service-connected disability rated as totally disabling at the time of death under 38 U.S.C. 1318.

(b) *Parent's DIC is income based.* Unlike DIC benefits for a surviving spouse and child, the amount of a parent's DIC payable is adjusted based on a parent's income and DIC is not payable to a parent whose income exceeds statutory limits. Sections 5.531 through 5.537 provide income and payment rules.

(c) *Net worth not considered.* Net worth is not a factor in determining entitlement to a parent's DIC or the amount of a parent's DIC payable.

(Authority: 38 U.S.C. 501(a), 1151, 1310, 1315, 1318)

§ 5.531 General income rules for parent's dependency and indemnity compensation.

(a) *All payments are counted in income.* All payments of any kind from any source are counted in determining the income of a veteran's parent, except as provided in § 5.533.

(b) *Payments.* (1) *What is counted.* For purposes of this section, ''payments'' are cash and cash equivalents (such as checks and other negotiable instruments) and the fair market value of personal services, goods, or room and board a parent receives in lieu of other forms of payment.

(2) *What is not counted.* ''Payments'' do not include any of the following:

(i) The value of a parent's use of his or her property, such as the rental value of a home a parent owns and lives in.

(ii) Dividends from commercial insurance policies.

(iii) Retirement benefits from the following sources (or to the following persons), if the benefits have been waived pursuant to Federal statute:

(A) Civil Service Retirement and Disability Fund;

(B) Railroad Retirement Board;

(C) District of Columbia, for firemen, policemen, or public school teachers;

(D) Former U.S. Lighthouse Service.

(c) *Spousal income combined.* Income for purposes of a parent's dependency and indemnity compensation (DIC) benefits is the combined income of a parent and the parent's spouse, unless the marriage has been terminated or the parent is legally separated from his or her spouse. Income is combined whether the parent's spouse is the veteran's other surviving parent or the veteran's stepparent. See § 5.534(c) concerning how much of the spouse's income to count for the year of remarriage.

(d) *Income-producing property.*—(1) *Scope.* This paragraph (d) provides rules for determining whether income from property will be counted as a parent's income. The provisions of this paragraph (d) apply to all property, real or personal, in which a parent has an interest, whether acquired through purchase, bequest or inheritance.

(2) *Proof of ownership.* In determining whether to count income from real or personal property, VA will consider the terms of the recorded deed or other evidence of title. However, VA will accept the claimant's statement concerning the terms of ownership in the absence of evidence to the contrary.

(3) *Transfer of ownership with retention of income.* If a parent transfers ownership of property to another person or legal entity, but retains the right to income, the income will be counted.

(4) *Income from jointly owned property.* In the absence of evidence showing otherwise, VA will consider a parent who owns property jointly with others, including partnership property, to be entitled to a share of the income from that property proportionate to the parent's share of ownership. VA will accept the claimant's statement concerning the terms of ownership in the absence of evidence to the contrary.

(e) *Procedure when income amounts are uncertain—deferred determinations.* When a parent is uncertain about the amount of income the parent will receive during a calendar year, VA will calculate dependency and indemnity payments for that calendar year using the highest amount of income the parent estimates, or VA's best estimate of income if the parent's estimate appears to be unrealistically low in light of the parent's past income and current circumstances. VA will adjust benefits, or pay benefits, when actual total income for the year is determined. See § 5.535.

(Authority: 38 U.S.C. 1315(f))

§ 5.532 Deductions from income for parent's dependency and indemnity compensation.

(a) *Expenses of a business or profession.* Necessary business operating expenses are deductible from gross income from a business or profession. Examples include the cost of goods sold and payments for rent, taxes, upkeep, repairs, and replacements. Depreciation is not a deductible expense. Losses sustained in operating a business or profession may not be deducted from income from any other source. For purposes of this section, ''business'' includes, but is not limited to, the operation of a farm and transactions involving investment property.

(b) *Expenses associated with disability, accident, or health insurance recoveries.*

VA will deduct from sums recovered under disability, accident, or health insurance medical, legal, or other expenses incident to the insured injury or illness. However, VA will not deduct the same medical expenses under this paragraph (b) and paragraph (d) of this section.

(c) *Expenses of a deceased spouse or of the deceased veteran.*—(1) *Deceased spouse.* Amounts a parent pays for the following expenses of a deceased spouse are deductible:

(i) A deceased spouse's just debts, excluding debts secured by real or personal property.

(ii) The expenses of the spouse's last illness and burial to the extent such expenses are not reimbursed by VA under 38 U.S.C. chapter 23 (see subpart J of this part concerning VA burial benefits) or 38 U.S.C. chapter 51 (see § 5.551(e) concerning the use of accrued benefits to reimburse the person who bore the expense of a deceased beneficiary's last sickness or burial).

(2) *Deceased veteran.* Amounts a parent pays for the expenses of the veteran's last illness and burial are deductible to the extent that such expenses are not reimbursed by VA under 38 U.S.C. chapter 23 (see subpart J of this part concerning VA burial benefits).

(3) *When expenses are deducted.* Expenses deductible under this paragraph (c) are deductible for the year in which they were paid. However, if such expenses were paid during the year following the year the veteran or spouse died, the expenses may be deducted for the year the expenses were paid or the year of death, whichever is to the parent's advantage.

(4) *Proof of expenses.* VA will accept as proof of expenses deductible under this paragraph (c) a claimant's statement as to the amount and nature of each expense, the date of payment, and the identity of the creditor unless the circumstances create doubt as to the credibility of the statement.

(d) *Unusual medical expenses.*—(1) *Definitions*—(i) *Family members.* For purposes of this section, a family member is a relative of the parent or parent's spouse, who is a member of the household of the parent or parent's spouse, and whom the parent or parent's spouse has a moral or legal obligation to support. This includes a relative who would normally be a resident of the household, but who is physically absent due to unusual or unavoidable circumstances, such as a child away at school or a family member confined to a nursing home.

(ii) *Unusual medical expenses.* For purposes of this section, *unusual medical expenses* means unreimbursed medical expenses above 5 percent of annual income. For the definition of medical expenses that VA will deduct, see § 5.707.

(2) *Expenses of parent and parent's family members.* VA will deduct amounts paid by a parent for his or her unusual medical expenses and those of family members.

(3) *Expenses of spouse and spouse's family members.* VA will deduct the unusual medical expenses of the spouse and the spouse's family members if the combined annual income of the parent and the parent's spouse is the basis for calculating income.

(4) *When expenses are deducted.* VA will deduct unusual medical expenses from income for the calendar year in which they were paid regardless of when the expenses were incurred.

(5) *Proof of expenses.* VA will accept the claimant's statement as to the amount and nature of each medical expense, the date of payment, and the identity of the creditor unless the circumstances create doubt as to the credibility of the statement.

(6) *Estimates of expenses for future benefit periods.* For purpose of authorizing prospective payment of benefits, VA may accept a claimant's estimate of future medical expenses based on a clear and reasonable expectation that unusual medical expenditure will be incurred. VA will adjust an award based on such an estimate upon receipt of an amended estimate or upon receipt of an eligibility verification report. See §§ 5.708 and 5.709 concerning requirements for eligibility verification reports.

(e) *Certain salary deductions not deductible for determining income.* For purposes of determining a parent's

income, a salary may not be reduced by the amount of deductions made under a retirement act or plan or for income tax withholding.

(Authority: 38 U.S.C. 1315(f))

§ 5.533 Income not counted for parent's dependency and indemnity compensation.

VA will not count payments from the following sources when calculating a parent's income for dependency and indemnity compensation (DIC) purposes:

(a) *Death gratuity.* Death gratuity payments by the Secretary concerned under 10 U.S.C. 1475 through 1480. This includes death gratuity payments in lieu of payments under 10 U.S.C. 1478 made to certain survivors of Persian Gulf conflict veterans authorized by sec. 307, Pub. L. 102–25, 105 Stat. 82.

(b) *Donations received.* Donations from public or private relief or welfare organizations, including the following:

(1) The value of maintenance furnished by a relative, friend, or a civic or governmental charitable organization, including money paid to an institution for the care of the parent due to impaired health or advanced age.

(2) Benefits received under noncontributory programs, such as Supplemental Security Income payments.

(c) *Certain VA benefit payments.* The following VA benefit payments:

(1) Payments under 38 U.S.C. chapter 11, Compensation for Service-Connected Disability or Death.

(2) Payments under 38 U.S.C. chapter 13, Dependency and Indemnity Compensation for Service-Connected Death. However, payments under 38 U.S.C. 1312(a), described in § 5.583 are counted as income.

(3) Nonservice-connected VA disability and death pension payments.

(4) VA benefit payments listed in § 5.472(e).

(d) *Certain life insurance payments.* Payments under policies of Servicemembers' Group Life Insurance, U.S. Government Life Insurance, or National Service Life Insurance.

(e) *Social Security death payments.* Lump-sum death payments under title II of the Social Security Act.

(f) *State service bonuses.* Payments of a bonus or similar cash gratuity by any State based upon service in the Armed Forces.

(g) *10 percent of income from retirement plans and similar plans and programs.* 10 percent of the amount of payments to a person under public or private retirement, annuity, endowment, or similar plans or programs is not counted as income under this section. This includes payments for:

(1) Annuities or endowments paid under a Federal, State, municipal, or private business or industrial plan.

(2) Old age and survivor's insurance and disability insurance under title II of the Social Security Act.

(3) Retirement benefits received from the Railroad Retirement Board.

(4) Permanent and total disability or death benefits received from the Office of Workers' Compensation Programs of the U.S. Department of Labor, the Social Security Administration, or the Railroad Retirement Board, or pursuant to any worker's compensation or employer's liability statute, including damages collected incident to a tort suit under employer's liability law of the U.S. or a political subdivision of the U.S. This ten percent exclusion applies after the income from the specified payments is reduced by the deductions described in § 5.532(b) concerning expenses associated with disability, accident, or health insurance recoveries.

(5) A commercial annuity, endowment, or life insurance proceeds.

(6) Disability, accident or health insurance proceeds. This ten percent exclusion applies after the income from the specified payments is reduced by the deductions described in § 5.532(b) concerning expenses associated with disability, accident, or health insurance recoveries.

(h) *Casualty loss reimbursement.* Reimbursements of any kind for any casualty loss are not counted, but only up to the greater of the fair market value or the reasonable replacement cost of the property involved immediately preceding the loss. For purposes of this section, a ''casualty loss'' is the complete or partial destruction of property resulting from an identifiable event of a sudden, unexpected or unusual nature.

(i) *Profit from sale of non-business property.* (1) Profit realized from the sale of real or personal property other than in the course of a business. However, any amounts received in excess of the sale price, such as interest payments, will be counted as income.

(2) If payments are received in installments, the sums received (including principal and interest) will not be counted until the parent has received an amount equal to the sale price. Any amounts received after the sale price has been recovered will be counted as income.

(j) *Payment for civic obligations.* Payments received for discharge of jury duty or other obligatory civic duties.

(k) *Radiation Exposure Compensation Act payments.* Payments under Section 6 of the Radiation Exposure Compensation Act of 1990.

(Authority: 42 U.S.C. 2210 (note))

(l) *Ricky Ray Hemophilia Relief Fund payments.* Payments under section 103(c)(1) of the Ricky Ray Hemophilia Relief Fund Act of 1998.

(Authority: 42 U.S.C. 300c–22 (note))

(m) *Energy Employees Occupational Illness Compensation Program payments.* Payments under the Energy Employees Occupational Illness Compensation Program.

(Authority: 42 U.S.C. 7385e(2))

(n) *Payments to Aleuts.* Payments to certain eligible Aleuts under 50 U.S.C. Appx. 1989c–5.

(Authority: 50 U.S.C. Appx. 1989c–5(d)(2))

(o) *Increased inventory value of a business.* The value of an increase of stock inventory of a business.

(p) *Employer contributions.* An employer's contributions to health and hospitalization plans for either an active or retired employee.

(q) *Other payments.* Other payments listed in §§ 5.706 and 5.707.

(Authority: 38 U.S.C. 1315(f))

§ 5.534 When VA counts a parent's income for parent's dependency and indemnity compensation.

(a) *General rules.* (1) VA counts income on a calendar year basis for purposes of a parent's dependency and indemnity compensation (DIC) benefits.

(2) The calendar year for which VA will count income is the calendar year in which the parent received the income, or anticipates receiving it.

(3) VA will count a parent's total income for the calendar year except as provided in this section.

(b) *Exception for first awards and awards following a period of no entitlement—proportionate annual income.*—(1) *When used.* VA will use proportionate annual income for the first award of parent's DIC, or for resuming payments on an award of a parent's DIC which was discontinued for a reason other than excess income or a change in marital or dependency status, if it is to the parent's advantage. Otherwise, VA will base the award on the parent's actual total annual income for the entire calendar year.

(2) *Proportionate annual income calculation.* A proportionate annual income calculation disregards income received, and expenses paid, prior to the effective date of an initial award of parent's DIC, or prior to the effective date of an award that follows a period of no entitlement for a reason other than excess income or a change in marital or

dependency status. In performing a proportionate annual income calculation, VA first determines what the parent's income was for the portion of the calendar year from the effective date of the award of a parent's DIC to the end of the calendar year. VA then calculates what annual income would have been if income had been received at the same rate for the entire calendar year.

(3) *How VA computes proportionate annual income.* VA will use the following steps in making the proportionate annual income calculation, rounding the result only at the final step.

(i) Determine income from the effective date of the award of a parent's DIC to the end of the calendar year, disregarding income received and expenses paid before the effective date of the award.

(ii) Divide the result by the number of days from the effective date of the award of parent's DIC to the end of the calendar year.

(iii) Multiply that result by 365. This result, rounded down to the nearest dollar, is the proportionate annual income.

(c) *Exception for an increase in income because of a parent's marriage.* If a parent marries during the applicable calendar year, income received by the parent's spouse prior to the date of the marriage is not counted.

(Authority: 38 U.S.C. 501(a), 1315(b))

§ 5.535 Adjustments to a parent's dependency and indemnity compensation when income changes.

(a) (1) *Applicability.* This paragraph (a) applies when, based on anticipated income, VA did not pay parent's DIC for a particular calendar year, or paid less than the full applicable statutory rate for that particular calendar year, but income for that calendar year was actually less than anticipated.

(2) *Retroactive adjustment; income reporting time limitation.* VA may retroactively pay a parent's DIC or pay a higher rate of a parent's DIC from the first of the applicable calendar year under the following circumstances:

(i) Satisfactory evidence shows that income was actually less than anticipated for that calendar year; and

(ii) VA receives such evidence no later than the end of the calendar year after the calendar year to which the evidence pertains. Otherwise, payment or increased payments may not be made for the applicable calendar year on the basis of such evidence.

(b) (1) *Applicability.* This paragraph (b) applies when, based on actual income, VA did not pay a parent's DIC for a particular calendar year, or paid less than the full applicable statutory rate for that particular calendar year, but the parent's income then changes.

(2) *Actual income.* If VA adjusts a parent's benefits for a given 12-month annualization period, pension or dependency and indemnity compensation may be awarded or increased, effective the beginning of the next 12-month annualization period, if satisfactory evidence is received within that period.

(Authority: 38 U.S.C. 501(a), 1315(e), 5110(a))

Cross-Reference: Sections 5.708 Eligibility verification reports and 5.709 Claimant and beneficiary responsibility to report changes.

§ 5.536 Parent's dependency and indemnity compensation rates.

(a) *Statutory rates.* VA pays dependency and indemnity compensation (DIC) to a parent based upon statutory rates that vary depending upon whether both parents are living, upon the parent's marital status, upon whether a parent is legally separated from his or her spouse, and upon whether a parent is a patient in a nursing home, significantly disabled or blind, or so disabled or blind as to require the aid and attendance of another person. These rates are reduced by varying amounts that depend upon the parent's income. See 38 U.S.C. 1315. Rate and income limitations are periodically adjusted whenever there is an increase in benefit amounts payable under title II of the Social Security Act. See 38 U.S.C. 5312(b). In cases based on service in the Commonwealth Army of the Philippines, as a guerrilla, or as a Philippine Scout, see § 5.615 (concerning calculation of the parent's DIC income limitation for claims based on such service).

(b) *Use of published rates and income limitations.* Whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of title II of the Social Security Act, VA increases the annual income limitations and the maximum monthly rates of parent's DIC by the same percentage as the Social Security increase. These increases are effective on the same date as the Social Security increase. VA will publish parent's DIC rates, the annual income limitations, and the formulas for adjusting parent's DIC rates for annual income in the Notices section of the **Federal Register** when there is a change in the amounts. VA will use this published data in calculating parent's DIC payments. The rates referenced in paragraphs (c) through (e) of this section are the rates specified in the applicable **Federal Register** notice of an increase in the rates of parent's DIC.

(c) *One parent—remarried.* Where there is only one parent and that parent has remarried and is living with his or her spouse, VA will pay DIC at the rate for one parent who has not remarried, or the rate applicable to a remarried parent living with his or her spouse, whichever will provide the greater monthly rate of DIC. However, § 5.531(c) (requiring spousal income to be combined) applies in either instance.

(d) *One parent—marriage ends or parent is legally separated from spouse.* When one parent has remarried and that marriage has ended or the parent is legally separated from his or her spouse, the rate of DIC for that parent will be that which would be payable if there is only one parent alone or two parents not living together, whichever applies.

(e) *Two parents living—one parent files DIC application.* Where there are two parents of the veteran living and only one parent has filed an application for DIC, the rate of DIC payable to that parent will be that which would be payable to such parent if both parents had filed an application.

(f) *Minimum payment.* (1) *Five dollar minimum.* If any payment of a parent's DIC is due after the applicable rate payable is adjusted for income, the amount of that payment will not be less than $5 monthly.

(2) *Minimum DIC payment required for special monthly DIC.* The special monthly DIC will be paid to a parent who is a patient in a nursing home, is blind, or in need of aid and attendance only if he or she is entitled to at least the minimum DIC payment described in paragraph (f)(1) of this section.

(g) *Rate changes due to changes in marital status or living arrangements.* If a parent's conditions of entitlement change because of a change in marital status or living arrangements, VA will determine the new rate payable based on the new status. For example, if the parent was unmarried for part of the year, and married for part of the year, VA will pay the applicable rate for an unmarried parent for the part of the year that the parent was unmarried, and then pay the applicable rate for a married parent for the part of the year that the parent was married.

(h) *Rates payable when one of two parents receiving death compensation elects DIC.*—(1) *Parent who elects DIC.* The rate of DIC for the parent who elects DIC will not exceed the amount that would be paid to the parent if both parents had elected DIC.

(2) *Parent still receiving death compensation.* The rate of death compensation for the parent who did

not elect DIC will not exceed the amount that would be paid if both parents were receiving death compensation.

(Authority: 38 U.S.C. 501(a), 1315, 5312)

§ 5.537 Payment intervals for parent's dependency and indemnity compensation.

(a) *Monthly payments.* VA pays parent's dependency and indemnity compensation (DIC) monthly, except as provided in paragraph (b) of this section.

(b) *Exception.* VA will pay the parent's DIC benefit semiannually, on or about June 1 and December 1, if the amount of the annual benefit is less than four percent of the maximum annual rate payable for that parent. However, a parent receiving payment semiannually may elect to receive payment monthly in cases in which receiving payments semiannually would cause other Federal benefits to be denied.

(Authority: 38 U.S.C. 501(a), 1315)

Effective Dates

§ 5.538 Effective date of dependency and indemnity compensation award.

(a) *Death in service.* The following effective dates apply for dependency and indemnity compensation (DIC) awards based upon a veteran's death in service:

(1) *Claim received no later than 1 year after the date of initial report or finding of death.* (i) If VA grants DIC based on a claim received no later than 1 year after the date the Secretary concerned makes either an initial report of the veteran's actual death or a finding of the veteran's presumed death in active military service, the effective date is the first day of the month fixed by that Secretary as the month of death in the report or finding.

(ii) *Exception.* VA will not pay benefits based on a report of actual death under paragraph (a)(1)(i) of this section for any period for which the claimant received, or was entitled to receive, any of the veteran's following military entitlements: an allowance, an allotment, or service pay.

(2) *Claim received more than 1 year after date of initial report or finding of death.* If VA grants DIC based on a claim received more than 1 year after the date of the initial report or finding of death described in paragraph (a)(1)(i) of this section, the effective date is the date VA received the claim.

(b) *Service-connected death after separation from service.* The following effective dates apply for DIC awards based upon a veteran's death after separation from service:

(1) *Claim received no later than 1 year after death.* If VA grants DIC based on a claim received no later than 1 year after the veteran's death, the effective date is the first day of the month in which the veteran's death occurred.

(2) *Claim received more than 1 year after death.* If VA grants DIC based on a claim received more than 1 year after the veteran's death, then the effective date is the date VA received the claim.

(c) *DIC elected in lieu of death compensation.* If VA receives an election of DIC in lieu of death compensation, the award of DIC benefits is effective the date of receipt of the election. See § 5.759.

(d) *DIC award to a child.* The following effective dates apply for DIC awards to a child:

(1) *Claim received no later than 1 year after date entitlement arose.* If VA grants DIC based on a claim received no later than 1 year after the date entitlement arose, as defined in § 5.150, the effective date is the first day of the month in which entitlement arose.

(2) *Claim received more than 1 year after date entitlement arose.* If VA grants DIC based on a claim received more than 1 year after the date entitlement arose, as defined in § 5.150, the effective date is the date VA received the claim, except as otherwise provided in §§ 5.230 and 5.696.

(e) *Additional allowance for a child.* Any additional allowance awarded for a child is effective on the date the surviving spouse's DIC award is effective, except as otherwise provided in § 5.230.

(Authority: 38 U.S.C. 5110(d)(1), (e)(1), (j))

§ 5.539 Discontinuance of dependency and indemnity compensation to a person no longer recognized as the veteran's surviving spouse.

(a) *Discontinuance required.* When VA is paying dependency and indemnity compensation (DIC) to one person (''former payee'') as a veteran's surviving spouse and another person (''new payee'') establishes that he or she is the surviving spouse entitled to that benefit, VA will discontinue payment of DIC to the former payee. For information concerning the effective date of the award of DIC to the new payee, see § 5.538.

(b) *Effective date of discontinuance of payments to the former payee.* DIC payments to the former payee will be discontinued as follows:

(1) *Effective date of discontinuance of payments to a former payee if the new payee's award is effective before VA received the new payee's claim.* If the effective date of an award of DIC to the new payee is a date before VA received the new payee's claim, then the award to the former payee will be discontinued on the effective date of the new payee's DIC award.

(2) *Effective date of discontinuance of payments to the former payee if the new payee's award is effective on the date VA received the new payee's claim.* If the effective date of an award of DIC to the new payee is the date VA received the new payee's claim, then the award to the former payee will be discontinued effective the date of receipt of the new payee's claim or the first day of the month after the month for which VA last paid benefits to the former payee, whichever is later.

(Authority: 38 U.S.C. 5110(a), 5112(a))

§ 5.540 Effective date and payment adjustment rules for award or discontinuance of dependency and indemnity compensation to a surviving spouse where payments to a child are involved.

(a) *General rule.* When VA is paying dependency and indemnity compensation (DIC) to a veteran's child and a surviving spouse becomes entitled or loses entitlement, VA will discontinue or adjust payment of DIC as described in this section.

(b) *Surviving spouse establishes entitlement.* This paragraph (b) applies when a surviving spouse becomes entitled to DIC when VA is already paying DIC to the veteran's child.

(1) *Rate for child lower than rate for surviving spouse*—(i) *Effective date.* If a veteran's child received DIC at a rate lower than the rate payable to the surviving spouse, the award of DIC to the surviving spouse is effective the date provided by § 5.538.

(ii) *Rate payable to the surviving spouse.* The initial amount of DIC payable to the surviving spouse is the difference between the rate paid to the child and the rate payable to the surviving spouse. The full rate will be paid to the surviving spouse effective the first day of the month after the month for which VA last paid benefits to the child.

(2) *Rate for child same as or higher than the rate for surviving spouse.* If a veteran's child received DIC at a rate equal to or higher than the rate payable to the surviving spouse, the award of DIC to the surviving spouse is effective the first day of the month after the month for which VA last paid benefits to the child.

(c) *Surviving spouse receives dependency and indemnity compensation after his or her entitlement ends and a veteran's child is entitled to DIC.* This paragraph (c)

applies when a surviving spouse continues to receive DIC after his or her entitlement ends and the veteran's child is entitled to DIC when the surviving spouse's entitlement ends.

(1) *Rate for child is lower than rate for surviving spouse.* If the veteran's child is entitled to a rate of DIC lower than the rate paid to the surviving spouse, the payments to the surviving spouse will be reduced to the rate payable to the child or children as if there were no surviving spouse. This reduced benefit will be paid effective from the date the surviving spouse's entitlement ends to the first day of the month after the month for which VA last paid benefits to the surviving spouse. The award of DIC to the child is effective the first day of the month after the month for which VA last paid benefits to the surviving spouse.

(2) *Rate for child higher than rate for surviving spouse*—(i) *Effective date of discontinuance of payments to surviving spouse.* If the veteran's child is entitled to a rate higher than the rate paid to the surviving spouse, the discontinuation of the award to the surviving spouse is effective the first day of the month after the month for which VA last paid benefits to the surviving spouse.

(ii) *Effective date and rate for child.* The award to the veteran's child is effective the day after the end of the surviving spouse's entitlement. The initial amount of DIC payable to the child is the difference between the rate payable to the child and the rate paid to the surviving spouse. The full rate is payable effective the first day of the month after the month for which VA last paid benefits to the surviving spouse.

(3) *Rate for child same as rate for the surviving spouse*—(i) *Effective date of discontinuance of benefit to surviving spouse.* If the veteran's child is entitled to the same rate as the rate paid to the surviving spouse, the discontinuance of the award to the surviving spouse is effective the first day of the month after the month for which VA last paid benefits to the surviving spouse.

(ii) *Effective date and rate for child.* If the veteran's child is entitled to the same rate as the rate paid to the surviving spouse, the award of the full rate to the veteran's child is effective the first day of the month after the month for which VA last paid benefits to the surviving spouse.

(Authority: 38 U.S.C. 501(a), 5110(a), 5112(a))

§ 5.541 Effective date of reduction of a surviving spouse's dependency and indemnity compensation due to recertification of pay grade.

If recertification of a veteran's military pay grade results in reduced dependency and indemnity compensation, VA will reduce the benefit effective the first day of the month after the month for which VA last paid the greater benefit.

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

§ 5.542 Effective date of an award or an increased rate based on decreased income: Parents' dependency and indemnity compensation.

(a) *Time limit for receipt of evidence of reduced income.* If VA receives evidence of a decrease in expected or actual income before the end of the calendar year after the calendar year to which the evidence pertains, the effective date of an award or increased payment of parents' dependency and indemnity compensation (DIC) based on that evidence will be the date entitlement arose, as defined in § 5.150, but not earlier than the beginning of the calendar year to which the evidence pertains. Otherwise, payment or increased payments may not be made for that calendar year on the basis of such evidence.

(b) *Excessive income for a calendar year.* Unless paragraph (a) of this section applies, if payments of parents' DIC were not made or if payments were made at a reduced rate for a particular calendar year because income did not permit a higher payment, the effective date of an award or increased payment based on a reduction in income during that calendar year will be the beginning of the next calendar year.

(Authority: 38 U.S.C. 501(a), 1315(e), 5110(a))

§ 5.543 Effective date of reduction or discontinuance based on increased income: Parents' dependency and indemnity compensation.

(a) *Effective-date rule.* If VA reduces or discontinues parents' dependency and indemnity compensation (DIC) based on an increase in the parent's expected or actual income for a particular calendar year, the reduction or discontinuance will be effective the first day of the month after the month in which the income increased or is expected to increase. If VA cannot determine the month in which the income increased or is expected to increase, the effective date of the reduction or discontinuance will be January 1 of the calendar year in which the income increased. If VA later receives evidence showing the month in which the income increased, VA will adjust the effective date accordingly.

(b) *Overpayments.* If DIC was being paid to two parents living together, and an overpayment is created by the retroactive discontinuance of DIC, then the overpayment will be established on the award of each parent.

(Authority: 38 U.S.C. 501(a), 5112(b)(4))

§ 5.544 Dependency and indemnity compensation rate adjustments when an additional survivor files a claim.

This section does not apply to cases governed by § 5.524.

(a) *General rule.* If an additional survivor files a claim for dependency and indemnity compensation (DIC) while another survivor is receiving DIC (for example, one or more children are receiving DIC and another child files for DIC) and the additional survivor has apparent entitlement to DIC, then VA will reduce DIC while VA determines the additional survivor's entitlement.

(b) *Effective date of reduction of benefits*—(1) *Benefits payable before filing of claim.* If benefits would be payable to the additional survivor from a date before the date VA received the additional survivor's claim, the effective date of any reduction in the benefit will be the date of the additional survivor's potential entitlement.

(2) *Benefits payable from the date of application.* If benefits would be payable to the additional survivor from the date VA received the additional survivor's claim, VA will reduce the benefit on the later of the following dates:

(i) The date VA received the additional survivor's claim; or

(ii) The first day of the month after the month for which VA last paid benefits to the original survivor.

(c) *Effective date of award to additional survivor.* If an award for the additional survivor is warranted, the full rate to which the additional survivor is entitled is payable to the additional survivor from the effective date of that award.

(d) *Resumption of previous level of payments to other survivors.* If entitlement is not established for the additional survivor, benefits to other survivors that were reduced under paragraph (a) of this section will be resumed, if otherwise in order, from the date of the reduction in the benefit.

(Authority: 38 U.S.C. 1313, 5110(a), (e), 5112)

§ 5.545 Effective dates of awards and discontinuances of special monthly dependency and indemnity compensation.

(a) *Effective date of award*—(1) *General rule.* Except as provided in paragraph (a)(2) of this section, the

effective date of an award of special monthly dependency and indemnity compensation (DIC) will be the later of:

(i) The date VA receives the claim for special monthly DIC; or

(ii) The date entitlement arose (as defined in § 5.150).

(2) *Exception: retroactive award of DIC.* When an award of DIC is effective for a period before the date of receipt of the claim and a claimant is also entitled to special monthly DIC at the time of that DIC award, the effective date of special monthly DIC will be the date entitlement to special monthly DIC arose.

(b) *Effective date of discontinuance*—(1) *Aid and attendance.* When a parent or surviving spouse is no longer in need of regular aid and attendance, VA will discontinue special monthly DIC based upon the need for regular aid and attendance effective the first day of the month after the month for which VA last paid that benefit.

(2) *Housebound.* When a surviving spouse is no longer housebound, VA will discontinue special monthly DIC based upon housebound status effective the first day of the month after the month for which VA last paid that benefit.

(c) *Special Monthly DIC.* Special monthly DIC based on the need for regular aid and attendance is not payable to the surviving parent or surviving spouse while he or she is receiving hospital care as a veteran. VA will resume special monthly DIC based on the need for regular aid and attendance effective the day that he or she was discharged or released from hospital care. See §§ 5.721 and 5.761.

(Authority: 38 U.S.C. 501(a), 1311(c) and (d), 1315(g), 5110, 5112)

Cross Reference: § 5.511, Special monthly dependency and indemnity compensation.

§§ 5.546–5.550 [Reserved]

Accrued Benefits

§ 5.551 Persons entitled to accrued benefits.

(a) *Scope.* For purposes of entitlement to accrued benefits:

(1) *Child.* (i) A person claiming entitlement to accrued benefits as a child must, on the date of the deceased beneficiary's death, have met the requirements of § 5.220.

(ii) This paragraph (a)(1)(ii) applies in a claim by a veteran's child who is at least age 18 but not yet age 23 and who was pursuing a course of instruction on the date of the deceased beneficiary's death. If such death occurred during a school vacation period and if school records show that the child was on the school rolls on the last day of the regular school term immediately before the date of the deceased beneficiary's death, then VA will consider the child to have been pursuing a course of instruction on the date of the death.

(2) *Dependent parent.* A person claiming entitlement to accrued benefits as a dependent parent must, on the date of the veteran's death, have met the requirements of §§ 5.238 and 5.300.

(b) *Limitations.* This section is subject to §§ 5.565, 5.567, and 5.568, Non-payment of certain benefits upon death of an incompetent veteran. See also § 5.592.

(c) *Deceased beneficiary was the veteran.*—(1) *Order of priority of accrued benefits payments.* If the deceased beneficiary was the veteran, accrued benefits are payable to a living person or persons, in the following order of priority:

(i) The veteran's surviving spouse. If the marriage between the veteran and the surviving spouse met the definition of marriage in § 5.191, then the continuous cohabitation requirement in § 5.200(b)(3) does not apply.

(ii) The veteran's surviving children (in equal shares).

(iii) The veteran's surviving dependent parents (in equal shares).

(2) *No eligible claimant.* If there is no eligible claimant, such accrued benefits are payable to the extent provided in paragraph (f) of this section.

(d) *Deceased beneficiary was the veteran's spouse*—(1) *Surviving spouse of a deceased veteran.* If the deceased beneficiary was the surviving spouse or remarried surviving spouse of a deceased veteran, then VA may pay accrued benefits to the veteran's children in equal shares. If there is no child, then VA will pay accrued benefits as stated in paragraph (f) of this section.

(2) *Spouse of a living veteran.* If the deceased beneficiary was the spouse of a living veteran, then VA will pay accrued benefits as stated in paragraph (f) of this section.

(e) *Deceased beneficiary was the veteran's child*—(1) *General rule.* If the deceased beneficiary was the veteran's child, then VA may pay accrued benefits to the veteran's surviving child who is entitled to death pension or dependency and indemnity compensation. If there is no eligible claimant, such accrued benefits are payable to the extent provided in paragraph (f) of this section.

(2) *Surviving child who elected 38 U.S.C. chapter 35 educational benefits.* A surviving child who has elected survivors' and dependents' educational assistance under 38 U.S.C. chapter 35 may receive benefits under paragraph (e)(1) of this section for periods before the beginning of benefits under chapter 35.

(3) *Deceased child's 38 U.S.C. chapter 18 benefits.* If a child claiming benefits under 38 U.S.C. chapter 18 dies, any accrued benefits resulting from such a claim are payable to the child's surviving parent. If there is no surviving parent, such accrued benefits are payable to the extent provided in paragraph (f) of this section.

(f) *No eligible claimant.* If there is no eligible claimant under paragraphs (c) through (e) of this section, then VA may pay accrued benefits to the person who bore the expense of the deceased beneficiary's last sickness or burial, but only to the extent necessary to reimburse that person for such expense. VA will not pay accrued benefits to any political subdivision of the U.S.

(g) *Effect of failure to claim accrued benefits, or waiver of benefits, on rights of another claimant.*—(1) *Person with higher priority.* If there is a living person with a higher priority when the beneficiary dies, VA will not pay accrued benefits to any person with a lower priority unless, no later than 1 year after the deceased beneficiary's death, the person with a higher priority dies, forfeits entitlement, or otherwise becomes disqualified. In such a case, VA will pay accrued benefits to the person next in priority if that person files a timely claim.

(2) *Person within a category of potential claimants.* If there is a living person within a category of potential claimants (children, for example), VA will not pay that person's share of accrued benefits to anyone else within that category unless, no later than 1 year after the deceased beneficiary's death, that person dies, forfeits entitlement, or otherwise becomes disqualified. The other potential claimant must file a timely claim.

(3) *Applicability of paragraph (g).* Paragraphs (g)(1) and (2) of this section apply even if the ''living person'' referred to in those paragraphs fails to file a timely claim or waives rights to accrued benefits.

(Authority: 38 U.S.C. 101(4)(A), 501(a), 5121(a); Sec. 104, Pub. L. 108–183, 117 Stat. 2656)

Cross Reference: § 5.1, for the definition of ''political subdivision of the U.S.''; § 5.784, Special rules for apportioned benefits on death of beneficiary or apportionee.

§ 5.552 Claims for accrued benefits.

(a) *Time limit for filing.* A claim for accrued benefits must be filed no later

than 1 year after the date of the deceased beneficiary's death.

(b) *Other claims accepted as a claim for accrued benefits.* A claim filed with VA by, for, or on behalf of, an apportionee, surviving spouse, child, or parent for either of the following benefits will also be accepted as a claim for accrued benefits:

(1) Death pension; or

(2) Dependency and indemnity compensation.

(Authority: 38 U.S.C. 5101(b), 5121(c))

§ 5.553 Notice of incomplete applications for accrued benefits.

If an application for accrued benefits is incomplete because the claimant has not furnished information necessary to establish that he or she is within the category of persons eligible for benefits under § 5.551, and if the claimant might be entitled to payment of any benefits that may have accrued, then VA will notify the claimant:

(a) Of the type of information required to complete the application;

(b) That VA will take no further action on the claim unless VA receives the required information; and

(c) That if VA does not receive the required information no later than 1 year after the date of the original VA notification of information required, no benefits will be awarded on the basis of that application.

(Authority: 38 U.S.C. 5121(c))

§ 5.554 Benefits payable as accrued benefits.

(a) *Qualifying benefits.* VA may pay the following benefits as accrued benefits:

(1) Clothing allowance under 38 U.S.C. 1162;

(2) Service-connected disability compensation under 38 U.S.C. chapter 11;

(3) Dependency and indemnity compensation under 38 U.S.C. chapter 13;

(4) Survivors' and dependents' educational assistance allowance or special restorative training allowance under 38 U.S.C. chapter 35;

(5) Medal of Honor pension under 38 U.S.C. 1562;

(6) Monetary benefits for an eligible child under 38 U.S.C. chapter 18;

(7) Pension, including death pension under 38 U.S.C. chapter 15;

(8) Restored Entitlement Program for Survivors (REPS) benefits (Sec. 156, Public Law 97–377, 96 Stat.1920–22);

(9) Subsistence allowance under 38 U.S.C. chapter 31; and

(10) Veterans' educational assistance under 38 U.S.C. chapter 30, 32, or 34 or 10 U.S.C. chapter 1606 or 1607.

(b) *Non-qualifying benefits.* VA cannot pay the following benefits as accrued benefits:

(1) Assistance in acquiring automobiles and adaptive equipment under 38 U.S.C. chapter 39;

(2) Assistance in acquiring specially adapted housing under 38 U.S.C. chapter 21;

(3) Insurance under 38 U.S.C. chapter 19;

(4) Naval pension under 10 U.S.C. 6160; and

(5) Special allowance under 38 U.S.C. 1312(a).

(Authority: 38 U.S.C. 5121(a))

§ 5.555 Relationship between accrued-benefits claims and claims filed by the deceased beneficiary.

(a) *Claim for accrued benefits results from the deceased beneficiary's entitlement.* A claim for accrued benefits is an original claim, and is separate from any claim filed during the deceased beneficiary's lifetime, notwithstanding that the claimant's entitlement to accrued-benefits depends on the deceased beneficiary's entitlement.

(b) *Accrued-benefits claimant bound by existing decisions.* A claimant for accrued benefits is bound by any existing benefits decision(s) on claims by the deceased beneficiary concerning those benefits to the same extent that the deceased beneficiary was (or would have been) bound by such decision(s).

(Authority: 38 U.S.C. 501(a), 5101, 5121, 7104(b), 7105(c))

§§ 5.556–5.563 [Reserved]

Special Provisions

§ 5.564 Cancellation of checks mailed to a deceased payee; payment of such funds as accrued benefits.

(a) *Disposition of checks mailed to a deceased payee: general rules*—(1) *VA benefit checks not negotiated by a deceased payee must be returned.* Upon the death of a beneficiary, unnegotiated VA benefit checks must be returned to the issuing office and canceled, subject to § 5.695 (permitting, under specific circumstances, a surviving spouse to negotiate a check for the month in which the veteran died). Upon their return, funds represented by such checks may be paid under paragraph (a)(2) of this section.

(2) *Payment of benefits where a deceased payee died on or after the last day of the period covered by the check.* If the payee died on or after the last day of the period covered by the returned check(s), VA will pay the amount represented on the returned check (or any amount recovered by VA after improper negotiation of such check(s)), to the payee's survivor under § 5.551(b) through (e), irrespective of whether the survivor files a claim. Any amount not paid in this manner will be paid to the estate of the deceased beneficiary, provided that the estate will not escheat (that is, revert to a governmental entity).

(3) *Deceased payee was not alive on the last day of the period covered by the check.* If the payee was not alive on the last day of the period covered by the check, such funds cannot be paid under this section.

(b) *Payment to a claimant having a lower order of priority.* If a survivor having a higher order of priority dies, then VA will pay a claimant having a lower order of priority under § 5.551(b) through (e), Persons entitled to accrued benefits, as applicable, if it is shown that the person or persons having a higher order of priority are deceased at the time the claim is adjudicated.

(c) *Payment of amounts withheld during hospitalization.* This section does not apply to checks for lump sums representing amounts withheld under § 3.551(b) of this chapter as in effect prior to the applicability date of this part 5 or § 5.727, or withheld before December 27, 2001, under former § 3.557 of this chapter (which concerned reduction of benefits when an incompetent veteran is hospitalized). These amounts are governed by §§ 5.567 and 5.568.

(Authority: 38 U.S.C. 501(a), 5122; Sec. 306, Pub. L. 95–588, 92 Stat. 2497)

§ 5.565 Special rules for payment of benefits on deposit in a special deposit account when a payee living in a foreign country dies.

(a) *Purpose.* Benefit payments will not be sent to a payee living in a foreign country if the Secretary of the Treasury determines that there is no reasonable assurance the payee will receive the benefit check or will be able to negotiate it for full value. See §§ 5.714 and 5.715. Up to $1,000 of such benefit payments may be deposited in an account entitled ''Secretary of the Treasury, Proceeds of Withheld Foreign Checks'' (special deposit account). This section describes who is entitled to the funds in that account when the payee dies, when to file a claim for those funds, and certain restrictions on payment.

(b) *Persons entitled to funds in special deposit account upon death of payee.* When the payee of a check for pension or disability compensation dies, the deceased payee's funds in the special deposit account are payable as follows:

(1) If the deceased payee was the veteran, to the surviving spouse or, if there is no surviving spouse, to children

of the veteran under 18 years of age on the date of the veteran's death in equal shares;

(2) If the deceased payee was the veteran's surviving spouse, to children of the spouse under 18 years of age on the date of the spouse's death in equal shares;

(3) If the deceased payee was the recipient of an apportioned share of the veteran's pension or disability compensation, to the veteran to the extent the special deposit account consists of such apportionment payments; or

(4) In any other case, to the person who bore the expense of the burial of the payee, but only to the extent necessary to reimburse that person for such expenses.

(c) *Time limit for filing claims and evidence.* (1) A claim for the funds in the special deposit account must be received by VA no later than 1 year after the date of the payee's death.

(2) The claimant must file necessary evidence in support of the claim no later than 6 months after the date VA requests that evidence.

(d) *Other restrictions.* (1) Payment made under this section is limited to amounts due on the date of the payee's death under decisions existing on the date of the death.

(2) Payment will be made under this section only if both the deceased beneficiary and the claimant have not been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the U.S. or an enemy of any ally of the U.S.

(Authority: 31 U.S.C. 3329, 3330; 38 U.S.C. 5309)

§ 5.566 Special rules for payment of all benefits except insurance payments deposited in a personal-funds-of-patients account when an incompetent veteran dies.

(a) *Purpose.* This section provides rules relating to the disposition of certain funds on deposit in a personal-funds-of-patients (PFOP) account for a veteran who was incompetent at the date of his or her death and who died after November 30, 1959.

(b) *Funds included.* The funds included are those on deposit in the PFOP account on the date of the veteran's death that were derived from any benefits except insurance payments deposited in the account by VA. Funds derived from such deposits are those that resulted from the VA deposits, even though there may have been an intervening change in the form of the asset. For example, if amounts representing any benefits except insurance payments deposited by VA are withdrawn to purchase bonds on the veteran's behalf and redeposited upon the maturity of the bonds, an amount equal to the amount withdrawn for the purchase will be considered as derived from the deposits.

(c) *Funds excluded.* This section does not apply to the disposition of:

(1) Amounts resulting from funds deposited in the PFOP account by the veteran or others besides VA, regardless of the source of the deposit; or

(2) Amounts, such as interest, representing an increase in the value of funds originally deposited by VA.

(d) *Eligible persons.* The funds described in paragraph (b) of this section will be paid to a person, or persons, living at the time of settlement (that is, when VA pays out the PFOP account) in the following priority:

(1) The veteran's surviving spouse. If the marriage between the veteran and the surviving spouse meets the definition of marriage in § 5.191, then the continuous cohabitation requirement in § 5.200(b)(3) does not apply.

(2) The veteran's surviving children, as defined in § 5.220 in equal shares, but without regard to their age or marital status.

(3) The veteran's parents, as defined in § 5.238, who on the date of the veteran's death were dependent within the meaning of § 5.300, in equal shares.

(4) If no recipient listed in paragraphs (d)(1) through (3) of this section is living at the time of settlement, the person who bore the expense of the veteran's last sickness or burial, but only to the extent necessary to reimburse that person for such expense.

(e) *Claims for funds governed by this section*—(1) *Time limit for filing.* A person eligible for the funds governed by this section must file a claim for the funds with VA no later than 5 years after the death of the veteran. However, if any person otherwise entitled is under legal disability on the date of the veteran's death, the 5-year period will run from the date of termination or removal of the legal disability.

(2) *Submission of evidence.* There is no time limit for filing evidence of entitlement to the funds governed by this section.

(3) *Effect of failure to claim funds, or waiver of claim, on rights of another claimant.* (i) If there is a living person with a higher priority, VA will not pay funds governed by this section to any person with a lower priority unless, within 5 years after the veteran's death, the person with higher priority dies, forfeits entitlement, or otherwise becomes disqualified. In such a case, VA will pay such funds to the person next in priority if that person files a timely claim.

(ii) If there is a living person within a category of potential claimants (children, for example), VA will not pay that person's share of funds governed by this section to anyone else within that category unless, within 5 years after the veteran's death, that person dies, forfeits entitlement, or otherwise becomes disqualified. The other potential claimants must file timely claims.

(iii) Paragraphs (e)(3)(i) and (ii) apply even if the ''living person'' referred to in those paragraphs fails to file a timely claim or waives rights to funds governed by this section.

(Authority: 38 U.S.C. 5502(d))

§ 5.567 Special rules for payment of Old-Law Pension when a hospitalized competent veteran dies.

(a) *Basic entitlement.* Amounts withheld on a running award of Old-Law Pension, under the provisions of § 3.551(b) of this chapter as in effect before the applicability date of this part 5 or under § 5.727, are payable in a lump sum after a competent veteran's death, if the amounts were not paid to the veteran under § 5.730. The lump sum is payable only to the living person first listed below:

(1) The veteran's surviving spouse. If the marriage between the veteran and the surviving spouse meets the definition of marriage in § 5.191, then the continuous cohabitation requirement in § 5.200(b)(3), does not apply.

(2) The veteran's surviving children, as defined in § 5.220 in equal shares, but without regard to their age or marital status.

(3) The veteran's parents, as defined in § 5.238, who on the date of the veteran's death were dependent within the meaning of § 5.300, in equal shares.

(4) If no recipient listed in paragraphs (a)(1) through (3) of this section is living at the time of settlement, the person who bore the expense of the veteran's last sickness or burial, but only to the extent necessary to reimburse that person for such expense.

(b) *Claims for funds governed by this section*—(1) *Time limit for filing.* A person eligible for the funds governed by this section must file a claim for the funds with VA no later than 5 years after the death of the veteran. However, if any person otherwise entitled is under legal disability on the date of the veteran's death, the 5-year period will run from the date of termination or removal of the legal disability.

(2) *Submission of evidence.* There is no time limit for filing evidence of

entitlement to the funds governed by this section.

(3) *Effect of failure to claim funds, or waiver of claim, on rights of another claimant.*—(i) *Person with higher priority.* If there is a living person with a higher priority, VA will not pay funds governed by this section to any person with a lower priority unless, within 5 years after the veteran's death, the person with a higher priority dies, forfeits entitlement, or otherwise becomes disqualified. In such a case, VA will pay such funds to the person next in priority if that person files a timely claim.

(ii) *Person within a category of potential claimants.* If there is a living person within a category of potential claimants (children, for example), VA will not pay that person's share of funds governed by this section to anyone else within that category unless, within 5 years after the veteran's death, that person dies, forfeits entitlement, or otherwise becomes disqualified. The other potential claimants must file timely claims.

(iii) *Applicability of paragraph (b)(3).* Paragraphs (b)(3)(i) and (ii) of this section apply even if the ''living person'' referred to in those paragraphs fails to file a timely claim or waives rights to funds governed by this section.

(c) *Lump sum withheld after discharge from institution.* The provisions of paragraphs (a) and (b) of this section will apply even in the event of the death of any veteran prior to receiving a lump sum that was withheld because treatment or care was terminated against medical advice or as the result of disciplinary action.

(d) *VA benefit checks not negotiated by a deceased payee.* The provisions of paragraphs (a) and (b) of this section will apply even in cases in which a check was issued and the veteran died before negotiating the check.

(Authority: Sec. 306, Pub. L. 95–588, 92 Stat. 2497)

§ 5.568 Non-payment of certain benefits upon death of an incompetent veteran.

(a) *Old-Law Pension.* If an award of Old-Law Pension for an incompetent veteran was reduced under § 3.551(b) of this chapter as in effect before the applicability date of this part 5 or § 5.727, and the veteran dies before payment of amounts withheld or not paid, no part of such amount will be paid to any person.

(b) *Award of disability pension, disability compensation, or emergency officers' retired pay.* If VA discontinued an award of disability pension, disability compensation, or emergency officers' retired pay under former § 3.557(b) of this part (as applicable prior to December 27, 2001) because the veteran was hospitalized by the U.S. or a political subdivision and had an estate which equaled or exceeded the statutory maximum and the veteran dies before payment of amounts withheld or not paid because of such care, VA will pay no part of such amount to any person.

(c) *Applicability.* The provisions of this section apply to amounts withheld for periods prior to, as well as subsequent to, the VA's determination of incompetency. The term ''dies before payment'' includes cases in which a check was issued and the veteran died before negotiating the check.

(Authority: 38 U.S.C. 5503, as in effect prior to December 27, 2001; Sec. 306, Pub. L. 95–588, 92 Stat. 2497)

Cross Reference: § 5.1, for the definition of ''political subdivision of the U.S.''

§§ 5.569–5.579 [Reserved]

Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors

Special Benefits for Veterans, Dependents, and Survivors

§ 5.580 Medal of Honor pension.

(a) *Placement on the Medal of Honor Roll.* The Secretaries of the Departments of the Army, Navy, Air Force, and Homeland Security determine entitlement to placement on the Medal of Honor Roll and issue certificates setting forth the right to receive Medal of Honor pension. VA will pay the Medal of Honor pension after the Secretary concerned delivers VA a certified copy of the certificate.

(b) *Amount and effective date of Medal of Honor pension and entitlement to a retroactive lump-sum payment*—(1) *Effective date of monthly pension.* The effective date of monthly payment of a Medal of Honor pension is the date the service department concerned received the servicemember's or veteran's form requesting placement on the Medal of Honor Roll.

(2) *Monthly rate.* VA will pay a Medal of Honor pension at the rate specified in 38 U.S.C. 1562, as adjusted under paragraph (c)(4) of this section.

(3) *Retroactive lump-sum payment.* VA will pay to each servicemember or veteran who receives a Medal of Honor pension, a retroactive lump-sum payment for the period beginning the first day of the month after the date of the event for which the veteran earned the Medal of Honor, and ending on the last day of the month before the month in which the pension commenced under paragraph (b)(1) of this section. VA will calculate the amount of the lump-sum payment using the Medal of Honor pension rates in effect for each year of the period for which the retroactive payment is made.

(4) *Automatic annual adjustment.* VA will, effective December 1 of each year, increase the monthly Medal of Honor pension by the same percentage by which benefit amounts payable under Title II of the Social Security Act are increased effective December 1 of that year. The current and historic rates are located on the Internet at *http://www.va.gov* and are available from any VA regional office.

(c) *Medal of Honor pension exempt from offset, attachment, or other legal process.* The Medal of Honor pension is paid in addition to all other payments under laws of the U.S. It is not subject to any attachment, execution, levy, tax lien, or detention under any process whatever.

(d) *Only one Medal of Honor pension is allowed.* VA will pay a servicemember or veteran only one Medal of Honor pension under this section, even if the servicemember or veteran is awarded more than one Medal of Honor.

(Authority: 38 U.S.C. 1560, 1561, 1562)

§ 5.581 Awards of benefits based on special acts or private laws.

(a) *Special act* means an act of Congress that authorizes VA to pay benefits to a particular person. Special acts are also known as private laws.

(b) *Claim must be filed.* VA will grant benefits based on a special act only to a person who files a claim based on the special act, unless the person:

(1) Is currently receiving benefits; or

(2) Has a pending claim for any benefit at the time that the special act becomes effective.

(c) *Special acts relating to military service*—(1) *Change to character of discharge or release.* If a special act corrects the character of discharge or release from military service and does not grant pension or disability compensation directly, the claimant acquires veteran status and may apply for and be granted benefits.

(2) *Special act as conclusive proof of service.* For VA purposes, a special act that states a veteran's service began on a particular date or dates and that the veteran was discharged under conditions other than dishonorable on a particular date is conclusive proof of such service.

(d) *Rate, effective date, and duration of benefit.* (1) VA will apply the rate, effective date, and discontinuance date specified in a special act, except as

provided in paragraph (e) of this section.

(2) When a special act does not provide the effective date VA will determine the effective date according to § 5.152.

(e) *Changes in rates*—(1) *Hospital care.* VA will adjust pension payable under a special act, pursuant to §§ 5.720 through 5.723, 5.726, and 5.728 (reduction of payments based on hospital, domiciliary, or nursing home care), unless the special act expressly prohibits such reduction.

(2) *Incarceration and fugitive felon.* VA will adjust disability compensation and pension payable under a special act, pursuant to §§ 5.810 through 5.815, and 5.817 (reduction of payments during incarceration or suspension of payments while a fugitive felon), unless the special act expressly prohibits such reduction.

(f) *Prohibition against duplicate awards.* When pension or disability compensation is authorized by a special act, VA will not pay any other pension or disability compensation to the extent such awards would be duplicative under 38 U.S.C. 5304, unless the payee makes an election or unless the special act expressly authorizes VA to do so. See §§ 5.24(c)(3), 5.464, 5.746, 5.747, 5.756, 5.761, and 5.762.

(Authority: 38 U.S.C. 501(a), 1505, 5313, 5313B, 5503)

§ 5.582 Naval pension.

(a) *Certification.* VA will pay naval pension if the Secretary of the Navy certifies that the person is entitled to the pension.

(b) *Concurrent receipt of awards in effect before July 14, 1943.* Awards of naval pension in effect before July 14, 1943, or renewed or continued awards may be paid concurrently with VA pension or disability compensation; however, naval pension allowance under 10 U.S.C. 6160 may not exceed one-fourth of the rate of VA pension or disability compensation otherwise payable, exclusive of additional allowances for dependents or specific disabilities.

(c) *No concurrent receipt of awards initially made after July 13, 1943.* Naval pension initially awarded after July 13, 1943, may not be paid concurrently with VA pension or disability compensation.

(d) *Naval pension not payable as accrued benefit.* Naval pension remaining unpaid at the date of the veteran's death is not payable by VA as an accrued benefit.

(Authority: 10 U.S.C. 1414, 6160; 38 U.S.C. 5304)

§ 5.583 Special allowance under 38 U.S.C. 1312.

(a) *Allowance payable.* This section applies to VA payment of a special allowance to the surviving dependent of a veteran who:

(1) Served after September 15, 1940;

(2) Died after December 31, 1956, as a result of such service; and

(3) Was not a fully and currently insured person under title II of the Social Security Act.

(b) *Allowance not payable.* The special allowance is not payable:

(1) Where the veteran's death is not service connected but is treated ''as if'' it were service connected under the provisions of 38 U.S.C. 1151. See § 5.510(b)(2) and (3); or

(2) Where the veteran's death was due to service in the Commonwealth Army of the Philippines while such forces were in the service of the Armed Forces pursuant to the military order of the President dated July 26, 1941, or in the New Philippine Scouts under sec. 14 of Public Law 79–190, 59 Stat. 543.

(c) *Claims for special allowance.* A claim for dependency and indemnity compensation will be accepted as a claim for the special allowance where VA determines that the special allowance is payable or where VA receives a specific inquiry concerning entitlement to the special allowance.

(d) *Certification by the Social Security Administration.* Payment of this special allowance will be authorized on the basis of a certification from the Social Security Administration, after VA receives a claim. Award actions subsequent to the original award, including adjustment and discontinuance, will be made in accordance with new certifications from the Social Security Administration.

(e) *Special allowance payable on death.* (1) The special allowance will be payable only if the death occurred:

(i) While on active duty, active duty for training, or inactive duty training as a member of a uniformed service (regardless of whether the death occurred in the line of duty); or

(ii) As the result of a service-connected disability incurred after September 15, 1940.

(2) Where the veteran died after separation from service:

(i) Discharge from service must have been under conditions other than dishonorable, as outlined in § 5.30; and

(ii) Line of duty and service connection will be determined as outlined in Subpart K, Matters Affecting the Receipt of Benefits, of this part.

(Authority: 38 U.S.C. 107, 1312)

Cross Reference: § 5.1, for the definition of ''uniformed services''.

§ 5.584 Loan guaranty for a surviving spouse: eligibility requirements.

VA will provide a certification of loan guaranty benefits to a surviving spouse based on a claim filed after December 31, 1958, if all of the following conditions are met:

(a) The veteran served in the Armed Forces of the U.S. (Allied Nations are not included) at any time after September 15, 1940;

(b)(1) The veteran died in service; or

(2) The veteran died after separation from service and the separation was under conditions other than dishonorable, provided the veteran's death was the result of injury or disease incurred in or aggravated by service in the line of duty rendered after September 15, 1940, regardless of the date of entrance into such service (cases where the veteran's death is not service connected but is treated ''as if'' it were service connected, under 38 U.S.C. 1318, or where disability compensation is payable because of death resulting from hospitalization, treatment, examination, or training, under 38 U.S.C. 1151, are not included);

(c) The surviving spouse meets the requirements of the term ''surviving spouse'' as outlined in § 5.200(a);

(d) The surviving spouse is unmarried or remarried after reaching age 57; and

(e) The surviving spouse is not eligible for a loan guaranty certification as a veteran in his or her own right.

(Authority: 38 U.S.C. 3701(b)(2))

§ 5.585 Certification for death gratuity.

Section 1476, title 10 United States Code authorizes a service department to pay a death gratuity for death of a servicemember after discharge or release from training. Entitlement to the death gratuity is contingent upon the findings in this section, certified by the Secretary of Veterans Affairs to the Secretaries of the Departments of the Army, Navy, Air Force, or Homeland Security.

(a) *Certification by VA to the Secretary concerned.* If VA determines, either on the basis of a claim for benefits or at the request of the Secretary concerned, that a death occurred under the following circumstances, VA will certify to the Secretary concerned:

(1) The veteran died after December 31, 1956;

(2) The veteran died during the 120-day period that began on the day after the day of his or her discharge or release from duty as described in 10 U.S.C. 1476;

(3) Death resulted from injury or disease incurred or aggravated while on such duty, or travel to or from such duty; and

(4) The veteran was discharged or released from such service under conditions other than dishonorable.

(b) *VA law applies.* VA will apply the standards, criteria, and procedures for determining the incurrence or aggravation of an injury or disease under paragraph (a) of this section under the disability compensation laws administered by VA, except that there is no requirement under this section that any incurrence or aggravation was in the line of duty.

(Authority: 10 U.S.C. 1476; 38 U.S.C. 1323)

§ 5.586 Certification for dependents' educational assistance.

(a) *Eligibility for dependents' educational assistance (DEA).* DEA is an education benefit, payable to a veteran's spouse, surviving spouse, or child, that VA is authorized to provide for certain classes, licenses, or certifications. See §§ 21.3020 through 21.3344 of this chapter. In addition to paragraphs (b) through (d) of this section, § 21.3021 of this chapter will be applied in a determination of eligibility for DEA. For purposes of this section, the term *child* means a veteran's child who meets the requirements of § 5.220, except as to age and marital status.

(b) *Service connection.* The standards and criteria for determining service connection, either direct or presumptive, are those applicable to the period of service during which the disability was incurred or aggravated.

(c) *Disabilities treated as if service connected*—(1) *Paired organs or extremities.* For purposes of eligibility for DEA, a ''service-connected disability'' includes a disability treated as if service connected under § 5.282.

(2) *Disability due to hospitalization, etc.* For purposes of eligibility for DEA, a ''service-connected disability'' does not include a disability treated as if service connected under § 5.350.

(Authority: 38 U.S.C. 3501(a))

§ 5.587 Minimum income annuity and gratuitous annuity.

(a) *Eligibility for minimum income annuity.* The minimum income annuity authorized by Public Law 92–425, 86 Stat. 706, as amended, is payable to a person:

(1) Who the Department of Defense, the Department of Homeland Security, the Department of Health and Human Services, or the Department of Commerce has determined meets the eligibility criteria of sec. 4(a) of Public Law 92–425, 86 Stat. 712, as amended, other than sec. 4(a)(1) and (2);

(2) Who is eligible for pension under subchapter III of 38 U.S.C. chapter 15, or section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978; and

(3) Whose annual income, as determined in establishing pension eligibility, is less than the maximum annual rate of pension in effect under 38 U.S.C. 1541(b).

(b) *Calculation of the minimum income annuity payment*—(1) *Annual income.* VA will determine a beneficiary's annual income for minimum income annuity purposes under the provisions of §§ 5.370, 5.410 through 5.413, and 5.423 for beneficiaries receiving Improved Pension, or under §§ 5.472 through 5.474 for beneficiaries receiving Old-Law Pension or Section 306 Pension, except that VA will exclude the amount of the minimum income annuity from the calculation.

(2) *Determining rate of annuity for a person entitled to Improved Pension.* VA will determine the minimum income annuity payment for a beneficiary entitled to Improved Pension by subtracting the annual income for minimum income annuity purposes from the maximum annual pension rate under 38 U.S.C. 1541(b).

(3) *Determining rate of annuity for a person entitled to Old-Law Pension and Section 306 Pension.* VA will determine the minimum income annuity payment for a beneficiary receiving Old-Law Pension and Section 306 Pension by reducing the maximum annual pension rate under 38 U.S.C. 1541(b) by the amount of the Retired Servicemen's Family Protection Plan benefit, if any, that the beneficiary receives and subtracting from that amount the annual income for minimum income annuity purposes.

(4) *Recalculation.* VA will recalculate the monthly minimum income annuity payment whenever there is a change to the maximum annual rate of pension in effect under 38 U.S.C. 1541(b), and whenever there is a change in the beneficiary's income.

(c) *Exception as to the requirement of pension eligibility.* A person otherwise eligible for pension under subchapter III of 38 U.S.C. chapter 15, or section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978, will still be considered eligible for pension for purposes of determining eligibility for the minimum income annuity, even though no amount of pension is payable after adding the minimum income annuity, authorized under Public Law 92–425, 86 Stat. 706, as amended, to any other countable income.

(d) *Concurrent receipt of gratuitous annuity under Public Law 100–456.* If the Department of Defense or the Department of Homeland Security, the Department of Health and Human Services, or the Department of Commerce determines that a minimum income annuitant also is entitled to the gratuitous annuity authorized by Public Law 100–456, 102 Stat. 1918, as amended, which is payable to certain surviving spouses of servicemembers who died before November 1, 1953, and were entitled to retired or retainer pay on the date of death, VA will combine the payment of the gratuitous annuity with the minimum income annuity payment.

(e) *Discontinuance.* Other than as provided in paragraph (c) of this section, if a beneficiary receiving the minimum income annuity becomes ineligible for pension, VA will discontinue the minimum income annuity effective the same date.

(Authority: Sec. 4, Pub. L. 92–425, 86 Stat. 706, 712, as amended (10 U.S.C. 1448 note); Sec. 653, Pub. L. 100–456, 102 Stat. 1918, 1991, as amended (10 U.S.C. 1448 note))

§ 5.588 Special allowance payable under section 156 of Public Law 97–377.

A surviving spouse or child of a veteran who either died on active duty before August 13, 1981, or died as a result of a service-connected disability that was incurred or aggravated before August 13, 1981, may be entitled to receive a special allowance to replace social security benefits that were reduced or discontinued by the Omnibus Budget Reconciliation Act of 1981.

(a) *Eligibility requirements.*—(1) *Determination on how death occurred.* VA must first determine that the person on whose earnings record the claim is based either died on active duty before August 13, 1981, or died as a result of a service-connected disability that was incurred or aggravated before August 13, 1981. For purposes of this determination, character of discharge is not a factor for consideration and death on active duty after August 12, 1981, is qualifying provided that the death resulted from a service-connected disability that was incurred or aggravated before August 13, 1981.

(2) *Determination under Public Law 97–377.* Once a favorable determination has been made under paragraph (a)(1) of this section, VA will make determinations as to the age, relationship, and school-attendance requirements contained in paragraphs (a)(1) and (b)(1) of sec. 156 of Public Law 97–377, 96 Stat. 1920. In making these eligibility determinations, VA will apply the provisions of the Social Security Act, and any regulations promulgated pursuant thereto, as in effect during the claimant's period of

eligibility. Unless otherwise provided in this section, when issues are raised concerning eligibility or entitlement to this special allowance that VA cannot appropriately resolve under the provisions of the Social Security Act, or the regulations promulgated pursuant to the Social Security Act, the provisions of title 38, Code of Federal Regulations, are applicable.

(b) *Calculation of payment rate*—(1) *Basic entitlement rate.* A basic entitlement rate will be calculated for each eligible claimant in accordance with the provisions of paragraphs (a)(2) and (b)(2) of sec. 156 of Public Law 97–377, 96 Stat. 1920, using data to be provided by the Social Security Administration. This basic entitlement rate will then be used to calculate the monthly payment rate as described in paragraphs (b)(2) through (6) of this section.

(2) *Original or reopened awards to a surviving spouse.* The monthly payment rate will be equal to the basic entitlement rate increased by the overall average percentage (rounded to the nearest tenth of a percent) of each legislative increase in dependency and indemnity compensation rates under 38 U.S.C. 1311 which became effective concurrently with or subsequent to the effective date of the earliest adjustment under section 215(i) of the Social Security Act that was disregarded in computing the basic entitlement rate.

(3) *Original and reopened awards to a child.* The monthly payment rate will be equal to the basic entitlement rate increased by the overall average percentage (rounded to the nearest tenth of a percent) of each legislative increase in the rates of educational assistance allowance under 38 U.S.C. 3531(b) which became effective concurrently with or subsequent to the effective date of the earliest adjustment under section 215(i) of the Social Security Act that was disregarded in computing the basic entitlement rate.

(4) *Subsequent legislative increases in rates.* The monthly rate of the special allowance payable to a surviving spouse will be increased by the same overall average percentage increase (rounded to the nearest tenth of a percent) and on the same effective date as any legislative increase in the rates payable under 38 U.S.C. 1311. The monthly rate of the special allowance payable to a child will be increased by the same overall average percentage increase (rounded to the nearest tenth of a percent) and on the same effective date as any legislative increase in the rates payable under 38 U.S.C. 3531(b).

(5) *Amendment of awards.* Prompt action will be taken to amend any award of this special allowance to conform with evidence indicating a change in basic eligibility, any basic entitlement rate, or any effective date previously determined. It is the claimant's responsibility to promptly notify VA of any change in his or her status or employment that affects eligibility or entitlement.

(6) *Rounding of monthly rates.* Any monthly rate calculated under the provisions of this paragraph (b), if not a multiple of $1, will be rounded to the next lower multiple of $1.

(c) *Claimant not entitled to this special allowance.* The following persons are not entitled to this special allowance for the reasons indicated:

(1) A claimant eligible for death benefits under 38 U.S.C. 1151. The death in such a case is not service connected.

(2) A claimant eligible for death benefits under 38 U.S.C. 1318. The death in such a case is not service connected.

(3) A claimant whose claim is based on a person's service in:

(i) The Commonwealth Army of the Philippines while such forces were in the service of the Armed Forces pursuant to the military order of the President dated July 26, 1941, including recognized guerrilla forces (see 38 U.S.C. 107);

(ii) The New Philippine Scouts under sec. 14 of Public Law 79–190, 59 Stat. 543 (see 38 U.S.C. 107);

(iii) The commissioned corps of the Public Health Service (specifically excluded by sec. 156, Public Law 97–377, 96 Stat. 1920); or

(iv) The National Oceanic and Atmospheric Administration (specifically excluded by sec. 156, Public Law 97–377, 96 Stat. 1920).

(d) *Appellate jurisdiction.* VA has appellate jurisdiction of all determinations made in connection with this special allowance.

(e) *Claims.* A claimant for this special allowance must file an application. If VA receives an informal communication from a claimant about this special allowance, VA will forward an application to the claimant.

(f) *Retroactivity and effective dates.* There is no time limit for filing a claim for this special allowance. Upon the filing of a claim, the effective date of an award or increased award of benefits begins on or after the first day of the month in which the claimant first became eligible for this special allowance, except that no payment may be made for any period before January 1, 1983.

(Authority: Sec. 156, Pub. L. 97–377, 96 Stat. 1920)

§ 5.589 Monetary allowance for a Vietnam veteran or a veteran with covered service in Korea whose child was born with spina bifida.

(a) *Monthly monetary allowance.* VA will pay a monthly monetary allowance under subchapter I of 38 U.S.C. chapter 18, based upon the level of disability as determined under paragraph (d) of this section, to or for a person who VA has determined to be a person suffering from spina bifida whose biological mother or father is or was a Vietnam veteran or a veteran with covered service in Korea. A person suffering from spina bifida is entitled to only one monthly allowance under this section, even if each of the person's biological parents is or was Vietnam veterans or veterans with covered service in Korea. Whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of Title II of the Social Security Act, VA will, effective on the dates such increases become effective, increase by the same percentage the monthly allowance rates under 38 U.S.C. chapter 18.

(b) *No effect on other VA benefits.* Receipt of a monetary allowance under 38 U.S.C. chapter 18 will not affect the right of the person, or the right of any claimant or beneficiary, to receive any other benefit to which he or she may be entitled under any law administered by VA.

(c) *Definitions*—(1) *Vietnam veteran.* For purposes of this section, the term *Vietnam veteran* means a person who performed active military service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, without regard to the person's character of discharge. For the definition of ''service in the Republic of Vietnam,'' see § 5.262(a)(1).

(2) Veteran with *covered service in Korea.* For purposes of this section, the term *veteran with covered service in Korea* means a person who served in the active military service in or near the Korean Demilitarized Zone (''DMZ'') between September 1, 1967, and August 31, 1971, and who is determined by VA, in consultation with the Department of Defense, to have been exposed to an herbicide agent during such service. Exposure to an herbicide agent will be conceded if the veteran served between April 1, 1968, and August 31, 1971, in a unit that, as determined by the Department of Defense, operated in or near the Korean DMZ in an area in which herbicides are known to have been applied during that period, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

(3) *Person.* For purposes of this section, the term *person* means a person, regardless of age or marital status, whose biological father or mother is or was a Vietnam veteran or a veteran with covered service in Korea and who was conceived after the date on which the veteran first served in the Republic of Vietnam during the Vietnam era or had covered service in Korea. Notwithstanding the provisions of § 5.181(b), VA will require the types of evidence specified in §§ 5.221 and 5.229 to establish that a person is the biological son or daughter of a Vietnam veteran or a veteran with covered service in Korea.

(4) *Spina bifida.* For purposes of this section, the term *spina bifida* means any form and manifestation of spina bifida except spina bifida occulta.

(d) *Disability ratings.* (1) *Determining the level of payment.* Except as otherwise specified in this paragraph (d), VA will determine the level of payment as follows:

(i) *Level I.* The person walks without braces or other external support as his or her primary means of mobility in the community, has no sensory or motor impairment of the upper extremities, has an IQ of 90 or higher, and is continent of urine and feces without the use of medication or other means to control incontinence.

(ii) *Level II.* Provided that none of the disabilities is severe enough to warrant payment at Level III, and the person:

(A) Walks with braces or other external support as his or her primary means of mobility in the community;

(B) Has sensory or motor impairment of the upper extremities, but is able to grasp a pen, feed himself or herself, and perform self care;

(C) Has an IQ of at least 70 but less than 90;

(D) Requires medication or other means to control the effects of urinary bladder impairment and no more than two times per week is unable to remain dry for at least 3 hours at a time during waking hours;

(E) Requires bowel management techniques or other treatment to control the effects of bowel impairment, but does not have fecal leakage severe or frequent enough to require wearing of absorbent materials at least 4 days a week; or

(F) Has a colostomy that does not require wearing a bag.

(iii) *Level III.*

(A) The person uses a wheelchair as his or her primary means of mobility in the community;

(B) Has sensory or motor impairment of the upper extremities severe enough to prevent grasping a pen, feeding himself or herself, and performing self care;

(C) Has an IQ of 69 or less;

(D) Despite the use of medication or other means to control the effects of urinary bladder impairment, at least three times per week is unable to remain dry for 3 hours at a time during waking hours;

(E) Despite bowel management techniques or other treatment to control the effects of bowel impairment, has fecal leakage severe or frequent enough to require wearing of absorbent materials at least 4 days a week;

(F) Regularly requires manual evacuation or digital stimulation to empty the bowel; or

(G) Has a colostomy that requires wearing a bag.

(2) *Ratings by Director of the Compensation Service.* If a person who would otherwise be paid at Level I or II has one or more disabilities, such as blindness, uncontrolled seizures, or renal failure that result either from spina bifida, or from treatment procedures for spina bifida, the Director of the Compensation Service may increase the monthly payment to the level that, in his or her judgment, best represents the extent to which the disabilities resulting from spina bifida limit the person's ability to engage in ordinary day-to-day activities, including, but not limited to, activities outside his or her residence. A Level II or Level III payment will be awarded depending on whether the effects of a disability are of equivalent severity to the effects specified under Level II or Level III.

(3) *Statements from private physicians, or government or private institutions.* VA may accept statements from private physicians, or examination reports from government or private institutions, for purpose of rating spina bifida claims without further examination, provided the statements or reports are adequate for assessing the level of disability due to spina bifida under the provisions of paragraph (d)(1) of this section. In the absence of adequate medical information, VA will schedule an examination for purpose of assessing the level of disability.

(4) *Medical evidence.* VA will pay a person eligible for a monetary allowance due to spina bifida at Level I unless or until VA receives medical evidence supporting a higher payment. When required to reassess the level of disability under paragraph (d)(5) or (6) of this section, VA will pay a person eligible for this monetary allowance at Level I in the absence of evidence adequate to support a higher level of disability or if the person fails to report, without good cause, for a scheduled examination. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant, death of an immediate family member, etc.

(5) *Person under age of 1 year.* VA will pay a person under the age of 1 year at Level I unless a pediatric neurologist or a pediatric neurosurgeon certifies that, in his or her medical judgment, there is a neurological deficit that will prevent the person from ambulating, grasping a pen, feeding himself or herself, performing self care, or achieving urinary or fecal continence. If any of those deficits are present, VA will pay the person at Level III. In either case, VA will reassess the level of disability when the person reaches the age of 1 year.

(6) *Reassessment of level of payment.* VA will reassess the level of payment whenever VA receives medical evidence indicating that a change is warranted. For a person between the ages of 1 and 21, however, VA must reassess the level of payment at least every 5 years.

(e) *Effective dates.* See § 5.591.

(Authority: 38 U.S.C. 501(a), 1805, 1811, 1812, 1821, 1832–1834, 5101)

§ 5.590 Monetary allowance for a female Vietnam veteran's child with certain birth defects.

(a) *Monthly monetary allowance*—(1) *General rule.* VA will pay a monthly monetary allowance under subchapter II of 38 U.S.C. chapter 18 to or for a person whose biological mother is or was a Vietnam veteran and who VA has determined to have a disability resulting from one or more covered birth defects. Except as provided in paragraph (a)(3) of this section, the amount of the monetary allowance paid will be based upon the level of such disability suffered by the person, as determined in accordance with the provisions of paragraph (e) of this section. Whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of Title II of the Social Security Act, VA will, effective on the dates such increases become effective, increase by the same percentage the monthly allowance rates under 38 U.S.C. chapter 18.

(2) *Affirmative evidence of cause other than mother's service during Vietnam era.* No monetary allowance will be provided under this section based on a particular birth defect of a person in any case where affirmative evidence establishes that the birth defect results from a cause other than the active military service of the person's mother during the Vietnam era and, in determining the level of

disability for a person with more than one birth defect, the particular defect resulting from other causes will be excluded from consideration. This will not prevent VA from paying a monetary allowance under this section for other birth defects.

(3) *Nonduplication; spina bifida.* In the case of a person whose only covered birth defect is spina bifida, a monetary allowance will be paid under § 5.589, not under this section, and the person will not be rated for disability under this section. In the case of a person who has spina bifida and one or more additional covered birth defects, a monetary allowance will be paid under this section, and the amount of the monetary allowance will be not less than the amount the person would receive if his or her only covered birth defect were spina bifida. If, but for the person's one or more additional covered birth defects, the monetary allowance payable to or for the person would be based on a rating at Level I, II, or III under § 5.589(d), then the rating of the person's level of disability under paragraph (e) of this section will be not less than Level II, III, or IV, respectively.

(b) *No effect on other VA benefits.* Except as provided in paragraph (a)(3) of this section, receipt of a monetary allowance under 38 U.S.C. chapter 18 will not affect the right of the person, or the right of any claimant or beneficiary, to receive any other benefit to which he or she may be entitled under any law administered by VA.

(c) *Definitions*—(1) *Vietnam veteran.* For purposes of this section, the term *Vietnam veteran* means a person who performed active military service in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975, without regard to the characterization of the person's service. For the definition of ''service in the Republic of Vietnam,'' see § 5.262(a)(1).

(2) *Person.* For purposes of this section, the term *person* means a person, regardless of age or marital status, whose biological mother is or was a Vietnam veteran and who was conceived after the date on which the veteran first entered the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975. Notwithstanding the provisions of § 5.181(b), VA will require the types of evidence specified in §§ 5.221 and 5.229 sufficient to establish that a person is the biological son or daughter of a Vietnam veteran.

(3) *Covered birth defect.* For purposes of this section, the term *covered birth defect* means any birth defect identified by VA as a birth defect that is associated with the service of women Vietnam veterans in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975, and that resulted, or may result, in permanent physical or mental disability. However, the term ''covered birth defect'' does not include a condition due to a:

(i) Familial disorder;

(ii) Birth-related injury; or

(iii) Fetal or neonatal infirmity with well-established causes.

(d) *Identification of covered birth defects.* All birth defects that are not excluded under the provisions of this paragraph (d) are covered birth defects.

(1) *Covered birth defects.* Covered birth defects include, but are not limited to, the following conditions (however, if a birth defect is determined to be familial in a particular family, it will not be a covered birth defect):

(i) Achondroplasia;

(ii) Cleft lip and cleft palate;

(iii) Congenital heart disease;

(iv) Congenital talipes equinovarus (clubfoot);

(v) Esophageal and intestinal atresia;

(vi) Hallerman-Streiff syndrome;

(vii) Hip dysplasia;

(viii) Hirschprung's disease (congenital megacolon);

(ix) Hydrocephalus due to aqueductal stenosis;

(x) Hypospadias;

(xi) Imperforate anus;

(xii) Neural tube defects (including, but not limited to, spina bifida, encephalocele, and anencephaly);

(xiii) Poland syndrome;

(xiv) Pyloric stenosis;

(xv) Syndactyly (fused digits);

(xvi) Tracheoesophageal fistula;

(xvii) Undescended testicle; and

(xviii) Williams syndrome.

(2) *Familial disorders.* Birth defects that are familial disorders, including, but not limited to, hereditary genetic conditions, are not covered birth defects. Familial disorders include, but are not limited to, the following conditions, unless the birth defect is not familial in a particular family:

(i) Albinism;

(ii) Alpha-antitrypsin deficiency;

(iii) Crouzon syndrome;

(iv) Cystic fibrosis;

(v) Duchenne's muscular dystrophy;

(vi) Galactosemia;

(vii) Hemophilia;

(viii) Huntington's disease;

(ix) Hurler syndrome;

(x) Kartagener's syndrome (Primary Ciliary Dyskinesia);

(xi) Marfan syndrome;

(xii) Neurofibromatosis;

(xiii) Osteogenesis imperfecta;

(xiv) Pectus excavatum;

(xv) Phenylketonuria;

(xvi) Sickle cell disease;

(xvii) Tay-Sachs disease;

(xviii) Thalassemia; and

(xix) Wilson's disease.

(3) *Congenital malignant neoplasms.* Conditions that are congenital malignant neoplasms are not covered birth defects. These include, but are not limited to, the following conditions:

(i) Medulloblastoma;

(ii) Neuroblastoma;

(iii) Retinoblastoma;

(iv) Teratoma; and

(v) Wilm's tumor.

(4) *Chromosomal disorders.* Conditions that are chromosomal disorders are not covered birth defects. These include, but are not limited to, the following conditions:

(i) Down syndrome and other Trisomies;

(ii) Fragile X syndrome;

(iii) Klinefelter's syndrome; and

(iv) Turner's syndrome.

(5) *Birth-related injury.* Conditions that are due to a birth-related injury are not covered birth defects. These include, but are not limited to, the following conditions:

(i) Brain damage due to anoxia during or around time of birth;

(ii) Cerebral palsy due to birth trauma,

(iii) Facial nerve palsy or other peripheral nerve injury;

(iv) Fractured clavicle; and

(v) Horner's syndrome due to forceful manipulation during birth.

(6) *Fetal or neonatal infirmity.* Conditions that are due to a fetal or neonatal infirmity with well-established causes or that are miscellaneous pediatric conditions are not covered birth defects. These include, but are not limited to, the following conditions:

(i) Asthma and other allergies;

(ii) Effects of maternal infection during pregnancy, including, but not limited to, maternal rubella, toxoplasmosis, or syphilis;

(iii) Fetal alcohol syndrome or fetal effects of maternal drug use;

(iv) Hyaline membrane disease;

(v) Maternal-infant blood incompatibility;

(vi) Neonatal infections;

(vii) Neonatal jaundice;

(viii) Post-infancy deafness/hearing impairment (onset after the age of 1 year);

(ix) Prematurity; and

(x) Refractive disorders of the eye.

(7) *Developmental disorders.* Conditions that are developmental disorders are not covered birth defects. These include, but are not limited to, the following disorders:

(i) Attention deficit disorder;

(ii) Autism;

(iii) Epilepsy diagnosed after infancy (after the age of 1 year);

(iv) Learning disorders; and

(v) Mental retardation (unless part of a syndrome that is a covered birth defect).

(8) *Non-permanent physical or mental disabilities.* Conditions that do not result in permanent physical or mental disability are not covered birth defects. These include, but are not limited to, the following conditions:

(i) Conditions rendered non-disabling through treatment;

(ii) Congenital heart problems surgically corrected or resolved without disabling residuals;

(iii) Heart murmurs unassociated with a diagnosed cardiac abnormality;

(iv) Hemangiomas that have resolved with or without treatment; and

(v) Scars (other than of the head, face, or neck) as the only residual of corrective surgery for birth defects.

(e) *Disability ratings.* Whenever VA determines, upon receipt of competent medical evidence, that a person has one or more covered birth defects, VA will also determine the level of disability currently resulting from the covered birth defects combined with any associated disabilities. No monetary allowance will be payable under this section if VA determines under this paragraph (e) that a person has no current disability resulting from the covered birth defects, unless VA determines that the provisions of paragraph (a)(3) of this section apply. Except as otherwise provided in paragraph (a)(3) of this section, VA will determine the level of disability as follows:

(1) *Levels of disability*—(i) *Level 0.* The person has no current disability resulting from covered birth defects.

(ii) *Level I.* The person meets one or more of the following criteria:

(A) The person has residual physical or mental effects that only occasionally or intermittently limit or prevent some daily activities; or

(B) The person has disfigurement or scarring of the head, face, or neck without gross distortion or gross asymmetry of any facial feature including, but not limited to, the nose, chin, forehead, eyes, eyelids, ears (auricles), cheeks, or lips.

(iii) *Level II.* The person meets one or more of the following criteria:

(A) The person has residual physical or mental effects that frequently or constantly limit or prevent some daily activities, but the person is able to work or attend school, carry out most household chores, travel, and provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene, and communication, behavior, social interaction, and intellectual functioning are appropriate for his or her age; or

(B) The person has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of one facial feature or one paired set of facial features including, but not limited to, the nose, chin, forehead, eyes, eyelids, ears (auricles), cheeks, or lips.

(iv) *Level III.* The person meets one or more of the following criteria:

(A) The person has residual physical or mental effects that frequently or constantly limit or prevent most daily activities, but the person is able to provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene;

(B) The person is unable to work or attend school, travel, or carry out household chores, or does so intermittently and with difficulty;

(C) The person's communication, behavior, social interaction, and intellectual functioning are not entirely appropriate for his or her age; or

(D) The person has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of two facial features or two paired sets of facial features including, but not limited to, the nose, chin, forehead, eyes, eyelids, ears (auricles), cheeks, or lips.

(v) *Level IV.* The person meets one or more of the following criteria:

(A) The person has residual physical or mental effects preventing age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene;

(B) The person's communication, behavior, social interaction, and intellectual functioning are grossly inappropriate for his or her age; or

(C) The person has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of three facial features or three paired sets of facial features including, but not limited to, the nose, chin, forehead, eyes, eyelids, ears (auricles), cheeks, or lips.

(2) *Assessing limitation of daily activities.* Physical or mental effects on the following functions are to be considered in assessing limitation of daily activities:

(i) Mobility (ability to stand and walk, including, but not limited to, balance and coordination);

(ii) Manual dexterity;

(iii) Stamina;

(iv) Speech;

(v) Hearing;

(vi) Vision (other than correctable refraction errors);

(vii) Memory;

(viii) Ability to concentrate;

(ix) Appropriateness of behavior; and

(x) Urinary and fecal continence.

(f) *Information for determining whether a person has a covered birth defect and rating disability levels.*—(1) *Medical evidence.* VA may accept statements from private physicians or examination reports from government or private institutions for purposes of determining whether a person has a covered birth defect and for rating claims for covered birth defects. If they are adequate for such purposes, VA may make the determination and rating without further examination. In the absence of adequate information, VA may schedule examinations to determine whether a person has a covered birth defect or to assess the level of disability.

(2) *Monthly monetary allowance for those with a covered birth defect.* Except as paragraph (a)(3) of this section provides, VA will pay a monthly monetary allowance if VA is able to obtain medical evidence adequate to determine that a person has a covered birth defect and adequate to assess the level of disability due to covered birth defects.

(g) *Redeterminations.* VA will reassess a determination under this section whenever VA receives evidence indicating that a change is warranted.

(h) *Referrals.* If an agency of original jurisdiction is unclear in any case as to whether a condition is a covered birth defect, it may refer the issue to the Director of the Compensation Service for determination.

(i) *Effective dates.* See § 5.591.

(Authority: 38 U.S.C. 501(a), 1811–1816, 1821, 1832–1834, 5101)

Cross Reference: § 5.1, for the definition of ''competent evidence''.

§ 5.591 Effective date of award for a disabled child of a Vietnam veteran or a veteran with covered service in Korea.

This section provides the effective date of an award, reduction, or discontinuance of the monthly monetary allowance payable under § 5.589 to a Vietnam veteran or a veteran with covered service in Korea whose biological child is suffering from spina bifida or under § 5.590 to a female Vietnam veteran's biological child who suffers from one or more covered birth defects.

(a) *Effective date of award.* An award of a monetary allowance based on an original claim, a claim reopened after final denial, or a claim for increase will be effective the date VA received the claim or the date entitlement arose,

whichever is later, subject to the following rules:

(1) An allowance payable under § 5.589 will not be effective before October 1, 1997;

(2) An allowance payable under § 5.590 will not be effective before December 1, 2001;

(3) Subject to paragraphs (a)(1) and (2) of this section, the effective date will be the child's date of birth, if VA received the claim no later than 1 year after the birth date;

(4) Subject to paragraphs (a)(1) and (2) of this section, if a previously denied claim is reopened and granted based on corrected military records, VA assigns an effective date in accordance with §§ 5.34(d) and 5.35(e); and

(5) Subject to paragraphs (a)(1) and (2) of this section, if a beneficiary is awarded an increase of a monetary allowance due to an increase in disability, VA will assign an effective date in accordance with § 5.312(b).

(b) *Effective dates of reductions or discontinuances.* Except as otherwise provided in this paragraph (b), the effective date of a reduction or discontinuance of a monetary allowance will be assigned in accordance with § 5.705(a).

(1) If the monetary allowance was paid erroneously because of beneficiary error, VA will assign an effective date in accordance with § 5.167(b).

(2) If the monetary allowance was paid erroneously because of administrative error by VA, VA will assign an effective date in accordance with § 5.167(c).

(3) If a discontinuance is due to the beneficiary's death, VA will discontinue benefits effective the first day of the month of the beneficiary's death.

(4) If a reduction or discontinuance is warranted by a change of law or VA issue, or by a change in interpretation of a law or VA issue, VA will assign an effective date in accordance with § 5.152(c).

(5) If a reduction or discontinuance is warranted by a change in the beneficiary's physical condition, VA will pay a reduced rate or discontinue the monetary allowance effective the first day of the month that begins after the end of the 60-day period following the notice of the proposed reduction or discontinuance. The 60-day period is to be calculated in the same way as the notice period described in § 5.83(a).

(Authority: 38 U.S.C. 1805, 1832, 5110, 5112)

§ 5.592 Awards under Nehmer Court orders for disability or death caused by a condition presumptively associated with herbicide exposure.

(a) *Purpose.* This section states effective-date rules required by orders of a U.S. district court in the class-action case of *Nehmer* v. *U.S. Dep't of Veterans Affairs,* 712 F. Supp. 1404 (N.D. Cal. 1989).

(b) *Definitions.* For purposes of this section:

(1) *Nehmer class member* means:

(i) A Vietnam veteran who has a covered herbicide disease; or

(ii) A surviving spouse, child, or parent of a deceased Vietnam veteran who died from a covered herbicide disease.

(2) *Covered herbicide disease* means a disease for which the Secretary of Veterans Affairs has established a presumption of service connection pursuant to the Agent Orange Act of 1991, Public Law 102–4, other than chloracne. Those diseases are listed in § 5.262(e).

(c) *Effective date of disability compensation.* If a *Nehmer* class member is entitled to disability compensation for a covered herbicide disease, the effective date of the award will be as follows:

(1) *Disability compensation denied between September 25, 1985, and May 3, 1989.* If VA denied disability compensation for the same covered herbicide disease in a decision issued between September 25, 1985, and May 3, 1989, the effective date of the award will be the later of the date VA received the claim on which the prior denial was based or the date the disability arose, except as provided in paragraph (c)(3) of this section. A prior decision will be construed as having denied disability compensation for the same disease if the prior decision denied disability compensation for a disease that reasonably may be construed as the same covered herbicide disease for which disability compensation has been awarded. Minor differences in the terminology used in the prior decision will not preclude a finding, based on the record at the time of the prior decision, that the prior decision denied disability compensation for the same covered herbicide disease.

(2) *New or pending claim.* If the class member's claim for disability compensation for the covered herbicide disease either was pending before VA on May 3, 1989, or was received by VA between that date and the effective date of the statute or regulation establishing a presumption of service connection for the covered disease, the effective date of the award will be the later of the date such claim was received by VA or the date the disability arose, except as provided in paragraph (c)(3) of this section. A claim will be considered a claim for disability compensation for a particular covered herbicide disease if:

(i) The claimant's application and other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing disability compensation claims, as indicating an intent to apply for disability compensation for the covered herbicide disability; or

(ii) VA issued a decision on the claim, between May 3, 1989, and the effective date of the statute or regulation establishing a presumption of service connection for the covered disease, in which VA denied disability compensation for a disease that reasonably may be construed as the same covered herbicide disease for which disability compensation has been awarded.

(3) *Claim received no later than 1 year after separation from service.* If the class member's claim referred to in paragraph (c)(1) or (2) of this section was received no later than 1 year after the date of the class member's separation from service, the effective date of the award will be the day after the date of the class member's separation from active military service.

(4) *Requirements not met.* If the requirements of paragraph (c)(1) or (2) of this section are not met, the effective date of the award will be determined in accordance with § 5.152, and with the appropriate effective date section of this part 5. See § 5.150(a) for the general rule of effective dates, and § 5.150(c) for a list of locations of other effective date provisions in part 5.

(d) *Effective date of dependency and indemnity compensation.* If a *Nehmer* class member is entitled to dependency and indemnity compensation (DIC) for a death due to a covered herbicide disease, the effective date of the award will be as follows:

(1) *DIC denied between September 25, 1985, and May 3, 1989.* If VA denied DIC for the death in a decision issued between September 25, 1985, and May 3, 1989, the effective date of the award will be the later of the date VA received the claim on which such prior denial was based or the date the death occurred, except as otherwise provided in paragraph (d)(3) of this section.

(2) *New or pending claim.* If the class member's claim for DIC for the death was either pending before VA on May 3, 1989, or was received by VA between that date and the effective date of the statute or regulation establishing a presumption of service connection for

the covered herbicide disease that caused the death, the effective date of the award will be the later of the date such claim was received by VA or the date the death occurred, except as otherwise provided in paragraph (d)(3) of this section. In accordance with § 5.52(b)(2), a claim by a surviving spouse or child for death pension will be considered a claim for DIC. In all other cases, a claim will be considered a claim for DIC if the claimant's application and other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing DIC claims, as indicating an intent to apply for DIC.

(3) *Claim received no later than 1 year after veteran's death.* If the class member's claim referred to in paragraph (d)(1) or (2) of this section was received no later than 1 year after the date of the veteran's death, the effective date of the award will be the first day of the month in which the death occurred.

(4) *Requirements not met.* If the requirements of paragraph (d)(1) or (2) of this section are not met, the effective date of the award will be determined in accordance with § 5.152.

(e) *Effect of other provisions affecting retroactive entitlement*—(1) *Scope.* If the requirements specified in paragraphs (c)(1), (c)(2), (d)(1), or (d)(2) of this section are satisfied, the effective date will be assigned as specified in those paragraphs, without regard to the provisions in 38 U.S.C. 5110(g) or § 5.152 prohibiting payment for periods prior to the effective date of the statute or regulation establishing a presumption of service connection for a covered herbicide disease. However, the provisions of this section will not apply if payment to a *Nehmer* class member based on a claim described in paragraph (c) or (d) of this section is otherwise prohibited by statute or regulation, as, for example, where a class member did not qualify as a surviving spouse at the time of the prior claim or denial.

(2) *Claims based on service in the Republic of Vietnam prior to August 5, 1964.* If a claim referred to in paragraph (c) or (d) of this section was denied by VA prior to January 1, 1997, and the veteran's service in the Republic of Vietnam ended before August 5, 1964, the effective-date rules of this regulation do not apply. The effective date of benefits in such cases will be determined in accordance with 38 U.S.C. 5110. If a claim referred to in paragraph (c) or (d) of this section was pending before VA on January 1, 1997, or was received by VA after that date, and the veteran's service in the Republic of Vietnam ended before August 5, 1964, the effective date will be the later of the date provided by paragraph (c) or (d) of this section or January 1, 1997.

(Authority: Sec. 505, Pub. L. 104–275, 110 Stat. 3342–43)

(f) *Payment of benefits to the survivor or estate of the deceased beneficiary*—(1) *General rule.* If a *Nehmer* class member entitled to retroactive benefits pursuant to paragraphs (c)(1) through (3) or (d)(1) through (3) of this section dies prior to receiving payment of any such benefits, VA will pay such unpaid retroactive benefits to the first person or entity listed below that is in existence at the time of payment:

(i) The class member's spouse, regardless of current marital status.

Note to paragraph (f)(1)(i): For purposes of this paragraph (f), a ''spouse'' is the person who was legally married to the class member at the time of the class member's death.

(ii) The class member's child, regardless of age or marital status (if more than one child exists, payment will be made in equal shares, accompanied by an explanation of the division).

Note to paragraph (f)(1)(ii): For purposes of this paragraph (f), the term ''child'' includes a natural and an adopted child, and also includes any stepchild who was a member of the class member's household at the time of the class member's death.

(iii) The class member's parent, regardless of dependency (if both parents are alive, payment will be made in equal shares, accompanied by an explanation of the division).

Note to paragraph (f)(1)(iii): For purposes of this paragraph (f), the term ''parent'' includes a natural and an adoptive parent, but in the event of successive parents, the persons who last stood as parents in relation to the class member will be considered the parents.

(iv) The class member's estate.

(2) *Inapplicability of certain accrued benefit requirements.* The provisions of 38 U.S.C. 5121(c) and § 5.552(a), requiring a survivor to file a claim for accrued benefits do not apply to payments under this section. When a *Nehmer* class member dies prior to receiving retroactive payments under this section, VA will pay the amount to an identified payee in accordance with paragraph (f)(1) of this section without requiring an application from the payee. Prior to releasing such payment, however, VA may ask the payee to provide further information as specified in paragraph (f)(3) of this section.

(3) *Identifying a payee.* VA will make reasonable efforts to identify the appropriate payee under paragraph (f)(1) of this section based on information in the veteran's claims file. If further information is needed to determine whether any appropriate payee exists or whether there is a person having equal or higher priority than a known prospective payee, VA will request such information from a survivor or authorized representative if the claims file provides sufficient contact information. Before releasing payment to an identified payee, VA will ask the payee to state whether there is any other survivor of the class member who may have equal or greater entitlement to payment under this section, unless the circumstances clearly indicate that such a request is unnecessary. If, following such efforts, VA releases the full amount of unpaid benefits to a payee, VA may not thereafter pay any portion of such benefits to any other person, unless VA is able to recover the payment previously released.

(4) *Bar to accrued benefit claims.* Payment of benefits pursuant to paragraph (f)(1) of this section will bar a later claim by any person for payment of all or any part of such benefits as accrued benefits under 38 U.S.C. 5121 and § 5.551(a).

(g) *Awards covered by this section.* This section applies only to awards of disability compensation or DIC for disability or death caused by a disease listed in paragraph (b)(2) of this section.

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

§§ 5.593–5.599 [Reserved]

Ancillary Benefits for Certain Service-Connected Veterans and Certain Members of the Armed Forces Serving on Active Duty

§§ 5.600–5.602 [Reserved]

§ 5.603 Financial assistance to purchase a vehicle or adaptive equipment.

(a) *Eligibility.* Certain persons with qualifying disabilities will be certified as eligible for financial assistance to purchase a vehicle and necessary adaptive equipment.

(b) *Definition of terms.* The following definitions apply to this section:

(1) *Adaptive equipment.* (i) *Adaptive equipment* means equipment that must be part of or added to a vehicle manufactured for sale to the general public to:

(A) Make it safe for use by the eligible person; and

(B) Assist the eligible person in meeting applicable standards of licensure by the proper licensing authority.

(ii) Adaptive equipment includes, but is not limited to:

(A) Automatic transmission;

(B) Power steering, power brakes, power window lifts, and power seats;

(C) Modification of the interior space if necessary for the eligible person to enter or travel in the vehicle; and

(D) Special equipment that the Under Secretary for Health or designee has deemed to be ordinarily necessary to assist an eligible person into or out of a vehicle, even if another person operates the vehicle for the eligible person, or for an eligible person to operate the vehicle.

(2) *Vehicle. Vehicle* means an automobile, van, truck, jeep, tractor, golf cart, or other conveyance.

(c) *Eligibility criteria*—(1) *Persons eligible.* The claimant must be:

(i) A veteran who is entitled to disability compensation under 38 U.S.C. chapter 11, including disability compensation under 38 U.S.C. 1151, for a qualifying disability described in paragraph (c)(2) of this section; or

(ii) A member of the Armed Forces serving on active duty who has a qualifying disability described in paragraph (c)(2) of this section that is the result of an injury incurred or disease contracted in or aggravated by active military service.

(2) *Qualifying disabilities.* The claimant must have one of the following disabilities:

(i) Anatomical loss or permanent loss of use of one or both feet;

(ii) Anatomical loss or permanent loss of use of one or both hands;

(iii) Permanent impairment of vision of both eyes: central visual acuity of 20/200 or less in the better eye, with corrective glasses, or central visual acuity of more than 20/200 if there is a field defect in which the peripheral field has contracted to such an extent that the widest diameter of visual field subtends an angular distance no greater than 20 degrees in the better eye;

(iv) Ankylosis of one or both knees or of one or both hips; however, VA will provide to a person with ankylosis only financial assistance to purchase adaptive equipment, and will not provide financial assistance to purchase a vehicle; or

(v) Severe burn injury.

(d) *Limitations on assistance*—(1) *Claim for financial assistance to purchase a vehicle or adaptive equipment.* (i) The claimant must file a claim for financial assistance to purchase a vehicle or adaptive equipment, which includes a certification by the claimant that the vehicle will be operated only by a person properly licensed. However, VA will provide financial assistance to purchase a vehicle for an eligible person who cannot qualify to operate a vehicle if another person is to operate the vehicle for the eligible person.

(ii) A claim for financial assistance to purchase a vehicle will also be considered a claim for adaptive equipment necessary to operate the vehicle according to the safety standards of the licensing authority.

(iii) There is no time limit in which the claimant must apply for benefits under this section.

(iv) For a claimant applying while still on active duty, the claim will be deemed filed with VA on the date the application is shown to be in possession of military authorities for transmittal to VA.

(2) *Financial assistance for vehicles.* An eligible person is not entitled to benefits for the purchase of more than one vehicle under the provisions of this section. No payments may be made for the repair, maintenance, or replacement of the vehicle.

(3) *Financial assistance for adaptive equipment.* An eligible person is not entitled to adaptive equipment for more than two vehicles in a 4-year period unless, due to circumstances beyond the eligible person's control, one of the adapted vehicles is no longer available. The Under Secretary for Health or designee may authorize payments or reimbursements for the repair, replacement, or reinstallation of adaptive equipment deemed necessary for the operation of the vehicle. See § 17.158 of this chapter for additional limitations on assistance for adaptive equipment.

(e) *VA certification process for financial assistance to purchase a vehicle or adaptive equipment.* If a claim for financial assistance to purchase a vehicle or adaptive equipment is granted, VA will issue a certificate of eligibility to the claimant.

(f) *Redemption of certificate of eligibility*—(1) *Purchase of vehicle.* VA may pay the financial assistance to purchase a vehicle to the seller as follows:

The eligible person must give the certificate of eligibility to the seller of the vehicle. The seller must send the purchase receipt and certificate of eligibility to a VA regional office for reimbursement of the purchase price, or the statutory limit set in 38 U.S.C. 3902(a), whichever is less.

(2) *Purchase of adaptive equipment.* VA may pay the adaptive equipment allowance to either the seller or the eligible person as follows:

(i) *Seller.* The eligible person must give the certificate of eligibility to the seller of the adaptive equipment. The seller must send the purchase receipt and certificate of eligibility to a VA regional office for reimbursement of the actual cost of the adaptive equipment.

(ii) *Eligible person.* The eligible person must send the purchase receipt and certificate of eligibility to VA for reimbursement of the actual cost of the adaptive equipment.

(Authority: 38 U.S.C. 3901, 3902, 3903)

§ 5.604 Specially adapted housing under 38 U.S.C. 2101(a).

A certificate of eligibility for assistance in acquiring specially adapted housing under 38 U.S.C. 2101(a) or 2101A(a) may be extended to a veteran or a member of the Armed Forces serving on active duty if the following requirements are met:

(a) *Eligibility.* A veteran must have had active military service after April 20, 1898. Benefits are not restricted to veterans with wartime service. After December 15, 2003, the benefit under this section is also available to a person in the Armed Forces serving on active duty.

(b) *Disability.* A person in the Armed Forces serving on active duty must have a disability rated as permanent and total that was incurred or aggravated in the line of duty in active military service. A veteran must be entitled to compensation under 38 U.S.C. chapter 11 for a disability rated as permanent and total. In either case, the disability must be due to:

(1) The anatomical loss or loss of use of both lower extremities, such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair;

(2) Blindness in both eyes, having only light perception, plus the anatomical loss or loss of use of one lower extremity;

(3) The anatomical loss or loss of use of one lower extremity together with residuals of organic injury or disease which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair;

(4) The anatomical loss or loss of use of one lower extremity together with the anatomical loss or loss of use of 1 upper extremity which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair;

(5) The anatomical loss or loss of use of both upper extremities such as to preclude use of the arms at or above the elbow; or

(6) Full thickness or subdermal burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk.

(c) *Preclude locomotion. Preclude locomotion* means the necessity for

regular and constant use of a wheelchair, braces, crutches or canes as a normal mode of locomotion although occasional locomotion by other methods may be possible.

(Authority: 38 U.S.C. 1151(c)(1), 2101, 2101A, 2102, 2104)

Cross Reference: Assistance to certain disabled veterans in acquiring specially adapted housing. See §§ 36.4400 through 36.4410 of this chapter.

§ 5.605 Special home adaptation grants under 38 U.S.C. 2101(b).

A certificate of eligibility for assistance in acquiring necessary special home adaptations, or, after October 27, 1986, for assistance in acquiring a residence already adapted with necessary special features, under 38 U.S.C. 2101(b) or 2101A(a) may be issued to a veteran who served after April 20, 1898, or to a member of the Armed Forces serving on active duty who is eligible for the benefit under this section after December 15, 2003, if the following requirements are met:

(a)(1) The veteran or member of the Armed Forces serving on active duty is not entitled to a certificate of eligibility for assistance in acquiring specially adapted housing under § 5.604, nor had the veteran or member of the Armed Forces serving on active duty previously received assistance in acquiring specially adapted housing under 38 U.S.C. 2101(a).

(2) A veteran or member of the Armed Forces serving on active duty who first establishes entitlement under this section and who later becomes eligible for a certificate of eligibility under § 5.604 may be issued a certificate of eligibility under § 5.604.

(b) A member of the Armed Forces serving on active duty must have a disability rated as permanent and total that was incurred or aggravated in the line of duty in active military service. A veteran must be entitled to compensation under 38 U.S.C. chapter 11 for a disability rated as permanent and total. In either case, the disability must:

(1) Include the anatomical loss or loss of use of both hands; or

(2) Be due to:

(i) Blindness in both eyes with 5/200 visual acuity or less; or

(ii) Deep partial thickness burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk; or

(iii) Full thickness or subdermal burns that have resulted in contracture(s) with limitation of motion of one or more extremities or the trunk; or

(iv) Residuals of an inhalation injury, including, but not limited to, pulmonary fibrosis, asthma, and chronic obstructive pulmonary disease.

(Authority: 38 U.S.C. 1151(c)(1), 2101, 2101A, 2102, 2104)

Cross Reference: Assistance to certain disabled veterans in acquiring specially adapted housing. See §§ 36.4400 through 36.4410 of this chapter.

§ 5.606 Clothing allowance.

(a) *General rule.* VA will pay an annual clothing allowance to a veteran with a qualifying disability. However, VA will pay more than one annual clothing allowance if VA determines that the veteran has more than one qualifying disability. For purposes of this section, a ''veteran'' includes a person who has returned to active duty after previously meeting the definition of ''veteran'' found in § 5.1.

(b) *Qualifying disability.* A ''qualifying disability'' is a service-connected disability, or a disability compensable ''as if'' service connected under 38 U.S.C. 1151, that:

(1) Is the anatomical loss or loss of use of a hand or foot compensable at a rate specified in §§ 5.322 through 5.329, § 5.331, or § 5.332 that requires the veteran to wear or use a prosthetic or orthopedic appliance (including, but not limited to, a wheelchair) that tends to wear or tear the veteran's clothing, which is shown on VA examination, or by a hospital or examination report from a facility specified in § 5.91(a);

(2) The Under Secretary for Health or designee certifies that the veteran wears or uses a prosthetic or orthopedic appliance (including, but not limited to, a wheelchair) that tends to wear or tear the veteran's clothing; or

(3) Is a skin condition that the Under Secretary for Health or designee certifies requires the veteran to use prescription medication that causes irreparable damage to the veteran's outer garments.

(c) *New claim required every year.* The veteran must file a claim for a clothing allowance every year, unless:

(1) The clothing allowance was granted according to the criteria in paragraph (b)(1) of this section; or

(2) The Under Secretary for Health or designee finds that a clothing allowance granted according to the criteria in paragraph (b)(2) or (3) of this section is static.

(d) *Payment year.* Clothing allowance is paid annually. The payment year covers a 12-month period beginning August 1 and ending July 31 of the following year. The initial year of payment eligibility begins August 1 of the calendar year in which VA notifies the veteran of his or her entitlement to service connection for a qualifying disability.

(e) *Time limits for claim.*—(1) *Initial year of payment eligibility.* A veteran who meets the requirements of paragraphs (b)(1) through (3) of this section is eligible to receive the annual clothing allowance for the initial year of payment eligibility if:

(i) VA notifies the veteran of his or her entitlement to service connection for a qualifying disability before August 1 of the initial year of payment eligibility, and the veteran files a claim for clothing allowance no later than 1 year after August 1 of the initial year of payment eligibility; or

(ii) VA notifies the veteran of his or her entitlement to service connection for a qualifying disability after August 1 of the initial year of payment eligibility, and the veteran files a claim for clothing allowance no later than 1 year after the date of the notice.

(2) *Payment year following date of claim.* VA will pay the clothing allowance for the payment year that begins after the date of the claim for clothing allowance, if the veteran is entitled to the clothing allowance, and if:

(i) VA notified the veteran of his or her entitlement to service connection for a qualifying disability before August 1 of the initial year of payment eligibility, and the veteran filed the claim for clothing allowance more than 1 year after August 1 of the initial year of payment eligibility; or

(ii) VA notified the veteran of his or her entitlement to service connection for a qualifying disability after August 1 of the initial year of payment eligibility, and the veteran filed the claim for clothing allowance more than 1 year after the date of the notice.

(f) *Reduction for incarceration.* An eligible veteran who is incarcerated for any reason for more than 60 days in a Federal, State, or local penal institution and who is provided clothing without charge by the institution will not receive the full clothing allowance payment. VA will reduce the amount stated in 38 U.S.C. 1162 by 1/365th of that amount for each day over 60 days that the veteran was incarcerated during the 12-month period beginning August 1 and ending July 31. VA will not reduce the amount for the initial 60 days of a period of incarceration.

(Authority: 38 U.S.C. 107, 1162, 5313A)

Cross Reference: § 5.1, for the definition of ''State''.

§§ 5.607–5.609 [Reserved]

Subpart I—Benefits for Certain Filipino Veterans and Survivors

Philippine Service

§ 5.610 Eligibility for benefits based on Philippine service.

(a) *Old Philippine Scouts*—(1) *Included service.* Service in the Old Philippine Scouts (Scouts who enlisted before October 6, 1945) constitutes active military service for purposes of pension, disability compensation, dependency and indemnity compensation (DIC), and burial benefits. Service as an officer commissioned in connection with the administration of Pub. L. 79–190, 59 Stat. 538, also constitutes active military service under this paragraph (a)(1).

(2) *Rate of payment.* Benefits are payable at the full-dollar rate.

(3) *Acceptable evidence of service in the Old Philippine Scouts.* Service must be established as specified in § 5.40.

(b) *New Philippine Scouts*—(1) *Included service.* All enlistments and reenlistments of New Philippine Scouts in the Regular Army between October 6, 1945, and June 30, 1947, inclusive, constitute active military service for purposes of disability compensation and DIC, and, in the case of deaths occurring after December 15, 2003, burial benefits.

(2) *Rate of payment.* Except as provided in §§ 5.613 and 5.617, benefits based on service described in paragraph (b)(1) of this section are payable at a rate of $0.50 for each dollar authorized under the law.

(3) *Acceptable evidence of service in the New Philippine Scouts.* Service must be established as specified in § 5.40.

(c) *Commonwealth Army of the Philippines*—(1) *Included service.* Service of a member of the Commonwealth Army of the Philippines constitutes active military service for purposes of disability compensation, DIC, and burial allowance, from and after the dates and hours, respectively, when he or she was called into service of the Armed Forces of the U.S. by orders issued from time to time by the Commander-in-Chief, Southwest Pacific Area, or other competent authority in the Army of the U.S., pursuant to the Military Order of the President of the U.S. dated July 26, 1941.

(2) *Rate of payment.* Except as provided in §§ 5.613 and 5.617, benefits based on service described in paragraph (c)(1) of this section are payable at a rate of $0.50 for each dollar authorized under the law.

(3) *Presumption of soundness.* Unless the record shows examination at the time of entrance into the Armed Forces of the U.S., such a person is not entitled to the presumption of soundness. This also applies upon reentering the Armed Forces after a period of inactive military service.

(4) *Acceptable evidence of service in the Commonwealth Army of the Philippines.* Service must be established as specified in § 5.40.

(d) *Guerrilla service*—(1) *Included service.* A person who served as a guerrilla under a commissioned officer of the U.S. Army, Navy, or Marine Corps, or under a commissioned officer of the Commonwealth Army of the Philippines recognized by and cooperating with the U.S. Forces is considered to have performed active military service for purposes of disability compensation, DIC, and burial allowance. Service as a guerrilla by a member of the Old Philippine Scouts or the Armed Forces of the U.S. is considered service in his or her regular status. (See paragraph (a) of this section.)

(2) *Rate of payment.* Except as provided in §§ 5.613 and 5.617, benefits based on service described in paragraph (d)(1) of this section are payable at a rate of $0.50 for each dollar authorized under the law.

(3) *Acceptable evidence of guerrilla service.* Service must be established as specified in § 5.40. The following certifications by a U.S. service department in accordance with § 5.40 will be accepted as establishing guerrilla service:

(i) Recognized guerrilla service; or

(ii) Unrecognized guerrilla service under a recognized commissioned officer only if the person was a former member of the U.S. Armed Forces (including the Old Philippine Scouts), or the Commonwealth Army of the Philippines. This excludes civilians.

(4) *Unacceptable evidence of guerrilla service.* A certification of anti-Japanese activity will not be accepted as establishing guerrilla service.

(e) *Combined service.* Where a veteran who had Commonwealth Army of the Philippines or guerrilla service and also had other service, wartime or peacetime, in the Armed Forces of the U.S., has disabilities that are compensable separately on a dollar and a $0.50-for-each-dollar authorized basis, and the disabilities are combined under the authority contained in 38 U.S.C. 1157, the rating for which dollars are payable will be first considered and the difference between this rating and the combined rating will be the basis for computing the amount payable at the rate of $0.50 for each dollar authorized.

(Authority: 38 U.S.C. 107)

Cross Reference: § 5.21, Service VA recognizes as active military service. § 5.28, Other groups designated as having performed active military service. § 5.39, Minimum active duty service requirement for VA benefits. § 5.40, Service records as evidence of service and character of discharge that qualify for VA benefits.

§ 5.611 Philippine service: determination of periods of active military service, including, but not limited to, periods of active military service while in prisoner of war status.

(a) *Period of service.* For an Old Philippine Scout, a member of one of the regular components of the Commonwealth Army of the Philippines while serving with the Armed Forces of the U.S., and a New Philippine Scout, the period of active military service will be from the date certified by the U.S. Armed Forces as the date of enlistment or the date of reporting for active duty, whichever is later, to the date of release from active duty, discharge, death, or in the case of a member of the Commonwealth Army of the Philippines, June 30, 1946, whichever is earlier. Release from active duty includes:

(1) Leaving one's organization in anticipation of, or due to, the capitulation.

(2) Escape from prisoner of war status.

(3) Parole by the Japanese.

(4) Beginning of missing-in-action status, except if factually shown that at that time he or she was with his or her unit or if death is presumed to have occurred while carried in such status. However, if there is credible evidence that he or she was alive after commencement of his or her missing-in-action status, then the presumption of death will not apply for VA purposes.

(5) Capitulation on May 6, 1942, except that periods of recognized guerrilla service, unrecognized guerrilla service under a recognized commissioned officer, or periods of service in units which continued organized resistance against the Japanese prior to formal capitulation will be considered return to active duty for the period of such service.

(b) *Prisoner of war status.* Active military service of an Old Philippine Scout or a member of the Commonwealth Army of the Philippines serving with the Armed Forces of the U.S. will include a prisoner of war status immediately following a period of active duty, or a period of recognized guerrilla service or unrecognized guerrilla service under a recognized commissioned officer. In those cases where, following release from active

duty as set forth in paragraph (a) of this section, the veteran is factually found by the VA to have been injured or killed by the Japanese because of anti-Japanese activities or because of his or her former service in the Armed Forces of the U.S., such injury or death may be held to have been incurred in active military service for VA purposes. VA will make such determinations based on all available evidence, including, but not limited to U.S. service department reports, and VA will consider the character and length of the veteran's former active military service in the Armed Forces of the U.S.

(c) *Arrest.* A prisoner of war status based upon arrest during general zonification will not be sufficient of itself to bring a case within the definition of return to military control.

(d) *Period of guerrilla service.* The active military service of a guerrilla will be the period certified by a U.S. service department.

(Authority: 38 U.S.C. 107)

Cross Reference: § 5.40, Service records as evidence of service and character of discharge that qualify for VA benefits. § 5.140, Determining former prisoner of war status, for the definition of ''former prisoner of war''.

Benefits and Effective Dates of Certain Filipino Veterans and Survivors

§ 5.612 Overview of benefits available to a Filipino veteran and his or her survivor.

(a) *Scope.* The following table lists many of the benefits that VA may provide based on qualifying service in the Republic of the Philippines. This table does not confer any substantive rights.

BENEFITS AVAILABLE TO A FILIPINO VETERAN AND HIS OR HER SURVIVOR

Benefit	Armed forces of the U.S., including Old Philippine Scouts (§ 5.610(a))	New Philippine Scouts (§ 5.610(b))	Commonwealth Army of the Philippines/ Guerrillas (§ 5.610(c) and (d))
(1) Disability Compensation.	Yes—Full-Rate	Yes—Full-Rate if U.S. citizen or permanent resident alien and residing in U.S. Otherwise, Half-Rate.	Yes—Full-Rate if U.S. citizen or permanent resident alien and residing in U.S. Otherwise, Half-Rate.
(2) Pension	Yes—Full-Rate	No	No.
(3) Clothing Allowance	Yes—Full-Rate	Yes—Half-Rate	Yes—Half-Rate.
(4) DIC	Yes—Full-Rate	Yes—Full-Rate if U.S. citizen or permanent resident alien and residing in U.S. Otherwise, Half-Rate.	Yes—Full-Rate if U.S. citizen or permanent resident alien and residing in U.S. Otherwise, Half-Rate.
(5) Parents' DIC	Yes—Full-Rate	Yes—Full-Rate if U.S. citizen or permanent resident alien and residing in U.S. Otherwise, Half-Rate.	Yes—Full-Rate if U.S. citizen or permanent resident alien and residing in U.S. Otherwise, Half-Rate.
(6) Burial Benefits	Yes—Full-Rate	Yes—Full-Rate if veteran dies after 12/15/03 and was a U.S. citizen or permanent resident alien and residing in U.S. on date of death (in some cases). See § 5.617 for specific requirements. Half-Rate if veteran dies after 12/15/03, but above criteria not met. No benefits payable if veteran died before 12/16/03.	Yes—Full-Rate if veteran dies after 11/1/00 and was a U.S. citizen or permanent resident alien and residing in U.S. on date of death (in some cases). See § 5.617 for specific requirements. Half-Rate if veteran dies after 11/1/00 but above criteria not met or if veteran died before 11/2/00.

(b) *Other sections relevant to claims based on qualifying service in the Republic of the Philippines*—(1) *Affidavits prepared in the Republic of the Philippines.* See § 5.132.

(2) *Child adopted under foreign law.* See § 5.225.

(3) *Dependents' educational assistance for a child based on the child's parent's service in the Commonwealth Army of the Philippines or as a New Philippine Scout as defined in § 5.610(b), (c), or (d).* See § 5.586.

(4) *Forfeiture based on fraud or treason committed in the Philippine Islands.* See §§ 5.676 and 5.677.

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

Cross Reference: § 5.1, for the definition of ''fraud''.

§ 5.613 Payment of disability compensation or dependency and indemnity compensation at the full dollar rate for certain Filipino veterans or their survivors residing in the U.S.

(a) *Definitions.* For purposes of this section:

(1) *United States* means the States, territories, and possessions of the United U.S.; the District of Columbia; and the Commonwealth of Puerto Rico.

(2) *Residing in the U.S.* means that a person's principal, actual residence is in the U.S. and that the person meets the residency requirements of paragraph (c)(1) of this section.

(3) *Citizen of the U.S.* means any person who acquires U.S. citizenship through birth in the territorial U.S., birth abroad as provided under title 8, United States Code, or through naturalization, and has not renounced his or her U.S. citizenship, or had such citizenship cancelled, revoked, or otherwise discontinued.

(4) *Lawfully admitted for permanent residence* means that a person has been, and continues to be, lawfully accorded the privilege of residing permanently in the U.S. as an immigrant by the U.S. Citizenship and Immigration Services under title 8, United States Code.

(b) *Eligibility requirements.* Disability compensation or dependency and indemnity compensation (DIC) is payable at the full-dollar rate based on service described in § 5.610(b), (c), or (d) to a veteran or a veteran's survivor who is residing in the U.S. and is either:

(1) A citizen of the U.S.; or

(2) An alien lawfully admitted for permanent residence in the U.S.

(c) *Evidence of eligibility for full-dollar rate benefits*—(1) *Evidence of residency.* (i) Evidence establishing that the veteran or the veteran's survivor is residing in the U.S. should identify the veteran's or veteran's survivor's name and relevant dates, and may include:

(A) A valid driver's license issued by the State of residence;

(B) Employment records, which may consist of pay stubs, W–2 forms, and certification of the filing of Federal, State, or local income tax returns;

(C) Residential leases, rent receipts, utility bills and receipts, or other relevant documents showing dates of utility service at a leased residence;

(D) Hospital or medical records showing medical treatment or hospitalization, and showing the name

of the medical facility or treating physician;

(E) Property tax bills and receipts; and

(F) School records.

(ii) A Post Office box mailing address in the veteran's or veteran's survivor's name does not constitute evidence showing that the veteran or veteran's survivor is lawfully residing in the U.S.

(2) *Evidence of citizenship.* A valid original or valid copy of one of the following documents is required to prove that the veteran or the veteran's survivor is a natural born citizen of the U.S.:

(i) A U.S. passport;

(ii) A birth certificate showing that he or she was born in the U.S.; or

(iii) A Report of Birth Abroad of a Citizen of the U.S. issued by a U.S. consulate.

(3) *Verification of citizenship.* Only verification by the U.S. Citizenship and Immigration Services to VA that a veteran or a veteran's survivor is a naturalized citizen of the U.S., or a valid U.S. passport, will be sufficient proof of such status.

(4) *Verification of permanent resident status.* Only verification by the U.S. Citizenship and Immigration Services to VA that a veteran or a veteran's survivor is an alien lawfully admitted for permanent residence in the U.S. will be sufficient proof of such status.

(d) *Continued eligibility.*—(1) *Present in the U.S.* In order to continue receiving benefits at the full-dollar rate under this section, a veteran or a veteran's survivor must be physically present in the U.S. for at least 183 days of each calendar year in which he or she receives payments at the full-dollar rate, and may not be absent from the U.S. for more than 60 consecutive days at a time, unless good cause is shown. When a veteran's or veteran's survivor's absence from the U.S. exceeds one of those limits, VA will pay a reduced rate of $0.50 for each dollar authorized under the law, effective on the date determined under § 5.618. If such veteran or veteran's survivor returns to the U.S., VA will resume payments at the full-dollar rate, effective on the date determined under § 5.614. However, if a veteran or a veteran's survivor becomes eligible for full-dollar rate benefits for the first time after June 30 of any calendar year, the 183-day rule will not apply during that calendar year. VA will not consider a veteran or a veteran's survivor to have been absent from the U.S. if he or she left and returned to the U.S. on the same date.

(2) *Veteran or veteran's survivor leaves U.S. or loses citizenship or status.* A veteran or a veteran's survivor receiving benefits at the full-dollar rate under this section must inform VA no later than 30 days after leaving the U.S., or no later than 30 days after losing either his or her U.S. citizenship or lawful permanent resident alien status. When a veteran or a veteran's survivor no longer meets the eligibility requirements of paragraph (b) of this section, VA will pay a reduced rate of $0.50 for each dollar authorized under the law, effective on the date determined under § 5.618. If such veteran or veteran's survivor regains his or her U.S. citizenship or lawful permanent resident alien status, VA will restore full-dollar rate benefits, effective on the date determined under § 5.614.

(3) *Verification of status.* When requested to do so by VA, a veteran or a veteran's survivor receiving benefits at the full-dollar rate under this section must verify that he or she continues to meet the residency and citizenship or permanent resident alien status requirements of paragraph (b) of this section. VA will advise the veteran or the veteran's survivor at the time of the request that the verification must be received no later than 60 days after the date of the request or else the rate of payment will be reduced. If VA does not receive the evidence within 60 days after the date of the request, VA will pay a reduced rate of $0.50 for each dollar authorized, effective on the date provided in § 5.104, Certifying continuing eligibility to receive benefits. If VA subsequently receives the requested evidence of continued eligibility, it will resume payments at the full-dollar rate, effective on the date determined under § 5.614.

(4) *Change of address.* A veteran or a veteran's survivor receiving benefits at the full-dollar rate under this section must promptly inform VA of any change in his or her address. If mail from VA to the veteran or the veteran's survivor is returned to VA by the U.S. Postal Service, VA will make reasonable efforts to determine the correct mailing address. If VA is unable to determine the correct mailing address through reasonable efforts, VA will pay a reduced rate of $0.50 for each dollar authorized under law, effective on the date determined under § 5.618. If VA subsequently receives evidence of a valid U.S. mailing address, it will resume payments at the full-dollar rate, effective on the date determined under § 5.614.

(Authority: 38 U.S.C. 107, 501(a))

Cross Reference: § 5.1, for the definitions of ''alien'' ''State''.

§ 5.614 Effective dates of benefits at the full-dollar rate for a Filipino veteran and his or her survivor.

Public Laws 106–377 and 108–183, which provide disability compensation and dependency and indemnity compensation (DIC) at full-dollar rates to certain Filipino veterans and their survivors, are considered liberalizing laws. Accordingly, the provisions of § 5.152, apply when determining the effective date of an award. If the requirements of § 5.152 are not satisfied, then the effective date of an award or increased award of benefits at the full-dollar rate under § 5.613 will be determined as follows:

(a) *Effective date of initial entitlement to the full-dollar rate.* The latest of the following dates:

(1) Date entitlement arose;

(2) Date on which the veteran or the veteran's survivor first met the residency and citizenship or permanent resident alien status requirements in § 5.613, if VA receives evidence of this no later than 1 year after that date; or

(3) Effective date of service connection, provided that no later than 1 year after VA notifies the veteran or the veteran's survivor that it has granted service connection, VA receives evidence that he or she meets the residency and citizenship or permanent resident alien status requirements in § 5.613.

(b) *Effective date of resumption of the full-dollar rate.* Depending on the reason for reduction to the rate of $0.50 for each dollar, the effective date of restored eligibility for the full-dollar rate will be:

(1) The date the beneficiary regains his or her U.S. citizenship or lawful permanent resident alien status as required in § 5.613;

(2) The date the veteran or the veteran's survivor returned to the U.S. after an absence of more than 60 consecutive days;

(3) In the case of a veteran or veteran's survivor who was absent from the U.S. for a total of 183 days or more and returned to the U.S. during the same calendar year, the first day of the following calendar year; or

(4) In the case of a veteran or veteran's survivor who was absent from the U.S. for a total of 183 days or more and returned to the U.S. in a later calendar year but less than 183 days after the beginning of such calendar year, the day following their return.

(5) In the case of resumption of the full-dollar rate under § 5.613(d)(3), the date the requested evidence of continued eligibility is received by VA; or

(6) In the case of resumption of the full-dollar rate under § 5.613(d)(4), the date VA receives evidence of a valid U.S. mailing address.

(c) *When payments at the full-dollar rate will begin after eligibility is restored.* In the case of a veteran or a veteran's survivor whose eligibility is restored under § 5.613, Payment of disability compensation or dependency and indemnity compensation at the full dollar rate for certain Filipino veterans or their survivors residing in the U.S., VA will resume payments at the full-dollar rate, if otherwise in order, effective the first day of the month after the date established in paragraph (b) of this section. However, such increased payments will not be retroactive for more than 1 year before the date on which VA receives evidence that the veteran or veteran's survivor met the requirements again.

(Authority: 38 U.S.C. 107; Pub. L. 106–377 App. A, 114 Stat. 1441A–57; Pub. L. 108–183, 117 Stat. 2651)

Cross Reference: § 5.1, for the definition of ''alien''.

§ 5.615 Parents' dependency and indemnity compensation based on certain Philippine service.

(a) *Scope.* This regulation applies to claims for parents' dependency and indemnity compensation (DIC) based on the following types of service, as described in § 5.610:

(1) Service in the Commonwealth Army of the Philippines;

(2) Service as a guerrilla; and

(3) Service as a New Philippine Scout.

(b) *Income limitations.* DIC is not payable to a parent whose annual income exceeds the limitations set forth in 38 U.S.C. 1315 (b), (c), or (d). For parents' DIC, these income limitations will be at a rate of $0.50 for each dollar. However, if the beneficiary meets the requirements for the full-dollar rate in § 5.613, then these income limitations will be at the full-dollar rate.

(Authority: 38 U.S.C. 107; Pub. L. 108–183, 117 Stat. 2651)

Cross Reference: §§ 5.530 through 5.537, for eligibility requirements and payment rules for parents' DIC.

§ 5.616 Hospitalization in the Philippines.

Hospitalization in the Philippines under 38 U.S.C. 1731, 1732, and 1733 does not qualify the deceased for burial benefits based on death while properly hospitalized by VA.

(Authority: 38 U.S.C. 107)

Cross Reference: §§ 5.630 through 5.653, for burial benefits.

§ 5.617 Burial benefits at the full-dollar rate for certain Filipino veterans residing in the U.S. on the date of death.

(a) *Definitions.* For purposes of this section:

(1) *United States* means the States, territories, and possessions of the U.S.; the District of Columbia; and the Commonwealth of Puerto Rico.

(2) *Residing in the U.S.* means a person's principal, actual residence was in the U.S. When death occurs outside the U.S., VA will consider the deceased person to have been residing in the U.S. on the date of death if the person maintained his or her principal, actual residence in the U.S. until his or her most recent departure from the U.S., and he or she had been physically absent from the U.S. less than 61 consecutive days when he or she died.

(3) *Citizen of the U.S.* means any person who acquires U.S. citizenship through birth in the territorial U.S., birth abroad as provided under title 8, United States Code, or through naturalization, and has not renounced his or her U.S. citizenship, or had such citizenship cancelled, revoked, or otherwise discontinued.

(4) *Lawfully admitted for permanent residence* means that the person had been, and continued to be, lawfully accorded the privilege of residing permanently in the U.S. as an immigrant by the U.S. Citizenship and Immigration Services under title 8, United States Code, on the date of death.

(b) *Eligibility requirements.* VA will pay burial benefits under 38 U.S.C. chapter 23, at the full-dollar rate, based on service described in § 5.610(c) or (d) when a person who performed such service dies after November 1, 2000, or based on service described in § 5.610(b) when a person who performed such service dies after December 15, 2003, and was on the date of death:

(1) Residing in the U.S.; and was

(2) Either:

(i) A citizen of the U.S.; or

(ii) An alien lawfully admitted for permanent residence in the U.S.; and was

(3) Either:

(i) Receiving disability compensation under 38 U.S.C. chapter 11; or

(ii) Meeting the disability, income, and net worth requirements of § 5.371,and would have been eligible for pension if the veteran's service had been deemed to be active military service.

(c) *Evidence of eligibility*—(1) *Evidence of residency.* (i) Evidence establishing that the veteran was residing in the U.S. on the date of death should identify the veteran's name and relevant dates, and may include:

(A) A valid driver's license issued by the State of residence;

(B) Employment records, which may consist of pay stubs, W–2 forms, and certification of the filing of Federal, State, or local income tax returns;

(C) Residential leases, rent receipts, utility bills and receipts, or other relevant documents showing dates of utility service at a leased residence;

(D) Hospital or medical records showing medical treatment or hospitalization of the veteran or the veteran's survivor, and showing the name of the medical facility or treating physician;

(E) Property tax bills and receipts; and

(F) School records.

(ii) A Post Office box mailing address in the veteran's name does not constitute evidence showing that the veteran was lawfully residing in the U.S. on the date of death.

(2) *Evidence of citizenship.* In a claim for full-dollar rate burial payments based on the deceased veteran having been a natural born citizen of the U.S., a valid original or valid copy of one of the following documents is required:

(i) A U.S. passport;

(ii) A birth certificate showing that he or she was born in the U.S.; or

(iii) A Report of Birth Abroad of a Citizen of the U.S. issued by a U.S. consulate.

(3) *Verification of citizenship.* In a claim for full-dollar rate burial payments based on the deceased veteran having been a naturalized citizen of the U.S., only verification of that status by the U.S. Citizenship and Immigration Services to VA, or a valid U.S. passport, will be sufficient proof for purposes of eligibility for full-dollar rate benefits.

(4) *Verification of permanent resident status.* In a claim for full-dollar rate burial payments based on the deceased veteran having been an alien lawfully admitted for permanent residence in the U.S., only verification of that status by the U.S. Citizenship and Immigration Services to VA will be sufficient proof for purposes of eligibility for full-dollar rate benefits.

(Authority: 38 U.S.C. 107, 501(a))

Cross Reference: § 5.1, for the definitions of ''alien'' and ''State''.

§ 5.618 Effective dates of reductions and discontinuances for benefits at the full-dollar rate for a Filipino veteran and his or her survivor.

(a) *General rule.* VA will assign an effective date of a reduction or discontinuance of benefits payable to a Filipino veteran or the veteran's survivor in accordance with § 5.705.

(b) *Discontinuance based on the withdrawal of recognition of service.* When a discontinuance is based on the

withdrawal of recognition of service, the discontinuance will be effective the first day of the month after the month for which VA last paid benefits.

(c) *Reduction of payments from the full-dollar rate to the half-dollar rate.* The effective date of discontinuance of the full-dollar rate of payment under § 5.613, and reduction to the $0.50 rate of payment will be the earliest of the dates stated in this section. Where an award is reduced, the reduced rate will be effective the day after the date of discontinuance of the greater benefit.

(1) *Absence from U.S. for 183 days or more.* If a veteran or a veteran's survivor receiving benefits at the full-dollar rate under § 5.613 is physically absent from the U.S. for a total of 183 days or more during any calendar year, VA will pay a reduced rate of $0.50 for each dollar authorized under the law, effective on the 183rd day of absence from the U.S.

(2) *Absence from U.S. for more than 60 consecutive days.* If a veteran or a veteran's survivor receiving benefits at the full-dollar rate under § 5.613 is physically absent from the U.S. for more than 60 consecutive days, VA will pay a reduced rate of $0.50 for each dollar authorized under the law, effective on the 61st day of the absence.

(3) *Loss of U.S. citizenship or status.* If a veteran or a veteran's survivor receiving benefits at the full-dollar rate under § 5.613 loses either U.S. citizenship or status as an alien lawfully admitted for permanent residence in the U.S., VA will pay a reduced rate of $0.50 for each dollar authorized under the law, effective on the day he or she no longer satisfies one of these criteria.

(4) *Verification of status.* In the case of a veteran or a veteran's survivor receiving benefits at the full-dollar rate under § 5.613, if VA requests evidence of verification of continued eligibility under § 5.613, but does not receive such evidence within 60 days after such request, VA will pay a reduced rate of $0.50 for each dollar authorized under the law, effective as provided in § 5.104.

(5) *Change of address.* If mail to a veteran or a veteran's survivor receiving benefits at the full-dollar rate under § 5.613 is returned to VA by the U.S. Postal Service, VA will make reasonable efforts to determine the correct mailing address. If VA is unable to determine the veteran's or the veteran's survivor's correct address through reasonable efforts, VA will pay a reduced rate of $0.50 for each dollar authorized under law, effective the first day of the month after the month for which VA last paid benefits.

(Authority: 38 U.S.C. 107)

Cross Reference: § 5.1, for the definition of ''alien''. § 5.705, General effective dates of reduction or discontinuance of benefits.

§§ 5.619–5.629 [Reserved]

Subpart J—Burial Benefits

Burial Benefits: General

§ 5.630 Types of VA burial benefits.

(a) *Burial benefits.* VA provides the following types of burial benefits, which are discussed in §§ 5.631 through 5.653:

(1) Burial allowance based on service-connected death;

(2) Burial allowance based on nonservice-connected death;

(3) Burial allowance for a veteran who died while hospitalized by VA;

(4) Burial plot or interment allowance; and

(5) Allowance for transportation of remains.

(b) *Definition.* For purposes of this subpart, *burial* means all the legal methods of disposing of the remains of a deceased person, including, but not limited to, cremation, burial at sea, and medical school donation.

(c) *Cross references.* (1) Other benefits and services related to the memorialization or interment of a deceased veteran include the following:

(A) Burial in a national cemetery (see §§ 38.600 through 38.629 of this chapter);

(B) Presidential memorial certificates (see 38 U.S.C. 112);

(C) Burial flags (see § 1.10 of this chapter); and

(D) Headstones or markers (see §§ 38.630 through 38.633 of this chapter).

(2) The provisions of §§ 5.631 through 5.653 do not apply to any of the programs listed in paragraph (c)(1) of this section.

§ 5.631 Deceased veterans for whom VA may provide burial benefits.

For purposes of providing burial benefits under subpart J of this part, a ''veteran'' is a person who:

(a) Had active military service and who was discharged or released under conditions other than dishonorable;

(b) Died during authorized travel to or from a period of active duty under § 5.29(a)(1); or

(c) Is entitled to a burial benefit based on a specific provision of law.

(Authority: 38 U.S.C. 101(2), 2302, 2307)

§ 5.632 Persons who may receive burial benefits.

VA may grant a claim for burial benefits that any person files for a burial expense that is reimbursable under subpart J of this part, up to the amount of the applicable statutory burial allowance or a plot or interment allowance. Except in claims a State or an agency or political subdivision of a State files under § 5.636(a)(2) or § 5.645(a), such persons generally include (but are not limited to) the following:

(a) The funeral director, if all or any part of the bill is unpaid.

(b) Any person who used personal funds to pay or help pay burial expenses.

(c) The executor or administrator of the estate of any person, including the estate of the deceased veteran, who prepaid the burial expenses. If no executor or administrator has been appointed, VA may pay burial benefits based on a claim filed by a person acting for such estate who will make distribution of the burial benefits to the person or persons entitled to such distribution under the laws of the veteran's last State of residence.

(d) In a claim for a plot or interment allowance under § 5.645(b), the person or entity from whom the burial plot was purchased, if all or any part of the bill is unpaid.

(Authority: 38 U.S.C. 2302, 2307)

Cross Reference: § 5.1, for the definition of ''State''.

§ 5.633 Claims for burial benefits.

(a) *When claims must be filed*—(1) *General rule.* Except as provided in paragraph (a)(2) of this section, VA must receive claims for the nonservice-connected burial allowance no later than 2 years after the burial of the veteran. If VA denies a claim for nonservice-connected burial allowance, the claimant has 2 years after the burial of the veteran to reopen the claim. There are no other time limitations to file claims for burial benefits under subpart J of this part.

(2) *Correction of character of discharge.* If a burial benefit was not payable at the time of the death or burial of the veteran because of the nature of the veteran's discharge from service, VA may pay the allowance if competent authority corrects a deceased veteran's discharge to reflect a discharge under conditions other than dishonorable. Claims for the nonservice-connected burial allowance must be filed no later than 2 years after the date that the discharge was corrected.

(b) *Supporting evidence*—(1) *General rule.* In order to pay burial benefits, VA must receive all of the following:

(i) A claim.

(ii) Proof of the veteran's death in accordance with § 5.500.

(iii) A statement of account, preferably on letterhead or in the form of an invoice from the funeral director or cemetery owner, showing: The name of the deceased veteran; the plot or interment expenses incurred; the dates of, and expenses incurred for, services rendered; the expenses incurred for any merchandise provided; any credits or payments received; and the unpaid balance.

(iv) A receipt, preferably on letterhead directly from the funeral director or cemetery owner, or such person's representative, showing by whom payment was made, and the name of the deceased veteran. Receipts for transportation charges must also show the dates of the services rendered.

(v) If an heir files the claim for burial expenses paid using funds from the veteran's estate or some other deceased person's estate, the claim must include waivers or evidence of unconditional consent from all other heirs, and the identity and right of all other persons to share in that estate must have been established at the time that each such person executed the waiver or gave consent.

(2) *Nonservice-connected deaths.* In the case of a veteran whose death was not service connected, VA may establish qualifying service based upon evidence of service that VA relied upon to grant disability compensation or pension during the veteran's lifetime, unless there is some other evidence which creates doubt as to the correctness of that evidence of service.

(Authority: 38 U.S.C. 2304, 5107(a))

§ 5.634 Reimbursable burial expenses: general.

(a) *General rule.* The term *burial expenses* as used in subpart J of this part means expenses of the funeral, transportation, and plot or interment of a deceased veteran. Generally, VA will reimburse the burial expenses identified in this subpart as reimbursable, up to the applicable statutory limit.

(b) *Non-reimbursable burial expenses.* VA will not reimburse for burial expenses incurred for any of the following:

(1) *Flags.* A privately purchased burial flag, except when VA was unable to provide a burial flag.

(2) *Duplicate items.* Any item or service, such as clothing or a casket, previously provided or paid for by the U.S. Government for burial purposes.

(3) *Accessory items.* An item or service that is not necessary or related to the funeral, burial, or transportation of the deceased veteran.

(Authority: 38 U.S.C. 2301, 2302, 2303(a), 2307)

§ 5.635 Reimbursable transportation expenses for a veteran who is buried in a national cemetery or who died while hospitalized by VA.

''Transportation expenses'' for purposes of §§ 5.639 and 5.644 include, but are not limited to, the following expenses:

(a) *Shipment by common carrier*—(1) *Pickup of remains.* Charge for pickup of remains from place hospitalized or place of death but not to exceed the usual and customary charge made to the general public for the same service.

(2) *Shipment.* Procuring permit for shipment.

(3) *Shipping case.* When a box purchased for burial purposes is also used as the shipping case, the amount payable may not exceed the usual and customary charge for a shipping case. In any such instance, any excess amount would be an acceptable item to be reimbursed as a burial expense.

(4) *Sealing.* Expense of sealing outside case (tin or galvanized iron), if a vault (steel or concrete) is used as a shipping case and also for burial, an allowance of $30 may be made thereon in lieu of a separate shipping case.

(5) *Hearse to common carrier.* Expense of hearse to the point where remains are to be placed on common carrier for shipment.

(6) *Transportation and Federal taxes.* Expense of transportation by common carrier, including amounts paid as Federal taxes.

(7) *Removal by hearse.* Expense of one removal by hearse direct from common carrier plus one later removal by hearse to place of burial.

(b) *Transported by hearse.*—(1) *Charges.* Charge for pickup of remains from place hospitalized or place of death and charge for one later removal by hearse to place of burial. These charges will not exceed those made to the general public for the same services.

(2) *Limitation on charges.* Payment of hearse charges for transporting the remains over long distances are limited to prevailing common carrier rates when common carrier service is available and can be easily and effectively utilized.

(Authority: 38 U.S.C. 2303, 2308)

§ 5.636 Burial of a veteran whose remains are unclaimed.

(a) *Unclaimed veteran's remains; burial allowance based on nonservice-connected death.* When a veteran's remains are unclaimed, burial allowance is payable either:

(1) Under § 5.643, if the requirements of that section are met; or

(2) If a deceased veteran either served during wartime (as defined in § 5.20) or was discharged or released from active military service for a disability incurred or aggravated in the line of duty and the following conditions are met:

(i) The remains of the deceased veteran are being held by a State (or a political subdivision of a State); and

(ii) An appropriate official of the State (or a political subdivision of the State) where the remains are being held certifies in writing that:

(A) There is no next of kin or other person claiming the remains of the deceased veteran; and

(B) There are not sufficient resources available in the veteran's estate to cover the burial expenses.

(b) *Unclaimed veteran's remains: burial allowance based on service-connected death.* Benefits are payable under § 5.638 if the requirements of that section are met.

(c) *Plot or interment allowance.* Benefits are payable under § 5.645 if the requirements of that section are met.

(d) *Burial.* When a veteran's remains are unclaimed, the Director of the VA regional office in the area in which the veteran died will immediately complete arrangements for burial in a national cemetery or, at his or her option, in a cemetery or cemetery section meeting the requirements of § 5.645(a), if the burial expenses do not exceed the total amount payable had burial been in a national cemetery.

(Authority: 38 U.S.C. 2302(a))

Cross Reference: § 5.1, for the definition of ''State''.

§ 5.637 [Reserved]

Burial Benefits: Allowances & Expenses Paid by VA

§ 5.638 Burial allowance based on service-connected death.

(a) *General rule.* VA will pay a burial allowance of up to the amount specified in 38 U.S.C. 2307 to reimburse a claimant for the burial expenses paid for a veteran who died as a result of a service-connected disability or disabilities (as described in § 5.504). Subject to paragraph (c) of this section, payment of the service-connected burial allowance is in lieu of other allowances authorized by subpart J of this part.

(b) *Exceptions.* VA will not pay the service-connected burial allowance if:

(1) Disability compensation for the cause of death is payable only under 38 U.S.C. 1151 (which provides compensation where a disability or death was caused by VA hospital care, medical or surgical treatment, examination, training and rehabilitation

services, or compensated work therapy program); or

(2) The basis of the claim for burial allowance is entitlement to dependency and indemnity compensation under 38 U.S.C. 1318 (which provides for benefits for a survivor of certain veterans rated totally disabled on the date of death as if the cause of death were service connected).

(c) *Additional allowances available based on service-connected death.* In addition to the service-connected burial allowance authorized by this section:

(1) VA may reimburse for transportation expenses related to burial in a national cemetery under § 5.639; and

(2) VA may pay the plot or interment allowance for burial in a State veterans cemetery under § 5.645(a).

(Authority: 38 U.S.C. 2307, 2308)

Cross Reference: § 5.1, for the definition of ''State''.

§ 5.639 Transportation expenses for burial in a national cemetery.

(a) *Eligibility.* VA will pay for the expense incurred, subject to paragraph (b) of this section, to transport a veteran's remains for burial in a national cemetery if the veteran:

(1) Died as the result of a service-connected disability;

(2) Was receiving service-connected disability compensation on the date of death; or

(3) Would have been receiving service-connected disability compensation on the date of death, but for the receipt of military retired pay or nonservice-connected disability pension.

(b) *Eligibility exceptions.* VA will not provide payment under this section if:

(1) Disability compensation for the cause of death is payable only under 38 U.S.C. 1151 (which provides compensation where a disability or death was caused by VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program); or

(2) The basis of the claim for transportation expenses is entitlement to dependency and indemnity compensation under 38 U.S.C. 1318 (which provides for benefits for a survivor of certain veterans rated totally disabled on the date of death as if the cause of death was service connected).

(c) *Amount payable.* The amount payable under this section will not exceed the cost of transporting the remains to the national cemetery closest to the veteran's last place of residence in which burial space is available, and is subject to the limitations set forth in §§ 5.635 (relating to reimbursable transportation expenses) and 5.651 (relating to the effect of contributions by government, public, or private organizations).

(Authority: 38 U.S.C. 2308)

§§ 5.640–5.642 [Reserved]

§ 5.643 Burial allowance based on nonservice-connected death.

(a) *General rule.* VA will pay a burial allowance of up to the amount specified in 38 U.S.C. 2302 to reimburse a claimant for the burial expenses paid for a veteran described in paragraph (b) of this section. Payment of the nonservice-connected burial allowance is subject to the applicable further regulations in subpart J of this part.

(b) *Eligibility.* VA will pay a nonservice-connected burial allowance under this section for a veteran whose death was not service connected (as described in § 5.504), that is, was not the result of a service-connected disability or disabilities, when the deceased veteran on the date of death:

(1) Was receiving VA pension or disability compensation;

(2) Would have been receiving disability compensation but for the receipt of military retired pay; or

(3) Had any of the following claims pending:

(i) An original claim for pension or disability compensation, and the evidence in the claims file on the date of death and any evidence received under paragraph (d) of this section was sufficient to grant pension or disability compensation effective before the date of death; or

(ii) A claim to reopen a pension or disability compensation claim, based on new and material evidence, and the evidence in the claims file on the date of the veteran's death and any evidence received under paragraph (d) of this section was sufficient to reopen the claim and grant pension or disability compensation effective before the date of death.

(c) *Evidence in the claims file on the date of the veteran's death* means evidence in VA's possession on or before the date of the deceased veteran's death, even if such evidence was not physically located in the VA claims file before the date of death.

(d) *Requesting additional evidence.* If the veteran had either an original claim or a claim to reopen pending on the date of death but the information in the claims file was not sufficient to grant pension or disability compensation effective before the date of death, and VA determines that additional evidence is needed to confirm that the deceased would have been entitled prior to death, VA will request such evidence. If VA does not receive such evidence within 1 year after the date of the request, the claim will be denied.

(e) *Additional allowances available based on nonservice-connected death.* In addition to the nonservice-connected burial allowance authorized by this section:

(1) VA may reimburse for transportation expenses related to burial in a national cemetery under § 5.639, but only if entitlement under paragraphs (b)(1) through (3) of this section is based on a claim for or award of disability compensation, rather than a claim for or award of pension; and

(2) VA may pay the plot or interment allowance for burial in a State veterans cemetery under § 5.645(a).

(Authority: 38 U.S.C. 2302, 2304)

Cross Reference: § 5.1, for the definition of ''State''.

§ 5.644 Burial allowance for a veteran who died while hospitalized by VA.

(a) *General rule.* VA will pay a burial allowance of up to the amount specified in 38 U.S.C. 2303(a) to reimburse a claimant for the burial expenses paid for a veteran described in paragraph (b) of this section. VA may pay an additional amount for transportation of the remains to the place of burial, as described in paragraph (d) of this section. VA may pay an additional amount for the burial plot, as described in § 5.645. Payment under this section is subject to the applicable further regulations in subpart J of this part.

(b) *Eligibility for burial allowance.* A burial allowance is payable under this section for a veteran whose death was not service connected and who died while hospitalized by VA. For purposes of this allowance, a veteran was hospitalized by VA if the veteran:

(1) Was admitted to a VA facility (as described in 38 U.S.C. 1701(3)) for hospital, nursing home, or domiciliary care under the authority of 38 U.S.C. 1710 or 1711(a);

(2) Was transferred or admitted to a non-VA facility (as described in 38 U.S.C. 1701(4)) for hospital care under the authority of 38 U.S.C. 1703;

(3) Was transferred or admitted to a nursing home for nursing home care at the expense of the U.S. under the authority of 38 U.S.C. 1720;

(4) Was transferred or admitted to a State nursing home for nursing home care for which payment is authorized under the authority of 38 U.S.C. 1741;

(5) Died while traveling under proper prior authorization, and at VA expense,

to or from a specified place for purpose of examination, treatment, or care; or

(6) Was hospitalized by VA pursuant to paragraphs (b)(1) through (4) of this section but was not at the VA facility at the time of death and was:

(i) On authorized absence that did not exceed 96 hours at the time of death;

(ii) On unauthorized absence for a period not in excess of 24 hours at the time of death; or

(iii) Absent from the hospital for a period not in excess of 24 hours of combined authorized and unauthorized absence at the time of death.

(c) *Hospitalization in the Philippines.* Hospitalization in the Philippines under 38 U.S.C. 1731, 1732, and 1733 does not meet the requirements of this section.

(d) *Reimbursement of transportation expenses.* In addition to the burial allowance authorized by this section, VA will reimburse for the expense of transportation of the remains of a person described in paragraph (b) of this section to the place of burial where death occurs:

(1) Within a State; or

(2) Within a State but the burial is to be outside of a State, except that reimbursement for the expense of transportation of the remains will be authorized only from the place of death to the port of embarkation, or to the border limits of the U.S. where burial is in Canada or Mexico.

(Authority: 38 U.S.C. 2303, 2307)

Cross Reference: § 5.1, for the definitions of ''nursing home'' and ''State''.

§ 5.645 Plot or interment allowance.

(a) *Plot or interment allowance for burial in a State veterans cemetery.* VA will pay the plot or interment allowance in the maximum amount specified in 38 U.S.C. 2303(b)(1) to a State, or an agency or political subdivision of a State, that provided a burial plot for a veteran (without regard to whether any other burial benefits were provided based on that veteran) when:

(1) The veteran was eligible for burial in a national cemetery under 38 U.S.C. 2402, but was not buried in a national cemetery or other cemetery under the jurisdiction of the U.S.;

(2) The State is claiming the plot or interment allowance for burial of the veteran in a cemetery, or section of a cemetery, owned by the State or agency or subdivision of the State;

(3) The State or agency or political subdivision of the State did not charge for the expense of the plot or interment; and

(4) The state uses the cemetery, or section of a cemetery solely for the interment of any or all of the following:

(i) Persons eligible for burial in a national cemetery;

(ii) In a claim based on a veteran dying after October 31, 2000, deceased members of a reserve component of the Armed Forces not otherwise eligible for interment in a national cemetery; or

(iii) In a claim based on a veteran dying after October 31, 2000, deceased former members of a reserve component of the Armed Forces not otherwise eligible for interment in a national cemetery who were discharged or released from service under conditions other than dishonorable.

(b) *Plot or interment allowance payable based on burial in other than a State veterans cemetery.* VA will provide a plot or interment allowance of up to the amount specified in 38 U.S.C. 2303(b)(2) to reimburse a claimant who incurred plot or interment expenses relating to the purchase of a burial plot for a deceased veteran who was eligible for burial in a national cemetery under 38 U.S.C. 2402 but was not buried in a national cemetery or other cemetery under the jurisdiction of the U.S. and who:

(1) Is eligible for a burial allowance under § 5.643 or § 5.644;

(2) Was discharged from active military service for a disability incurred in or aggravated in the line of duty (because in such cases, VA will accept the official service record as proof of eligibility for the plot or interment allowance and VA will disregard any previous VA determination made in connection with a claim for monetary benefits that the disability was not incurred or aggravated in the line of duty); or

(3) Who, at the time of discharge from active military service, had a disability, shown by official service records, which in medical judgment would have justified a discharge for disability.

(c) *Definitions.* For purposes of subpart J of this part, *plot* or *burial plot* means the final disposal site of the remains, whether it is a grave, mausoleum vault, columbarium niche, or other similar place. *Plot or interment expenses* are those expenses associated with the final disposition of the remains and are not confined to the acts done within the burial grounds but may include the removal of remains for burial or interment.

(Authority: 38 U.S.C. 501(a), 2303(b))

Cross Reference: § 5.1, for the definition of ''State''.

§§ 5.646–5.648 [Reserved]

Burial Benefits: Other

§ 5.649 Priority of payments when there is more than one claimant.

(a) *Persons who performed services or provided items.* VA will reimburse, before all other claimants, a claimant who performed services or provided items (including, but not limited to, a burial plot) and who has not been fully paid for the services or items.

(b) *Two or more persons used personal funds.* If two or more claimants have paid personal funds toward the burial expenses, VA will divide the applicable burial benefit(s) among such claimants in proportion to the share each paid.

(c) *Personal funds and veteran's estate.* VA will reimburse a claimant who used his or her personal funds before VA will reimburse the estate of the deceased veteran for amounts that the estate paid toward allowable burial expenses.

(d) *Plot or interment allowance.* (1) An unpaid bill for a burial plot will take priority in payment of the plot or interment allowance over claims for other plot or interment expenses. Any remaining balance of the plot or interment allowance may then be applied to the other plot or interment expenses.

(2) Notwithstanding paragraphs (a) through (c) of this section, VA will provide the entire plot or interment allowance under § 5.645(a), to an eligible State, or an agency or political subdivision of a State, rather than any other claimant for plot or interment allowance.

(e) *Exceptions for waivers.* Any claimant may waive his or her right to receive burial benefits in favor of another claimant. However, even if a claimant waives his or her right in favor of a particular claimant, VA may not pay that the later claimant more than that claimant personally paid toward allowable burial expenses.

(Authority: 38 U.S.C. 2302, 2307)

Cross Reference: § 5.1, for the definition of ''State''.

§ 5.650 Escheat (payment of burial benefits to an estate with no heirs).

VA will not pay burial benefits when the payment would escheat (that is, would be turned over to the State because there are no heirs to the estate of the person to whom such benefits would be paid).

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

§ 5.651 Effect of contributions by government, public, or private organizations.

(a) *Contributions by government or employer.* If a claimant files a claim for nonservice-connected burial benefits and the U.S., a State, any agency or political subdivision of the U.S. or of a State, or the employer of the deceased veteran has paid or contributed to burial expenses, then VA will reimburse the claimant up to the lesser of:

(1) The allowable statutory amount; or

(2) The amount of the total burial expenses minus the amount of burial expenses paid by any or all of the organizations described in this paragraph (a).

(b) *Contributions or payments by any other public or private organization.* Contributions or payments by any other public or private organization, such as a lodge, union, fraternal or beneficial organization, society, burial association, or insurance company, will bar payment of nonservice-connected burial benefits if such benefits would revert to the funds of such organization or would discharge such organization's obligation without payment. This section does not apply to contributions or payments on the burial expenses made for humanitarian reasons if the organization making the contribution or payment is under no legal obligation to do so.

(c) *Burial expenses paid by other agencies of the U.S.*—(1) *Burial allowance when Federal law or regulation also provides for payment.* VA cannot pay the nonservice-connected burial allowance when any Federal law or regulation also specifically provides for the payment of the deceased veteran's burial expenses. However, VA will pay the nonservice-connected burial allowance when a Federal law or regulation allows the payment of burial expenses using funds due, or accrued to the credit of, the deceased (such as Social Security benefits), but the law or regulation does not specifically require such payment. In such cases, VA will pay the difference between the total burial expenses and the amount paid thereon under such provision, not to exceed the amount specified in 38 U.S.C. 2302.

(2) *Payment by service department.* VA will not pay the burial allowance for deaths occurring during active military service or for other deaths where the service department pays the burial expenses.

(3) *When a veteran dies while hospitalized.* When a veteran dies while hospitalized at the expense of the U.S. government (including, but not limited to, death in a VA facility), the veteran's service department may be authorized to pay burial benefits under 10 U.S.C. 1481 or to reimburse a person who paid such expenses under 10 U.S.C. 1482. The deceased veteran may also qualify for VA burial benefits. Only one of these benefits is payable. VA will attempt to locate the nearest relative or person entitled to reimbursement and will ask that person to elect between these benefits.

(d) *Effect of payments made to a designated beneficiary of contract or insurance policy.* A contract or insurance policy that provides for payment on the death of a veteran to a designated beneficiary, who is not the person who actually provided the burial and funeral services, will not bar VA's payment of burial benefits to the beneficiary. Payment is not barred even if the organization that issued the contract or policy has the option of making payment directly to the provider of the burial and funeral services.

(Authority: 38 U.S.C. 2302(b), 2307)

Cross Reference: § 5.1, for the definitions of ''political subdivision of the U.S.'' and ''State''.

§ 5.652 Effect of forfeiture on payment of burial benefits.

(a) *Forfeiture for fraud.* VA will pay burial benefits, if otherwise in order, based on a deceased veteran who forfeited his or her right to receive benefits due to fraud under § 5.676. However, VA will not pay burial benefits to a claimant who participated in fraudulent activity that resulted in forfeiture under § 5.676.

(b) *Forfeiture for treasonable acts or for subversive activity.* VA will not pay burial benefits based on a period of service commencing before the date of commission of the offense where either the veteran or claimant has forfeited the right to all benefits except insurance payments under § 5.677, or § 5.678, because of a treasonable act or subversive activities, unless the offense was pardoned by the President of the U.S.

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

Cross Reference: § 5.1, for the definition of ''fraud''.

§ 5.653 Eligibility based on status before 1958.

When any person dies who had a status under any law in effect on December 31, 1957, that afforded entitlement to burial benefits, the burial allowance will be paid, if otherwise in order, even though such status does not meet the service requirements of 38 U.S.C. chapter 23.

(Authority: 38 U.S.C. 2305)

§§ 5.654–5.659 [Reserved]

Subpart K—Matters Affecting the Receipt of Benefits

Bars to Benefits

§ 5.660 In the line of duty.

(a) *Effect of line of duty findings on claims adjudication.* Except as provided in §§ 5.246 and § 5.247, VA may grant service connection only for a disability or death that was incurred or aggravated in the line of duty.

(b) *Definition.* Except as provided in paragraph (c) of this section, an injury, disease, or cause of death was incurred or aggravated ''in the 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 actions:

(1) The veteran's willful misconduct under § 5.661; or

(2) The veteran's abuse of alcohol or drugs under § 5.662.

(c) *Exceptions.* An injury, disease, or cause of death does not meet line of duty requirements if it was 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 court other than a U.S. military court for a felony under the laws of the jurisdiction of such court.

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

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

Cross Reference: § 5.1, for the definitions of ''drugs'' and ''willful misconduct''. § 5.140(b), Determining former prisoner of war status, (concerning whether the detention or internment of a former prisoner of war was in the line of duty).

§ 5.661 Willful misconduct.

(a) *Definitions.* See § 5.1 for the definitions of ''willful misconduct,'' ''proximately caused,'' and ''drugs''.

(b) *Effect of willful misconduct findings on claims adjudication.* (1) VA may not grant service connection for a disability or death resulting from injury or disease proximately caused by the

veteran's willful misconduct, and VA may not pay disability compensation for disability due to such injury, disease, or death. This paragraph (b) applies to service connection established under any provision of this part, including, but not limited to, §§ 5.246 and 5.247. It also applies to compensation awarded under § 5.350.

(2) VA may not grant disability or death pension for any condition proximately caused by the veteran's 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, § 5.662(b), may preclude VA from awarding service connection for such diseases or injuries.

(2) *Drugs.* (i) 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.

(ii) 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.

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

(iv) The use of drugs proximately caused by a service-connected disability is not willful misconduct.

(d) *Suicide constituting willful misconduct*—(1) *General rule.* (i) If an act of self-destruction is intentional, it constitutes willful misconduct.

(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) In order for a death resulting from suicide to be service connected, 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) VA considers the act of suicide or a bona fide attempt to be evidence of mental unsoundness. Therefore, where the evidence shows no reasonable, adequate motive for suicide, VA will consider the act to have resulted from mental unsoundness.

(iii) Competent evidence showing circumstances which could lead a rational person to self-destruction may establish a reasonable, adequate motive for suicide.

(3) *Evaluation of evidence.* (i) Competent 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, reasonable doubt should be resolved in favor of supporting a finding of service connection (see § 5.249).

(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 the line of duty will not govern.

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

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

(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, VA will not deem an injury or disease incurred during active military service to have been incurred in the line of duty if *the abuse of alcohol or drugs proximately caused* such injury or disease.

(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 the Schedule for Rating Disabilities in part 4 of this chapter if competent evidence shows that the service-connected disability proximately caused the abuse of alcohol or drugs.

(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 elements:

(1) Alcohol abuse;

(2) Drug abuse; or

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

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

Cross Reference: § 5.1, for the definitions of ''drugs,'' ''proximately caused,'' and ''willful misconduct''.

§ 5.663 Homicide as a bar to benefits.

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

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

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

(3) *Justification* means that there was a lawful reason for causing the death, including, but not limited to, acting in self-defense or in defense of another person, as provided in paragraph (c) of this section.

(b) *Homicide as a bar to benefits.* VA will not award pension, disability 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) He or she, 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.* Subject to the requirement of intent in paragraph (a) of this section, VA will accept a court of law conviction of homicide as binding.

(2) *Other situations.* In all other situations, including those in which a court acquitted the person of criminal charges or reversed the conviction on appeal and the person has not been retried, VA will determine whether the evidence clearly and unmistakably demonstrates that the person committed or abetted the commission of the homicide, as defined in paragraph (a) 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 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.* If a veteran's spouse commits homicide of the veteran, VA will pay benefits to the veteran's eligible child as if there were no surviving spouse.

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

(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.* If a veteran's parent commits homicide of the veteran, VA will pay to the veteran's other parent any benefits to which he or she 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.* If a VA claimant or beneficiary commits homicide of 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.* VA pays accrued benefits to various classes of claimants (for example, a child). VA ranks these classes in order of priority for payment of benefits. See § 5.551. 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))

Cross Reference: § 5.1, for the definitions of ''custody of a child'' and ''insanity''.

§§ 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 disability compensation benefits are not subject to forfeiture because of violation of hospital rules.

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

§ 5.676 Forfeiture for fraud.

(a) *Definition of fraud.* See § 5.1.

(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;

(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 benefits provided under this part. The forfeiture applies to both current and future 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 § 5.652.

(4) *Effective date of forfeiture.* See § 5.681.

(5) *Suspension for fraud.* When a case is recommended for forfeiture for fraud in accordance with § 5.679, VA will suspend payment of benefits, effective the first day of the month after the month for which VA last paid benefits. If VA ultimately decides that forfeiture is not appropriate, VA will restore payments effective the day benefits were suspended, 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 revokes the forfeiture under § 5.680.

(2) *Effect on a dependent 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 VA may apportion.* 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 VA would have 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) *Revocation.* See § 5.680(c).

(d) *Death benefits*—(1) *Veteran's fraud does not bar a dependent's death benefits.* Forfeiture of a veteran's benefits for fraud does not bar the award of death pension, death compensation, or dependency and indemnity compensation to an eligible dependent.

(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.

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

Cross Reference: § 5.1, for the definitions of ''fraud'' ''State''. § 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 U.S. or 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 benefits provided under this part. The forfeiture applies to both current and future 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 a dependent of a veteran who forfeited benefits for treasonable acts:

(i) An apportionment award of the forfeited benefits; or

(ii) An award of benefits provided under this part to the veteran's dependent 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.

(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 benefits, effective the first day of the month after the month for which VA last paid benefits. If VA ultimately decides that forfeiture is not appropriate, VA will restore payments effective the day benefits were suspended, 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 after September 1, 1959, except where there is a Presidential pardon for commission of the offense(s) leading to the forfeiture, or where VA revokes the forfeiture under the provisions of § 5.680.

(2) *Effect on a dependent 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 a dependent of the person who forfeited benefits, as follows:

(B) *Amount of disability compensation that may be apportioned.* If the forfeited benefit is disability compensation, the total amount payable to a veteran's spouse, child, and parent 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 VA may apportion.* If the forfeited benefit is pension, the total amount payable to a veteran's spouse and child 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 an eligible surviving dependent of a veteran who forfeited benefits for a treasonable act if all of the following elements 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.

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

Cross Reference: § 5.1, for the definitions of ''custody of a child'' and ''State''. § 5.679, Forfeiture decision procedures.

§ 5.678 Forfeiture for subversive activity.

(a) *Definition of subversive activity.* ''Subversive activity'' is any of the following offenses for which the United States Code prescribes punishment:

(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 U.S.

(xiii) Section 2390, Enlistment to serve against U.S.

(xiv) Chapter 105, Sabotage.

(3) *Title 18, Crimes and Criminal Procedure—claims filed after December 15, 2003.* With respect to the forfeiture of benefits awarded on the basis of claims filed after December 15, 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 a person is convicted of an offense listed in paragraph (a)(1) of this section. The Attorney General notifies VA in each case in which a person 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 benefits provided under this part to the person indicted pending disposition of the criminal proceedings. VA will suspend payments effective the first day of the month after 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 day benefits were suspended, 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 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).

(iv) *Effect on dependent.* VA may not award benefits provided under this part to the dependent 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.

(2) *Restoration of benefits for a surviving dependent.* Upon application following Presidential pardon for the offenses leading to forfeiture for subversive activity, VA may pay a veteran's dependent death pension, death compensation, or dependency and indemnity compensation, if the dependent is 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.* Forfeiture decisions will be made by an official authorized under § 5.5.

(2) *Recommendation of forfeiture.* The Regional Counsel of the region of the residence of the person or of the agency of original jurisdiction having jurisdiction over the person who is the subject of the forfeiture (or in the Philippines, the Manila Veterans Service Center Manager (VSCM)), may recommend forfeiture and submit the case to an official described in paragraph (a)(1) of this section.

(3) *Referral of forfeiture cases.* The following persons may refer cases to the Regional Counsel or VSCM in Manila, as appropriate, for consideration whether to recommend the case for forfeiture:

(i) The director of a Veterans Benefits Administration service;

(ii) The Chairman, Board of Veterans' Appeals; or

(iii) 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. No recommendation of forfeiture will be made until at least 60 days after the notice is sent, or until a hearing is held if one is requested within the period specified in paragraph (b)(5) of this section. 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 file a statement or evidence no later than 60 days after the date of the notice, either to rebut the charges or explain the person's position;

(5) The right to request a hearing no later than 60 days after the date of the notice, with representation by counsel of the person's choosing; and

(6) Information 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 § 5.5 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 § 5.5 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 § 5.676(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.

(e) *Finality of forfeiture decisions.* Forfeiture decisions are final and binding under the provisions in § 5.160(a); § 20.1103 of this chapter, or § 20.1104 of this chapter, as applicable.

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

Cross Reference: § 5.1, for the definitions of ''agency of original jurisdiction,'' ''final decision,'' and ''fraud.''

§ 5.680 Revocation of forfeiture.

(a) *Authority to make revocation decisions.* Revocations of forfeiture decisions will be made by an official authorized under § 5.5(b).

(b) *Bases for revocation.* VA will revoke a forfeiture in only the following cases:

(1) Upon a showing that the forfeiture decision was the product of clear and unmistakable error under § 5.162;

(2) Upon the submission of new and material evidence under § 5.55; or

(3) When a forfeiture for fraud was imposed before September 2, 1959, as provided in paragraph (c) of this section.

(c) *Special rules for revocation of a forfeiture for fraud imposed before September 2, 1959*—(1) *Basis for revocation.* 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, then VA will revoke the forfeiture.

(2) *Effective dates*—(i) *Effective date of revocation.* Revocation 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 § 5.152.

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

(A) VA revoked 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 dependent as provided in § 5.676(c)(2), Forfeiture for fraud; and

(C) The revocation results in payments being due to the beneficiary for periods during which VA paid the apportionment to the beneficiary's dependent.

(ii) *Deduction.* VA will reduce the payments to the beneficiary by the amount of apportioned benefits paid to the beneficiary's dependent during the period stated in paragraph (c)(3)(i)(C) of this section.

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

Cross Reference: § 5.1, for the definition of ''fraud''.

§ 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 month for which VA last 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 month for which VA last 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 benefits for fraud is effective the later of the effective 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 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 benefits for conviction for subversive activity is effective the later of the effective 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)

Cross Reference: § 5.1, for the definition of ''fraud''.

§ 5.682 Presidential pardon for offenses causing forfeiture.

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

(b) *Effective date of resumption of payment of monetary benefits.* Once VA has restored the beneficiary's rights 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 no later than 1 year after the date of the pardon, VA will restore payments effective the date of the pardon; or

(2) If an application is filed more than 1 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 Renouncement of benefits.

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

(b) *How to renounce a benefit.* The renouncement of the right to receive a benefit must be in writing and must be signed by the person entitled to that benefit, and not by a representative. The renouncement 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 first day of the month following 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 after the month for which VA last paid benefits.

(d) *Effect of renouncement of DIC on the rights of another beneficiary*—(1) *Effect on another beneficiary in the same class.* The renouncement of DIC by one person entitled to that benefit 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 a surviving spouse on rights of a child.* The renouncement of DIC by a surviving spouse does not entitle a child under age 18 to DIC, or increase the DIC rate payable to a child over age 18.

(e) *Reapplying for renounced benefits*—(1) *General rules.* (i) A person who renounced the right to receive a benefit may reapply for the same benefit at any time. VA will treat the new application as an original claim.

(ii) Except as otherwise provided in paragraph (e)(2) of this section, the effective date of 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 person who has renounced pension or parents' DIC benefits files a new application for the same benefit no later than 1 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: § 5.83(c)(4) (concerning when VA will send a contemporaneous notice of reduction, discontinuance, or other adverse action).

§§ 5.684–5.689 [Reserved]

Subpart L: Payments and Adjustments to Payments

General Rate-Setting and Payments

§ 5.690 Where to find benefit rates and income limits.

(a) *Rates of payment.* The rates of the following payments for benefits and income limitations on qualification for benefits are available on VA's public Web site at *http://www.va.gov*:

(1) Disability compensation;

(2) Death compensation;

(3) Dependency and indemnity compensation;

(4) Old-Law Pension;

(5) Section 306 Pension;

(6) Improved Pension; and

(7) Monthly allowances under 38 U.S.C. chapter 18 for children disabled from spina bifida or with certain birth defects.

(b) *Income limits.* The income limitations for the following benefit programs are available on VA's public Web site at *http://www.va.gov*:

(1) Old-Law Pension;

(2) Section 306 Pension;

(3) Improved Pension; and

(4) Parents' dependency and indemnity compensation.

(c) Whenever there is an increase in the rates listed in this section, VA will publish notice in the **Federal Register**.

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

§ 5.691 Adjustments for fractions of dollars.

(a) *Calculation of adjusted annual income or annual income.* For purposes of entitlement to pension, VA will round down to the nearest dollar when calculating adjusted annual income. See § 5.370, for the definition of adjusted annual income. For purposes of entitlement to parents' dependency and indemnity compensation (DIC), VA will round down to the nearest dollar when calculating annual income. See §§ 5.531 through 5.534 for how to calculate parents' DIC annual income.

(Authority: 38 U.S.C. 1503(b))

(b) *Calculation of increased rates and income limits.* VA will round up to the nearest dollar when calculating the increase due to a cost-of-living adjustment of any of the following amounts:

(1) Improved Pension maximum annual pension rates;

(2) Old-Law Pension and Section 306 Pension annual income limits;

(3) Income of a spouse when excluded from a veteran's countable annual income for Old-Law Pension and Section 306 Pension purposes;

(4) Parents' DIC annual rates and income limits; or

(5) The monthly allowance rates under 38 U.S.C. chapter 18 for children disabled from spina bifida or with certain birth defects.

(Authority: 38 U.S.C. 5312(c))

(c) *Calculation of monthly or other pension rates.* VA will round down to the nearest dollar the amount of Improved Pension or Section 306 Pension payable.

(Authority: 38 U.S.C. 5123)

§ 5.692 Fractions of one cent not paid.

VA will not pay fractions of a cent when paying any benefit.

(Authority: 38 U.S.C. 501(a), 5312(c)(2))

§ 5.693 Beginning date for certain benefit payments.

(a) *Definition.* For purposes of this section, *increased award* means a benefit payment increased as a result of:

(1) An added dependent;

(2) An increase in disability or disability rating, including, but not limited to, a temporary increased rating;

(3) A reduction in income;

(4) An election of Improved Pension under § 5.463, Effective dates of Improved Pension elections;

(5) Except as provided in paragraph (c)(6) of this section, a temporary total rating under § 4.29 of this chapter; or

(6) A temporary total rating under § 4.30 of this chapter.

(b) *Beginning payment date rule.* VA will pay benefits identified in this paragraph (b) beginning the first day of the month after the month in which the award or increased award becomes effective, except as provided in paragraph (c) of this section. However, VA will consider beneficiaries to be in receipt of monetary benefits as of the effective date of the award or increased award. This paragraph (b) applies to awards or increased awards of the following benefits based on an original claim, reopened claim, or claim for increase:

(1) Disability compensation;

(2) Pension;

(3) Dependency and indemnity compensation (DIC); or

(4) The monetary allowances under 38 U.S.C. chapter 18 for children disabled from spina bifida or with certain birth defects.

(c) *Exceptions to beginning payment date rule.* VA will begin payment of each of the following awards as of its effective date:

(1) Awards that provide only for continuity of entitlement with no increase in the rate of payment.

(2) Awards restoring a previously reduced benefit because the circumstances requiring reduction no longer exist.

(3) Awards to a surviving spouse at the veteran's rate for the month of the veteran's death.

(4) Awards that change any withholding, reduction, or suspension because of:

(i) Recoupment;

(ii) An offset to collect indebtedness;

(iii) Receipt of hospital, domiciliary, or nursing home care;

(iv) Incompetency;

(v) Incarceration; or

(vi) Discontinuance of apportionment.

(5) Benefit increases resulting solely from the enactment of certain types of legislation, including, but not limited to, the following:

(i) Cost-of-living increases for disability compensation and DIC for surviving spouses and children;

(ii) Increases in the maximum annual pension rate for Improved Pension;

(iii) Increases in the income limits and maximum monthly rate for parents' DIC;

(iv) Increases in the monetary allowances under 38 U.S.C. chapter 18 for children disabled from spina bifida or with certain birth defects; and

(v) Statutory changes in the criteria for the award of special monthly compensation.

(6) Awards based on temporary total ratings under § 4.29 of this chapter when the entire period of hospitalization or treatment, including any period of post-hospitalization convalescence, begins and ends within the same calendar month. In such cases the period of payment will begin on the first day of the month in which the hospitalization or treatment began.

(7) Apportionments of benefits.

(8) Certain awards of disability compensation to a veteran who is also eligible for retired pay, as described in paragraph (d)(1) of this section.

(9) Awards to a veteran's dependent of benefits that the veteran was receiving or entitled to receive when the veteran disappeared for 90 days or more.

(10) Certain awards of disability compensation to a veteran who was retired or separated for a catastrophic disability, as described in paragraph (e) of this section.

(d) *Cases involving waiver of retired pay.* (1) If the veteran's retired pay, as defined in § 5.745(a), is greater than the amount of VA disability compensation payable, VA will pay disability compensation from the effective date the veteran waives such retired pay.

(2) If the amount of VA disability compensation payable is greater than the veteran's retired pay, VA's payment

of the difference for any period before the effective date of the veteran's waiver of such retired pay is subject to the beginning payment date provision of paragraph (b) of this section.

(3) Nothing in this section precludes the veteran from receiving retired pay before the effective date of waiver of such pay.

(e) *Cases involving catastrophic disability.* If a veteran was retired or separated from the active military service for a catastrophic disability or disabilities, then VA will pay any compensation awarded based on an original claim as of its effective date as provided in this part. For purposes of this section, *catastrophic disability* means a permanent, severely disabling injury, disorder, or disease that compromises the ability of the veteran to carry out the activities of daily living to such a degree that he or she requires personal or mechanical assistance to leave home or bed, or requires constant supervision to avoid physical harm to self or others.

(Authority: 38 U.S.C. 501(a), 1832, 5111, 5305)

5.694 Deceased beneficiary.

When VA discontinues benefits because the beneficiary has died, the discontinuance will be effective the first day of the month in which the beneficiary died.

(Authority: 38 U.S.C. 1822, 1832, 5112(b)(1))

§ 5.695 Surviving spouse's benefit for the month of the veteran's death.

(a) *Month-of-death benefit.* For purposes of this section, *month-of-death benefit* means a payment to a deceased veteran's surviving spouse for the month in which the veteran died and in the amount of disability compensation or pension that the veteran would have received for that month, if not for his or her death.

(b) *Surviving spouse entitled to death pension or dependency and indemnity compensation (DIC) for the month of the veteran's death.* (1) *Surviving spouse's award greater than veteran's award.* If the surviving spouse is entitled to death pension or DIC for the month of the veteran's death in an amount greater than the amount of disability compensation or pension that the veteran would have received for that month if not for his or her death, then the surviving spouse is not entitled to a month-of-death benefit.

(2) *Surviving spouse's award equal to or less than veteran's award.* If the surviving spouse is entitled to death pension or DIC for the month of the veteran's death in an amount equal to or less than the amount of disability compensation or pension that the veteran would have received for that month but for his or her death, then VA will pay the surviving spouse death pension or DIC for the month of the veteran's death in an amount equal to the amount of disability compensation or pension the veteran would have received for that month if not for his or her death.

(c) *Surviving spouse not entitled to death pension or DIC for the month of death.* If a veteran who was receiving disability compensation or pension dies after December 31, 1996, and the surviving spouse is not entitled to death pension or DIC for the month of the veteran's death, then the surviving spouse is entitled to the month-of-death benefit. If the veteran died before January 1, 1997, then such veteran's surviving spouse is not entitled to the month-of-death benefit.

(d) *Payment issued to deceased veteran.* If VA issues payment of compensation or pension to a deceased veteran for the month of his or her death, VA will treat the payment as the month-of-death benefit payable to a surviving spouse who is otherwise eligible for payment under paragraph (b) of this section. If the surviving spouse negotiates or deposits the payment issued to a deceased veteran, then VA will consider the payment to be the benefit to which the surviving spouse is entitled under paragraph (b) of this section. However, if such payment is less than the amount the surviving spouse would receive under paragraph (b) of this section, VA may pay the unpaid difference as accrued benefits. See § 5.1 for the definition of ''accrued benefits''.

(e) When a veteran dies on or after August 6, 2012, the veteran's surviving spouse is entitled to the month-of-death benefit if: (1) The veteran was receiving disability compensation or pension when he or she died; or

(2) VA determines under §§ 5.551 through 5.555 that the veteran was entitled to receive such compensation or pension, or a higher rate of compensation or pension that the veterans was receiving when he or she died. If VA determines that the veteran was entitled to a higher rate of compensation or pension than VA had previously paid as a month-of-death benefit to the surviving spouse, then VA will pay the difference to the surviving spouse.

(Authority: 38 U.S.C. 5111(c), 5310)

§ 5.696 Payments to or for a child pursuing a course of instruction at an approved educational institution.

(a) *Definition of approved educational institution.* For purposes of this section, *approved educational institution* means an institution defined in § 5.220(b)(2) that is approved by the Department of Veterans Affairs.

(Authority: 38 U.S.C. 104(a))

(b) *Payment of Improved Pension or additional disability compensation.*—(1) *Entitlement.* If a veteran's child is at least 18 but less than 23 years old and is pursuing a course of instruction at an approved educational institution:

(i) VA will pay the veteran additional disability compensation if the veteran has service-connected disability rated at least 30 percent disabling;

(ii) VA may pay the veteran a higher rate of Improved Pension;

(iii) VA may pay a surviving spouse a higher rate of Improved Death Pension; or

(iv) VA may pay the child Improved Death Pension if no surviving spouse is eligible to receive Improved Death Pension or if the surviving spouse does not have custody of the child. See § 5.1, for the definition of ''custody of a child''.

(2) *Effective date of award of Improved Pension or additional disability compensation.* (i) *Child began a course of instruction at an approved educational institution on or before the child's 18th birthday.* If a child began a course of instruction at an approved educational institution on or before the child's 18th birthday and VA receives a claim on, before, or no later than 1 year after the child's 18th birthday, the effective date will be the child's 18th birthday.

(ii) *Child began a course of instruction at an approved educational institution after the child's 18th birthday.* If a child began a course of instruction at an approved educational institution after the child's 18th birthday and VA receives a claim no later than 1 year after the date the child began the course, the effective date will be the date the child began the course of instruction at an approved educational institution.

(c) *Payment of dependency and indemnity compensation (DIC) to a child not receiving DIC before the child's 18th birthday.* If a child was not receiving DIC before the child's 18th birthday, VA will pay DIC directly to the child for periods beginning on or after the child's 18th birthday if the child is entitled to DIC and is pursuing a course of instruction at an approved educational institution. The effective

date of the award of DIC will be as follows:

(1) *Child was pursuing a course of instruction at an approved educational institution on the child's 18th birthday.*—(i) *Child on a surviving spouse's award.* The effective date will be the child's 18th birthday if:

(A) Immediately before the child's 18th birthday, the child was a dependent on a surviving spouse's DIC award;

(B) The child began the course of instruction on or before the child's 18th birthday; and

(C) VA receives a claim for DIC on, before, or no later than 1 year after the child's 18th birthday.

(ii) *Child not on a surviving spouse's award.* The effective date will be the first day of the month of the child's 18th birthday if:

(A) Immediately before the child's 18th birthday, the child was not a dependent on a surviving spouse's DIC award;

(B) The child began the course of instruction at an approved educational institution on or before the child's 18th birthday; and

(C) VA receives a claim for DIC on, before, or no later than 1 year after the child's 18th birthday.

(2) *Child began a course of instruction after the child's 18th birthday.* The effective date will be the first day of the month in which the child began the course of instruction at an approved educational institution if:

(i) The child began the course after the child's 18th birthday; and

(ii) VA receives a claim for DIC no later than 1 year after the date the child began the course.

(Authority: 38 U.S.C. 5110(e))

Cross Reference: § 5.573, Effective date for dependency and indemnity compensation rate adjustments when an additional survivor files an application, for information on the impact on awards to other children.

(d) *Payment of DIC to a child receiving DIC before the child's 18th birthday.*—(1) *Entitlement.* VA may pay DIC directly to a child for periods beginning on or after the child's 18th birthday if:

(i) VA paid DIC to the child before the child's 18th birthday; and

(ii) The child is pursuing a course of instruction at an approved educational institution.

(2) *Effective dates.* The effective date for the payment of DIC to the child will be as follows:

(i) *Child began a course of instruction on or before the child's 18th birthday.* VA will pay DIC effective on the child's 18th birthday if:

(A) The child began the course of instruction on or before the child's 18th birthday; and

(B) VA receives evidence of such school attendance on, before, or no later than 1 year after the child's 18th birthday.

(ii) *Child began a course of instruction after the child's 18th birthday.* VA will pay DIC benefits effective the date the child began the course of instruction if:

(A) The child began the course of instruction after the child's 18th birthday; and

(B) VA receives evidence of such school attendance no later than 1 year after the date the child began the course of instruction.

(Authority: 38 U.S.C. 5110(e))

Cross Reference: § 5.524, Awards of dependency and indemnity compensation benefits to children when there is a retroactive award to a schoolchild, for the rate of payment.

(e) *Claims filed outside the 1-year period.* If VA receives a claim referred to in paragraphs (b) or (c) of this section, or evidence referred to in paragraph (d) of this section, after the expiration of the 1-year period, the effective date will be the date VA receives the claim or evidence.

(f) *Payments for vacation or holiday periods.*—(1) *Child returns to an approved educational institution.* A child is considered to be pursuing a course of instruction at an approved educational institution during a vacation or holiday period if the child:

(i) Was pursuing a course of instruction at an approved educational institution immediately before the vacation or holiday period; and

(ii) Resumes the course at the beginning of the next term either at the same or a different approved educational institution.

(2) *Child fails to return to an approved educational institution.* When VA has paid benefits for a vacation or holiday period, and the child does not resume the course, VA will discontinue benefits effective the first day of the month after the month for which VA last paid benefits, or the first day of the month that the child was scheduled to resume the course, whichever date is earlier.

(Authority: 38 U.S.C. 5112(b)(7))

(g) *Ending dates.*—(1) *Course of instruction completed.* If a child completes a course of instruction, then VA will discontinue benefits payable under this section effective the first day of the month after the month in which the course was completed.

(2) *Termination of course of instruction before completion.* Except as provided in paragraph (f)(2) of this section, if a course of instruction is terminated before completion, then VA will discontinue benefits payable under this section effective the first day of the month after the month in which the course of instruction was terminated.

(h) *Transfer to another course of instruction or another educational institution.* VA will not adjust payments previously made under this section because the child changed a course of instruction or transferred to a different approved educational institution.

(i) *Bars to benefit payments under this section.* VA will not pay benefits under this section if:

(1) The child has elected to receive educational assistance under 38 U.S.C. chapter 35 (see § 5.764 and § 21.3023 of this chapter); or

(2) The child is pursuing a course of instruction at an approved educational institution where the child is completely supported at the expense of the Federal Government, such as a military service academy.

(Authority: 38 U.S.C. 501(a), 3562)

§ 5.697 Exchange rates for income received or expenses paid in foreign currencies.

(a) *Pension and parents' dependency and indemnity compensation (DIC) rates.* In determining the rate of pension or parents' DIC payable to a person, VA will convert the amount of income received or expenses paid in foreign currencies into U.S. dollars using the quarterly exchange rates established by the U.S. Department of the Treasury as provided in this section. Benefits will be paid in U.S. dollars.

(1) *Calculation of pension or parents' DIC rates.* Because exchange rates for foreign currencies cannot be determined in advance, VA will estimate pension or parents' DIC rates using the most recent quarterly exchange rate. When the beneficiary or claimant informs VA of a change in income or expenses that would affect entitlement, VA will make retroactive benefit adjustments based on the exchange rate in effect at the time VA received notice of the change in income or expenses.

(2) *Retroactive adjustments due to changes in exchange rates.* (i) For retroactive adjustments to pension or parents' DIC rates due to changes in the currency exchange rate, VA will use the average of the four most recent quarterly exchange rates.

(ii) If income or expenses are reported for a prior reporting period, VA will calculate any retroactive benefit rate adjustment using the average of the four

most recent quarterly exchange rates that were available on the last day of the reporting period for which the income is being reported. See § 5.708(a)(2) for the definition of ''reporting period''.

(b) *Benefits and funds payable as reimbursement for expenses paid in foreign currency.*—(1) *Applicability.* This paragraph (b) applies to payment of the following benefits or funds:

(i) Monetary burial benefits paid under subpart J of this part;

(ii) Accrued benefits paid in accordance with § 5.551(e), as reimbursement to the person who bore the expense of the deceased beneficiary's last sickness or burial;

(iii) Funds in the special deposit account paid in accordance with § 5.565(b)(4), as reimbursement to the person who bore the expense of the burial of the payee;

(iv) Funds in a personal-funds-of-patients account paid in accordance with § 5.566(d)(4); and

(v) Funds paid in accordance with § 5.567(a)(4).

(2) *General rule.* If benefits or funds are payable as reimbursement for expenses paid in foreign currency, VA will calculate the payment amount using the quarterly exchange rate for the quarter in which expenses were paid. If the U.S. Department of the Treasury has not yet published a rate for that quarter, VA will calculate the payment amount using the most recent quarterly exchange rate. Payments will be made in U.S. dollars.

(3) *Exception.* If benefits or funds are payable to an unpaid creditor for charges billed in foreign currency, VA will calculate the payment amount using the quarterly exchange rate for the quarter in which the veteran, beneficiary, or payee died. If the U.S. Department of the Treasury has not yet published a rate for that quarter, VA will calculate the payment amount using the most recent quarterly exchange rate. Payments will be made in U.S. dollars.

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

§§ 5.698–5.704 [Reserved]

General Reductions, Discontinuances, and Resumptions

§ 5.705 General effective dates for reduction or discontinuance of benefits.

(a) *General rules.* Except as otherwise provided, VA will assign an effective date for the reduction or discontinuance of disability compensation, pension, dependency and indemnity compensation (DIC), or the monetary allowances under chapter 18 of title 38, United States Code, in accordance with the facts found. If more than one effective-date provision applies to a particular issue or event, VA will reduce or discontinue the benefit(s) on the earliest applicable effective date. VA will pay a reduced rate or discontinue benefits effective the date of reduction or discontinuance.

(b) *Reduction and discontinuance table.* The following table lists the locations of specific reduction and discontinuance effective-date provisions in this part 5. The table is solely for informational purposes, and does not confer any substantive rights.

Effective-date provision	Part 5 location
SUBPART C—ADJUDICATIVE PROCESS, GENERAL	
Filing a claim for death benefits	§ 5.52.
Requirement to provide Social Security numbers	§ 5.101(c).
Failure to report for VA examination or reexamination	§ 5.103(d).
Certifying continuing eligibility to receive benefits	§ 5.104(c).
Effective dates based on change of law or VA issue	§ 5.152(c).
Effective dates for reducing or discontinuing a benefit payment, or for severing service connection, based on omission or commission, or based on administrative error or error in judgment.	§ 5.167.
Effective dates for reducing or discontinuing a benefit payment or for severing service connection	§ 5.177.
SUBPART D—DEPENDENTS AND SURVIVORS	
Effective date of reduction or discontinuance based on changes in dependency status	§ 5.184.
Void or annulled marriages	§ 5.196.
Effective date of reduction or discontinuance of Improved Pension, disability compensation, or dependency and indemnity compensation due to marriage or remarriage.	§ 5.197.
Effect of remarriage on a surviving spouse's benefits	§ 5.203.
Effective date of reduction or discontinuance: child reaches age 18 or 23	§ 5.231.
Effective date of reduction or discontinuance: terminated adoptions	§ 5.232.
Effective date of reduction or discontinuance: stepchild no longer a member of the veteran's household	§ 5.233.
Effective date of an award, reduction, or discontinuance of benefits based on child status due to permanent incapacity for self-support.	§ 5.234.
SUBPART E—CLAIMS FOR SERVICE CONNECTION AND DISABILITY COMPENSATION	
Effective dates—discontinuance of total disability rating based on individual unemployability	§ 5.313.
Effective dates—reduction or discontinuance of additional disability compensation based on parental dependency	§ 5.314.
Effective dates: additional compensation for regular aid and attendance payable for a veteran's spouse under § 5.321	§ 5.336(b).
SUBPART F—NONSERVICE-CONNECTED DISABILITY PENSIONS AND DEATH PENSIONS	
Effective dates of changes to annual Improved Pension payment amounts due to a change in income	§ 5.422.
Improved Pension determinations when expected annual income is uncertain	§ 5.423.
Effective date of discontinuance of Improved Death Pension payments to a beneficiary no longer recognized as the veteran's surviving spouse.	§ 5.433.
Award or discontinuance of award of Improved Death Pension to a surviving spouse where Improved Death Pension payments to a child are involved.	§ 5.434.
Effective dates for discontinuances of Old-Law Pension and Section 306 Pension	§ 5.477.

Effective-date provision	Part 5 location
SUBPART G—DEPENDENCY AND INDEMNITY COMPENSATION, DEATH COMPENSATION, ACCRUED BENEFITS, AND SPECIAL RULES APPLICABLE UPON DEATH OF A BENEFICIARY	
Awards of dependency and indemnity compensation benefits to children when there is a retroactive award to a schoolchild.	§ 5.524(c).
Discontinuance of dependency and indemnity compensation to a person no longer recognized as the veteran's surviving spouse.	§ 5.539(b).
Effective date and payment adjustment rules for award or discontinuance of dependency and indemnity compensation to a surviving spouse where payments to a child are involved.	§ 5.540.
Effective date of reduction of a surviving spouse's dependency and indemnity compensation due to recertification of pay grade.	§ 5.541.
Effective date of reduction or discontinuance based on increased income: parents' dependency and indemnity compensation.	§ 5.543.
Dependency and indemnity compensation rate adjustments when an additional survivor files a claim	§ 5.544(b).
Effective dates of awards and discontinuances of special monthly dependency and indemnity compensation	§ 5.545(b).
SUBPART H—SPECIAL AND ANCILLARY BENEFITS FOR VETERANS, DEPENDENTS, AND SURVIVORS	
Awards of benefits based on special acts or private laws	§ 5.581(d), (e).
Effective dates of awards for a disabled child of a Vietnam or Korea veteran	§ 5.591(b).
SUBPART I—BENEFITS FOR CERTAIN FILIPINO VETERANS AND SURVIVORS	
Effective dates of reductions and discontinuances for benefits at the full-dollar rate for a Filipino veteran and his or her survivor.	§ 5.618.
SUBPART K—MATTERS AFFECTING THE RECEIPT OF BENEFITS	
Effective dates: forfeiture	§ 5.681.
Presidential pardon for offenses causing forfeiture	§ 5.682(d).
Renouncement of benefits	§ 5.683(c).
SUBPART L—PAYMENTS AND ADJUSTMENTS TO PAYMENTS	
Deceased beneficiary	§ 5.694.
Payments to or for a child pursuing a course of instruction at an approved educational institution	§ 5.696(b)–(g).
Eligibility verification reports	§ 5.708(e).
Adjustment in benefits due to reduction or discontinuance of a benefit to another payee	§ 5.710(b).
Payment to dependents due to the disappearance of a veteran for 90 days or more	§ 5.711(d).
Suspension of benefits due to the disappearance of a payee	§ 5.712.
Restriction on benefit payments to an alien located in enemy territory	§ 5.713.
Reduction of special monthly compensation based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.	§ 5.720(b), (e), (f).
Resumption of special monthly compensation based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.	§ 5.721(a).
Adjustment of Improved Pension while a veteran is receiving domiciliary or nursing home care	§ 5.722(a), (d), (f), (g).
Adjustment of Improved Pension while a veteran, surviving spouse, or child is receiving Medicaid-covered care in a nursing facility.	§ 5.723(b), (c).
Adjustment or discontinuance of Improved Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.	§ 5.724(a), (c), (d).
Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.	§ 5.725(a), (c).
Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care	§ 5.726(a), (d).
Reduction of Old-Law Pension while a veteran is receiving hospital, domiciliary, or nursing home care	§ 5.727(a), (c).
Reduction of Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.	§ 5.728(a), (c).
Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance during a veteran's temporary absence from hospital, domiciliary, or nursing home care or after released from such care.	§ 5.729(a), (d).
Resumption of Old-Law Pension and Old-Law Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.	§ 5.730(a).
General effective dates for awarding, reducing, or discontinuing VA benefit benefits because of an election	§ 5.743(b).
Prohibition against receipt of active military service pay and VA benefits for the same period	§ 5.746(c).
Effect of payment of compensation under the Radiation Exposure Compensation Act of 1990 on payment of certain VA benefits.	§ 5.754(d).
Payment of multiple VA benefits to a surviving child based on the service of more than one veteran	§ 5.762(c)(6)(ii).
Payment of Survivors' and Dependents' Educational Assistance and VA death pension or dependency and indemnity compensation for the same period.	§ 5.764.
SUBPART M—APPORTIONMENTS TO DEPENDENTS AND PAYMENTS TO FIDUCIARIES AND INCARCERATED BENEFICIARIES	
Effective date of reduction or discontinuance of apportionment	§ 5.783.
Determinations of incompetency and competency	§ 5.790(f).
Incarcerated beneficiaries—general provisions and definitions	§ 5.810(f).

(Authority: 38 U.S.C. 501(a), 1832, 5112)

§ 5.706 Payments excluded in calculating income or net worth.

(a) *Scope.* This section lists payments excluded by Federal statutes from income and net worth determinations when VA determines eligibility for benefits that are based on financial need. These benefits are Improved Pension, Section 306 Pension, Old-Law Pension, parents' dependency and indemnity compensation (DIC), and additional amounts of veterans' compensation payable for dependent parents. Income and net worth rules applying solely to a specific benefit are included in the regulations that deal with that specific benefit.

(b) *Specific payments excluded.* The following table states whether certain payments are included or excluded as income or net worth for any VA-administered benefit program that is based on financial need. This table does not confer any substantive rights.

Program or payment	Income	Net worth	Authority
COMPENSATION OR RESTITUTION PAYMENTS			
(1) *Relocation payments.* Payments to persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.	Excluded	Included	42 U.S.C. 4636.
(2) *Crime victim compensation.* Amounts received as compensation under the Victims of Crime Act of 1984 unless the total amount of assistance received from all federally funded programs is sufficient to fully compensate the claimant for losses suffered as a result of the crime.	Excluded	Excluded	42 U.S.C. 10602(c).
(3) *Restitution to persons of Japanese ancestry.* Payments made as restitution under Pub. L. 100–383 to a person of Japanese ancestry who was interned, evacuated, or relocated during the period of December 7, 1941, through June 30, 1946, pursuant to any law, Executive Order, Presidential proclamation, directive, or other official action respecting these persons.	Excluded	Excluded	50 U.S.C. App. 1989b–4(f).
(4) *Victims of Nazi persecution.* Payments made to persons because of their status as victims of Nazi persecution.	Excluded	Excluded	Sec. 1(a), Pub. L. 103–286, 108 Stat. 1450, 42 U.S.C. 1437a note.
(5) *Agent Orange settlement payments.* Payments made from the Agent Orange Settlement Fund or any other fund established pursuant to the settlement in the In Re Agent Orange product liability litigation, M.D.L. No. 381 (E.D.N.Y.).	Excluded	Excluded	Sec. 1, Pub. L. 101–201, 103 Stat. 1795.
(6) *Chapter 18 benefits.* Allowances paid under 38 U.S.C. chapter 18 to a veteran's child with a birth defect.	Excluded	Excluded	38 U.S.C. 1833(c).
PAYMENTS TO NATIVE AMERICANS			
(7) *Indian judgment fund distributions.* First $2,000 of income received by individual Indians under 25 U.S.C. 1407(1)–(4).	Excluded	Excluded	25 U.S.C. 1407.
(8) *Interests of individual Indians in trust or restricted lands.* Income received by individual Indians that is derived from interests in trust or restricted lands.	First $2,000 per year Excluded	Excluded	25 U.S.C. 1408.
(9) *Submarginal land.* Income derived from certain submarginal land of the U.S. that is held in trust for certain Indian tribes..	Excluded	Excluded	25 U.S.C. 459e.
(10) *Old Age Assistance Claims Settlement Act.* First $2,000 per capita distributions under the Old Age Assistance Claims Settlement Act.	Excluded	Excluded	25 U.S.C. 2307.
(11) *Alaska Native Claims Settlement Act.* Any of the following, if received from a Native Corporation, under the Alaska Native Claims Settlement Act:. (i) Cash, including cash dividends on stocks and bonds, up to a maximum of $2,000 per year; (ii) Stock, including stock issued as a dividend or distribution; (iii) Bonds that are subject to the protection under 43 U.S.C. 1606(h) until voluntarily and expressly sold or pledged by the shareholder after the date of distribution; (iv) A partnership interest; (v) Land or an interest in land, including land received as a dividend or distribution on stock; (vi) An interest in a settlement trust.	Excluded	Excluded	43 U.S.C. 1626(c).
(12) *Maine Indian Claims Settlement Act.* Payments received under the Maine Indian Claims Settlement Act of 1980.	Excluded	Excluded	25 U.S.C. 1728.
WORK-RELATED PAYMENTS			
(13) *Workforce investment.* Allowances, earnings, and payments to persons participating in programs under the Workforce Investment Act of 1998 (29 U.S.C. chapter 30).	Excluded	Included	29 U.S.C. 2931(a)(2).

Program or payment	Income	Net worth	Authority
(14) *AmeriCorps participants.* Allowances, earnings, and payments to AmeriCorps participants under the National and Community Service Act of 1990.	Excluded	Included	42 U.S.C. 12637(d).
(15) *Volunteer work.* Payments to volunteers involved in programs administered from the Corporation for National and Community Service, unless the payments are equal to or greater than the minimum wage. The minimum wage is either under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et. seq.) or under the law of the State where the volunteers are serving, whichever is greater.	Excluded	Excluded	42 U.S.C. 5044(f).
MISCELLANEOUS PAYMENTS			
(16) *Food stamps.* Value of the allotment provided to an eligible household under the Food Stamp Program.	Excluded	Excluded	7 U.S.C. 2017(b).
(17) *Food for children.* Value of free or reduced price for food under the Child Nutrition Act of 1966.	Excluded	Excluded	42 U.S.C. 1780(b).
(18) *Child care.* Value of any child care provided or arranged (or any amount received as payment for such care or reimbursement for costs incurred for such care) under the Child Care and Development Block Grant Act of 1990.	Excluded	Excluded	42 U.S.C. 9858q.
(19) *Services for housing recipients.* Value of services, but not wages, provided to a resident of an eligible housing project under a congregate services program under the Cranston-Gonzalez National Affordable Housing Act.	Excluded	Excluded	42 U.S.C. 8011(j)(2).
(20) *Home energy assistance.* The amount of any home energy assistance payments or allowances provided directly to, or indirectly for the benefit of, an eligible household under the Low-Income Home Energy Assistance Act.	Excluded	Excluded	42 U.S.C. 8624(f).
(21) *Programs for older Americans.* Payments, other than wages or salaries, received from programs funded under the Older Americans Act of 1965 (42 U.S.C. chapter 35).	Excluded	Included	42 U.S.C. 3020a(b).
(22) *Student financial aid.* Amounts of student financial assistance received under Title IV of the Higher Education Act of 1965, including Federal work-study programs or under Bureau of Indian Affairs student assistance programs, or vocational training under the Carl D. Perkins Vocational and Technical Education Act of 1998.	Excluded	Excluded	20 U.S.C. 1087uu, 2415(a).
(23) *Retired Serviceman's Family Protection Plan annuities.* Annuities received under subchapter 1 of the Retired Serviceman's Family Protection Plan.	Excluded	Included	10 U.S.C. 1441.
(24) *Medicare Prescription Drug Discount Card and Transitional Assistance Program.*	Excluded	Excluded	42 U.S.C. 1395w–141(g)(6).

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

§ 5.707 Deductible medical expenses.

(a) *Scope.* This section describes the medical expenses that VA will deduct from countable income for purposes of three of VA's benefit programs based on financial need: Improved Pension, Section 306 Pension, and parents' dependency and indemnity compensation (DIC).

Cross References: For the rules governing how such medical expenses are deducted, see §§ 5.413, Income deductions for calculating adjusted annual income, (regarding Improved Pension), 5.474, Deductible Expenses for Section 306 Pension Only, and 5.532 Deductions from income for parent's dependency and indemnity compensation.

(b) *Definition of licensed health care provider.* For purposes of this section, the term *licensed health care provider* means a person licensed to provide health care in the state in which the person provides health care. The term includes, but is not limited to, physicians, registered nurses, licensed vocational nurses, and licensed practical nurses.

(c) *Medical expenses—general.* If there is more than one way to categorize a medical expense under this paragraph (c), VA will categorize it in the way that is most favorable to the claimant or beneficiary. The following payments are medical expenses that will be deducted from income if they are not reimbursed:

(1) *Care by a licensed health care provider.* Payments for diagnosis, treatment, rehabilitation, or preventive maintenance (such as an annual physical examination) provided by a licensed health care provider.

(2) *Medical supplies and medications.* Payments for prescribed medication and legal non-prescription medication, as well as medically necessary food, beverages, and vitamins that a licensed health care provider authorized to write prescriptions directs a person to take.

(3) *Adaptive equipment.* Payments for adaptive devices or companion animals used to assist a person with an ongoing disability, to the extent that a non-disabled person would not normally make such payments.

(4) *Transportation expenses.* Payments for transportation for medical purposes, including transportation to and from a licensed health care provider's office. VA will deduct the full cost of parking, taxi, bus, or other transportation. However, VA limits the deductible expense per mile for travel by private vehicle to the amount stated on VA Form 21–8416, Medical Expense Report. That form may be obtained at *http://www.va.gov.*

(5) *Health insurance premiums.* Payments for health, medical, and hospitalization insurance premiums. This category includes Medicare premiums.

(6) *Institutional forms of care and in-home attendants.*—(i) *Nursing home care.* Payments to a facility that provides extended term inpatient medical care, if a responsible official of the facility certifies that the person is a patient (as opposed to a resident) in the facility.

(ii) *In-home attendant.* Payments for an in-home attendant for the personal care of a person and maintenance of the person's immediate environment, if the attendant is also providing some medical or nursing care. The following provisions also apply:

(A) If the person needs regular aid and attendance or is housebound, then the attendant need not be a licensed health care provider.

(B) Except as provided in paragraph (c)(6)(ii)(C) of this section, if the person neither needs of regular aid and attendance nor is housebound, then the attendant must be a licensed health care provider.

(C) If the person is neither a surviving spouse nor a veteran and a physician has stated that the person requires the level of medical or nursing care provided by the in-home attendant, then the attendant need not be a licensed health care provider.

(iii) *Veterans in State homes.* Payments to a State home, such as a veterans' or soldiers' and sailors' home operated by a State, if:

(A) The veteran is a patient (as opposed to a resident) in the State home; and

(B) The veteran is receiving hospital, domiciliary, or nursing home care in the State home.

(iv) *Custodial care.* Payments for custodial care (including room and board), nursing care, and medical treatment to an institution that houses and maintains a person because the person needs to live in a protected environment. One of the following conditions must be met:

(A) The person needs regular aid and attendance or is housebound; or

(B) A licensed physician has certified that the person needs to live in a protected environment because of a medical condition.

(v) *Custodial care in a government institution.* Payments to a government institution that houses and maintains a person because the person needs to live in a protected environment. One of the following conditions must be met:

(A) A licensed physician has certified that the person needs to live in a protected environment because of a medical condition; or

(B) The person is participating in a physician-supervised program of therapy or rehabilitation.

(vi) *Adult day care, rest homes, group homes.* Payments to an adult day care facility, rest home, group home, or similar facility, if the facility provides some medical or nursing care to the person. The care need not be provided by a licensed health care provider. One of the following conditions must be met:

(A) The person needs regular aid and attendance or is housebound; or

(B) A licensed physician has certified that the person needs the care provided by the facility.

(Authority: 38 U.S.C. 501(a), 1315(f)(3), 1503(a)(8))

§ 5.708 Eligibility verification reports.

(a) *Definitions.* (1) An eligibility verification report (EVR) is a form used to obtain information from claimants and beneficiaries about factors that may affect entitlement to pension or parents' dependency and indemnity compensation (DIC). See § 5.709(b).

(2) A reporting period is a period established by VA for which a claimant or beneficiary reports income, adjustments to income, and net worth to VA.

(b) *Circumstances when VA may require completion of an EVR.* As a condition of receipt or continued receipt of benefits, claimants or beneficiaries of pension or parents' DIC must, file a completed EVR upon VA's request in the following circumstances:

(1) *EVRs for claimants.* VA may require a claimant to file a completed EVR when necessary to update, complete, or clarify information regarding the claimant's income or marital status or any other factor that affects entitlement.

(2) *EVRs for beneficiaries.* (i) *Annual EVRs.* VA may require a beneficiary to file a completed EVR annually.

Note to paragraph (b)(2)(i): VA does not require the following beneficiaries to file EVRs annually: a beneficiary in receipt of Old-Law Pension or Section 306 Pension, a beneficiary in receipt of Improved Pension whose only income is Social Security benefits, or a parent who has reached age 72 and has been receiving parents' DIC for 2 consecutive calendar years.

(ii) *Other circumstances.* VA may require a beneficiary to file a completed EVR if:

(A) The Social Security Administration has not verified the social security number of the beneficiary or, if applicable, the beneficiary's spouse;

(B) Evidence suggests that the beneficiary or, if applicable, the beneficiary's spouse or child, may have received income from sources other than the Social Security Administration during the current or previous calendar year; or

(C) The Secretary decides completion of an EVR is necessary to ensure accurate and timely reporting of changes in the factors that affect entitlement or to protect the pension and parents' DIC programs from fraud.

(c) *Action VA takes upon receipt of information or of an EVR.* When VA receives new information in an EVR or through other means, VA may reconsider entitlement, adjust the amount of benefits paid, or request additional information, as appropriate.

Cross Reference: §§ 5.423(a); 5.531(e); and 5.478(a), Time limit to establish continuing entitlement to Old-Law Pension or Section 306 Pension (regarding the action VA takes when expected annual income exceeds income limits for Old-Law Pension or Section 306 Pension).

(d) *Action VA takes when a claimant does not return a completed EVR.* If VA does not receive a completed EVR within 60 days after the date VA requested the EVR from a claimant, VA will deny the claim.

(e) *Action VA takes when a beneficiary does not return a completed EVR.*—(1) *Failure to return an EVR.* If VA does not receive an EVR within 60 days after the date VA requested the EVR from a beneficiary, VA will immediately suspend future benefit payments.

(2) *Return of an incomplete EVR.* If VA receives an incomplete EVR no later than 60 days after the date VA requested the EVR from a beneficiary, VA will notify the beneficiary of the additional information needed to complete the EVR. If VA does not receive a completed EVR within 120 days after the date VA first requested the EVR, then VA will immediately suspend future benefit payments.

(3) *Discontinuance for failure to return a completed EVR.* A beneficiary whose benefits were suspended under paragraph (e)(1) or (2) of this section must return the completed EVR no later than 1 year after the date VA first requested the EVR. Otherwise, VA will discontinue benefits as follows:

(i) If the reporting period is the initial reporting period, the effective date of discontinuance is the first day of that period; or

(ii) If the reporting period is a subsequent reporting period, the effective date of discontinuance is the first day of the calendar year for which VA requested the beneficiary provide the information in the EVR.

(f) *Action VA takes when a beneficiary returns an EVR after benefits were suspended or discontinued.* If VA

suspended or discontinued benefits under paragraph (e) of this section, then VA will resume payments (if otherwise in order) as follows:

(1) If VA receives the completed EVR no later than 1 year after the end of the reporting period for which VA requested the beneficiary provide the EVR, then VA will resume payment of benefits as follows:

(i) *Payments suspended but not discontinued.* If payments were suspended but not discontinued, effective the date of suspension.

(ii) *Payments discontinued.* If payments were discontinued, effective the date of discontinuance.

(2) If VA receives the completed EVR more than 1 year after the end of the reporting period, VA will treat the EVR as a new claim.

(g) *VA will accept the EVR at any time to reduce or eliminate a debt.* A beneficiary or former beneficiary who owes or owed money to VA because VA discontinued payments for failure to file an EVR within the time limit in paragraph (e)(3) of this section may file the EVR at any time to reduce or eliminate a debt. If, based on information in the EVR, VA decides that the beneficiary or former beneficiary was entitled to benefits for any part of the period for which VA discontinued payment for failure to file an EVR, VA will reduce the debt accordingly. If the debt is eliminated, VA will not pay additional benefits for that period.

(Authority: 38 U.S.C. 501(a), 1315(e), 1506)

§ 5.709 Claimant and beneficiary responsibility to report changes.

(a) *General rule.* Claimants and beneficiaries of pension or parents' dependency and indemnity compensation (DIC) must promptly notify VA of any material change in a factor that affects entitlement to the benefit that they are claiming or receiving. VA may request any information or evidence that is necessary to determine whether the person is entitled (or continues to be entitled) to a benefit. See § 5.708, Eligibility verification reports, (explaining the circumstances when VA will require an eligibility verification report).

(b) *Table of factors affecting entitlement to pension or parents' DIC.* The following table lists factors that often change and that affect entitlement to pension or parents' DIC. The table is intended solely for informational purposes. It does not list every factor that could affect entitlement to pension or parents' DIC.

Benefit Type (Beneficiary)		Claimant/ Beneficiary and applicable Dependent(s)	Factors affecting Claimant/Beneficiary's entitlement to pension or parents' DIC benefits. ("YES" indicates that the factor may affect entitlement. "NO" indicates that the factor does not affect entitlement)					
			Income	Marital status	Net worth	Number of children (See § 5.220)	Nursing home status	School attendance (if 18 or older)
Improved	Disability Pension (Veteran)	Veteran	YES	YES	YES	YES	YES	NO
		Dependent spouse	YES	YES	YES	YES	NO	NO
		Dependent child	YES [1]	YES	YES	NO	NO	YES
	Death Pension (Surviving spouse)	Surviving spouse	YES	YES	YES	YES	YES	NO
		Dependent child	YES [1]	YES	YES	NO	NO	YES
	Death Pension (Surviving child)	Surviving child	YES [1]	YES	YES	NO	NO	YES
		Child's legal custodian	YES [4]	NO	YES	NO	NO	NO
Section 306	Disability Pension (Veteran)	Veteran	YES	YES	YES	YES	YES	NO
		Dependent spouse	YES [2]	YES	NO	YES	NO	NO
		Dependent child	NO	YES	NO	NO	NO	YES
	Death Pension (Surviving spouse)	Surviving spouse	YES	YES	YES	YES	YES	NO
		Dependent child	YES [3]	YES	NO	NO	NO	YES
	Death Pension (Surviving child)	Surviving child	YES [5]	YES	YES	NO	NO	YES
		Child's legal custodian	NO	NO	NO	NO	NO	NO
Old-Law	Disability Pension (Veteran)	Veteran	YES	YES	NO	YES	YES	NO
		Dependent spouse	NO	YES	NO	YES	NO	NO
		Dependent child	NO	YES	NO	NO	NO	YES
	Death Pension (Surviving spouse)	Surviving spouse	YES	YES	NO	YES	YES	NO
		Dependent child	YES [3]	YES	NO	NO	NO	YES
	Death Pension (Surviving child)	Surviving child	YES	YES	NO	NO	NO	YES
		Child's legal custodian	NO	NO	NO	NO	NO	NO
Parents' DIC (Surviving parent)		Surviving parent	YES	YES	NO	NO	YES	NO
		Surviving parent's spouse	YES [6]	YES	NO	NO	YES	NO

[1] A child's earned income (wages and/or salary) is not a factor under certain circumstances described in § 5.411(b), Counting a child's income for Improved Pension payable to a child's parent.
[2] For exceptions to this rule, see § 5.473, Counting a dependent's income for Old-Law Pension and Section 306 Pension.
[3] A child's income is not a factor unless it is turned over to the surviving spouse. (See § 5.473)
[4] The income of a custodian is a factor unless the custodian is an institution rather than a person.
[5] Only unearned income (income other than wages and/or salary) is a factor. (See § 5.473)
[6] The income of a surviving parent's spouse is a factor unless the parent and spouse are not living together.

(Authority: 38 U.S.C. 501(a); 1315; 1521(b), (c), and (h); 1522; 1541(b), (c), and (g); 1542; 1543; sec. 306, Pub. L. 95–588, 92 Stat. 2497)

§ 5.710 Adjustment in benefits due to reduction or discontinuance of a benefit to another payee.

(a) *Effect of reduction or discontinuance of a payee's benefit.* If a payee becomes entitled to pension, disability compensation, or dependency and indemnity compensation, or an increase in such a benefit because VA reduced or discontinued payment of the same benefit to another payee, then VA will pay the award or increase without the filing of a new claim, except as provided in paragraph (b)(2)(ii) of this section.

(b) *Effective dates.*—(1) *Sufficient information and evidence available.* If there is sufficient information and evidence for VA to award or increase the payee's benefit, then the effective date of the award or increase is the day of the reduction or discontinuance of the benefit to the other payee.

(2) *Insufficient information and evidence.* If there is not sufficient information or evidence for VA to award or increase the payee's benefit, then VA will request additional information or evidence.

(i) If VA receives the information or evidence no later than 1 year after the date of VA's request, then VA will award or increase the payee's benefit and pay the appropriate rate effective the day of the reduction or discontinuance of the benefit to the other payee.

(ii) If VA does not receive the information or evidence within 1 year after the date of VA's request, then the payee must file a new claim. The effective date of the award or increase will be the date VA receives the new claim.

(c) *Rate payable.* The rate for the person who becomes entitled pursuant to this section will be the rate that would have been payable if he or she had been the only original person entitled.

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

§ 5.711 Payment to dependents due to the disappearance of a veteran for 90 days or more.

(a) *General rule.*—(1) *Entitlement.* When a veteran who is receiving or entitled to receive disability compensation, Section 306 Pension, or Improved Pension disappears for 90 days or more, VA will pay the benefit to the veteran's dependent(s) as provided in this section. VA will pay dependents under this section only if the veteran's whereabouts are unknown to the dependent(s) and to VA and VA receives a claim from the dependent(s).

(2) *Definition.* For purposes of this section, *entitled to receive* means that VA has granted a claim for one of the benefits listed in paragraph (a)(1) of this section but has not yet paid the veteran.

(b) *Veteran receiving or entitled to receive disability compensation.* If the veteran was receiving or entitled to receive disability compensation, VA may pay it to the veteran's spouse, child, or dependent parent.

(1) *Rate payable.* The total rate that VA will pay the veteran's dependent(s) is the lesser of either the total rate of dependency and indemnity compensation (DIC) that would be payable if the veteran had died from a service-connected disability or the rate of disability compensation (minus any authorized insurance deductions) the veteran would have received or been entitled to receive at the time of disappearance. If there is a dependent parent, then the rate for parents' DIC may vary depending on the parent's annual income.

(i) *Disability compensation paid at DIC rate.* If VA pays disability compensation at the DIC rate pursuant to this paragraph (b), then it will pay benefits to the dependents as if the veteran were deceased.

(ii) *Disability compensation paid at veteran's rate.* If VA pays disability compensation at the veteran's rate pursuant to this paragraph (b), then it will pay benefits in proportion to the DIC rate for each dependent. VA will use the following steps in calculating each dependent's payment rate:

(A) Determine the DIC rate for each dependent.

(B) Combine those rates together to determine the total rate of DIC that would be payable.

(C) For each dependent, divide the rate in paragraph (b)(1)(ii)(A) of this section by the rate in paragraph (b)(1)(ii)(B) of this section. Calculate the result to four decimal places.

(D) For each dependent, multiply the result from paragraph (b)(1)(ii)(C) of this section by the veteran's rate.

(E) For each dependent, round the final result down to the nearest dollar.

(2) *Effective date of payments.*—(i) *Claim received no later than 1 year after VA last paid the veteran.* If VA receives a claim no later than 1 year after the first day of the month after the month for which VA last paid compensation to the veteran, then payments to the veteran's dependent(s) will be payable effective the first day of the month after the month for which VA last paid compensation to the veteran.

(ii) *Claim more than 1 year after VA last paid the veteran.* If VA receives a claim more than 1 year after the first day of the month after the month for which VA last paid compensation to the veteran, payments to the veteran's dependent(s) will be payable effective the date VA receives the claim.

(c) *Veteran receiving or entitled to receive pension.* If the veteran was receiving or entitled to receive Section 306 Pension or Improved Pension, VA may pay benefits to the veteran's spouse or child. The veteran's permanent and total disability status, income, and net worth will be presumed to continue unchanged.

(1) *Rate payable.* The total rate that VA will pay the veteran's dependent(s) is the lesser of the total rate of Improved Death Pension that would be payable if the veteran had died of a non-service-connected disability or the rate of pension the veteran would have received or been entitled to receive at the time of disappearance.

(i) *Pension paid at Improved Death Pension rate.* If VA pays pension at the Improved Death Pension rate pursuant to this paragraph (c), then it will pay benefits to the dependents as if the veteran were deceased.

(ii) *Pension paid at veteran's rate.* If VA pays pension at the veteran's rate pursuant to this paragraph (c), then it will pay benefits in proportion to the Improved Death Pension rate for each dependent. VA will use the following steps in calculating each dependent's payment rate:

(A) Determine the Improved Death Pension rate for each dependent.

(B) Combine those rates together to determine the total rate of Improved Death Pension that would be payable.

(C) For each dependent, divide the rate in paragraph (c)(1)(ii)(A) of this section by the rate in paragraph (c)(1)(ii)(B) of this section. Calculate the result to 4 decimal places.

(D) For each dependent, multiply the result from paragraph (c)(1)(ii)(C) of this section by the veteran's rate.

(E) For each dependent, round the final result down to the nearest dollar.

(2) *Effective date of payments.*—(i) *Claim received no later than 1 year after VA last paid the veteran.* If VA receives a claim no later than 1 year after the first day of the month after the month for which VA last paid pension to the veteran, payments to the veteran's dependent(s) will be payable effective the first day of the month after the month for which VA last paid pension to the veteran.

(ii) *Claim received more than 1 year after VA last paid the veteran.* If VA receives a claim more than 1 year after the first day of the month after the month for which VA last paid pension to the veteran, payments to the veteran's dependent(s) will be payable effective the date VA receives the claim.

(d) *Discontinuance of payments to veteran's dependent(s).*—(1) *Veteran's whereabouts become known.* If VA becomes aware of the veteran's whereabouts, VA will discontinue payments to the veteran's dependent(s) effective the first day of the month after the month for which VA last paid benefits to the veteran's dependent(s).

(2) *Veteran presumed dead.* VA will discontinue payments to the veteran's dependent(s) if the veteran is presumed dead under § 5.502. The date of the veteran's death is presumed to be 7 years after the date the veteran was last known to be alive. See § 5.694 for the effective date for discontinuance of benefits based on the death of a beneficiary.

(Authority: 38 U.S.C. 1158, 1507)

§ 5.712 Suspension of benefits due to the disappearance of a payee.

(a) *Suspension of benefits.* When a payee's whereabouts are unknown, VA will suspend payment of pension, disability compensation, dependency and indemnity compensation, the monetary allowance under 38 U.S.C. chapter 18 for children disabled from spina bifida or with certain birth defects, or other monetary allowances effective the first day of the month after the month for which VA last paid benefits to the payee.

(b) *Resumption of suspended benefits.* If VA has suspended payment of benefits under paragraph (a) of this section, VA will resume payments if VA becomes aware of the payee's whereabouts. The effective date of payments will be the first day of the first month for which VA suspended payments if entitlement is otherwise established. Retroactive payments to a veteran under this paragraph (b) will be reduced by the amount of any payments made to the veteran's dependents under § 5.711.

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

§ 5.713 Restriction on benefit payments to an alien located in enemy territory.

(a) *Restriction on payment.* VA will discontinue all benefits except insurance payments to an alien who is located in the territory of either an enemy of the U.S. or in the territory of an enemy of any ally of the U.S. in territory that is under the military control of either an enemy of the U.S. or an enemy of any ally of the U.S. VA will discontinue benefits to an alien located in territory described in this paragraph (a), effective the first day of the month after the month for which VA last paid benefits.

(b) *Apportionment of benefits.* VA may apportion to the dependent(s) of an affected alien all or any part of the benefits discontinued under paragraph (a) of this section.

(1) The amount payable to each dependent may not exceed the amount that would be payable to the dependent if the alien had died.

(2) VA will discontinue payments to the dependent(s) effective the date it receives notice that the alien is no longer located in territory described in paragraph (a) of this section.

(3) VA will reduce or discontinue payments to the dependent(s) upon the death of the alien or dependent, upon reduction or discontinuance of the alien's benefits, or when dependent status ends.

Cross Reference: § 5.715, Claims for undelivered or discontinued benefits.

(Authority: 38 U.S.C. 5112(a), 5308)

§ 5.714 Restriction on delivery of benefit payments to payees located in countries on Treasury Department list.

(a) *Definitions.* For purposes of this part:

(1) *Special deposit account* means the ''Secretary of the Treasury, Proceeds of Withheld Foreign Checks'' account established under 31 U.S.C. 3329(b)(4).

(2) *Treasury Department list* means the list of countries identified by the Secretary of the Treasury in 31 CFR 211.1, to which checks cannot be delivered with reasonable assurance that the payee will receive the check and be able to negotiate it for full value.

(b) *Evidence requests.* Unless a claimant or payee who is living in a country on the Treasury Department list requests the alternative means of delivery described in paragraph (d) of this section, VA will not request evidence in support of a claim for benefits if such evidence would be obtained from a country on the Treasury Department list.

(c) *Restriction on check delivery.* VA will not send benefit checks to a payee located in a country on the Treasury Department list or to a guardian or other person in the U.S. or a territory or possession of the U.S. who is legally responsible for the care of a payee located in a country on the Treasury Department list.

(d) *Alternative delivery permitted.* If requested by a payee located in a country on the Treasury Department list, VA will send benefit checks to him or her in care of a U.S. Foreign Service post, specified by the payee, in a country that is not on the Treasury Department list.

(e) *Disposition of benefit checks.* If the payee does not request the alternative means of delivery described in paragraph (d) of this section, VA will deposit checks described in paragraph (c) of this section into the special deposit account or into the U.S. Treasury as miscellaneous receipts, as required by 31 U.S.C. 3329(b) and 3330(b).

Cross Reference: § 5.715, Claims for undelivered or discontinued benefits.

(Authority: 31 U.S.C. 3329, 3330)

§ 5.715 Claims for undelivered or discontinued benefits.

(a) *Definitions.* For the definitions of ''special deposit account'' and ''Treasury Department list'', see § 5.714(a).

(b) *Claims for undelivered or discontinued benefits.* (1) Unless a payee requests the alternative means of delivery under § 5.714(d), the payee must file a claim with VA in order to be entitled to:

(i) Any amounts not paid because awarded benefits were discontinued under § 5.713;

(ii) Resumption of benefits discontinued under § 5.713; or

(iii) Any undelivered benefit payments deposited to the payee's credit in the special deposit account or into the U.S. Treasury as miscellaneous receipts as described in § 5.714(e).

(2) Undelivered amounts will be released or a discontinued benefit

restored retroactively or resumed only if:

(i) For a payee whose benefits were discontinued under § 5.713, the payee is no longer subject to the restriction in § 5.713(a);

(ii) For a payee whose benefit checks were withheld under § 5.714, the payee is no longer subject to the restriction in § 5.714(c); or

(iii) For a payee whose benefit checks were withheld under § 5.714, the payee requests the alternative means of delivery described in § 5.714(d).

(Authority: 31 U.S.C. 3329)

(c) *Forfeiture for treasonable acts.* Benefits are subject to forfeiture for treasonable acts as provided in § 5.677.

(d) *Evidence requests.* Subject to § 5.90, VA may request evidence necessary to support a claim under this section. Evidence VA may request includes:

(1) Satisfactory evidence that the payee has not been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy; and

(2) Evidence of continued entitlement to benefits during the period that VA discontinued benefits or benefit payments were undelivered.

(Authority: 38 U.S.C. 5308)

(e) *Germany and Japan.* VA will make no payments for any period before the date of filing a new claim if payments were discontinued before July 1, 1954, because the payee was a citizen or subject of Germany or Japan.

(Authority: 38 U.S.C. 5309)

Cross Reference: § 5.565, Special rules for payment of benefits on deposit in a special deposit account when a payee living in a foreign country dies.

(Authority: 31 U.S.C. 3330)

§§ 5.716–5.719 [Reserved]

Hospital, Domiciliary, and Nursing Home Care Reductions and Resumptions

§ 5.720 Adjustments to special monthly compensation based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care

(a) *Definitions.* For purposes of this section and §§ 5.721 through 5.730:

(1) *Hospital care.* Except as provided in paragraphs (c)(1) and (f)(1) of this section, *hospital care* means treatment provided in a VA hospital or provided in any hospital at VA expense.

(2) *Domiciliary or nursing home care* means treatment provided in a VA domiciliary or nursing home or in any domiciliary or nursing home at VA expense.

Note to paragraphs (a)(1) and (2): When multiple types of care are referred to consecutively (for example, ''hospital, domiciliary, or nursing home care''), VA will consider transfers between the different types of care as a continuous period of all such care. VA will not consider a transfer between different types of care (hospital, domiciliary, or nursing home care) to be a discharge or release under §§ 5.720 through 5.730.

(3) *Regular discharge or release* means a veteran, surviving spouse, or child is discharged or released at the order of a medical professional based on that professional's opinion that there is no medical reason to continue care.

(4) *Irregular discharge or release* means a veteran, surviving spouse, or child is discharged or released for any of the following reasons:

(i) Refusal to accept treatment;

(ii) Neglect of treatment;

(iii) Obstruction of treatment;

(iv) Disciplinary reasons;

(v) Refusal to accept transfer to another facility;

(vi) Leaving the facility against medical advice; or

(vii) Failure to return from unauthorized or authorized absence.

(5) *Temporary absence* means a veteran, surviving spouse, or child is placed on non-bed care status or authorized absence. A temporary absence is not a discharge or release. When calculating a period of temporary absence, VA includes the day on which the temporary absence begins.

(b) *Adjustment of special monthly compensation while receiving hospital, domiciliary, or nursing home care.* VA will discontinue special monthly compensation (SMC) payable because a veteran needs regular aid and attendance or a higher level of care if the veteran is admitted to hospital, domiciliary, or nursing home care and the veteran remains in such care on the first day of the second calendar month after the date of admission. In such cases, VA will reduce SMC to a rate specified in paragraph (c) of this section. The effective date of the reduced rate of SMC will be the first day of the second calendar month after the date of admission. However, VA will make no reduction or discontinuance under this paragraph (b) if:

(1) The rate of special monthly compensation payable would be the same with or without an award for regular aid and attendance; or

(2) An exception in paragraph (d) of this section applies.

(c) *Calculating reduction of the rate of special monthly compensation.* If appropriate under paragraph (b) of this section, VA will reduce a veteran's SMC rate as follows:

(1) *Discontinuance of special monthly compensation under § 5.332.* VA will discontinue SMC paid under § 5.332. For purposes of this paragraph (c)(1), *hospital care* means treatment in any hospital, including a private hospital, at U.S. Government expense. The discontinuance required by this paragraph (c)(1) is made only for hospital care; it is not made for domiciliary or nursing home care. VA will also make a reduction under paragraph (c)(3) of this section, if the veteran's circumstances meet any of those criteria.

(2) *Reduction of special monthly compensation under §§ 5.324 and 5.331.* VA will reduce the following payments to the rate payable under § 5.333:

(i) Special monthly compensation paid at the rate under § 5.324 if entitlement is based on the need for regular aid and attendance.

(ii) Special monthly compensation paid under § 5.331(d)(1) or (e)(1) because a veteran is entitled to the rate under § 5.324 based on the need for regular aid and attendance and has been awarded the intermediate or next higher rate based on additional disability that is independently ratable.

(3) *Reduction of special monthly compensation under § 5.330(e).* Special monthly compensation paid at the rate under § 5.330(e), based on the need for regular aid and attendance will be reduced as follows:

(i) If the veteran is entitled to the rate under § 5.324 both for the need for regular aid and attendance and for some other disability or combination of disabilities without considering any disabilities twice, then VA will reduce the special monthly compensation to the rate payable under § 5.326.

(ii) If the veteran is entitled to the rate under § 5.324 based on the need for regular aid and attendance and is entitled to the rate under § 5.326 without considering any disabilities twice, then VA will reduce the special monthly compensation to the rate payable under § 5.328, Special monthly compensation under 38 U.S.C. 1114(n).

(iii) If the veteran is entitled to the rate under § 5.324 based on the need for regular aid and attendance and is entitled to the rate under § 5.328 without considering any disabilities twice, then VA will not reduce the SMC rate payable under § 5.330.

(4) *Reduction of special monthly compensation under § 5.326(i).* VA will reduce SMC paid under § 5.326(i) to the rate payable under § 5.324.

(5) *Additional disability compensation based on having dependents.* In addition to the rates specified in paragraphs (c)(1) through

(4) of this section, VA will pay the additional amount of disability compensation payable to a veteran for dependents if he or she is entitled to disability compensation based on disabilities evaluated at 30 percent or more disabling.

(6) *Additional ratings under § 5.323.* In addition to the rates specified in paragraphs (c)(1) through (4) of this section, SMC under § 5.323, based on independently ratable disability, is payable subject to the statutory ceiling on the total amount of compensation specified in § 5.323(b).

(d) *Exceptions.* Except for the discontinuances required by paragraphs (c)(1) and (f)(1) of this section, VA will not reduce or discontinue SMC under this section if the need for regular aid and attendance is caused by disability resulting from:

(1) Loss of use of both lower extremities and loss of anal and bladder sphincter control; or

(2) Hansen's disease.

(e) *Readmission after discharge or release.*—(1) *Regular discharge or release.* If a veteran is readmitted to hospital, domiciliary, or nursing home care after a regular discharge or release, VA will consider the readmission to be a new admission subject to the provisions of paragraph (b) of this section.

(2) *Irregular discharge or release.*—(i) *Readmission less than 6 months after a period of hospital, domiciliary, or nursing home care.* VA will pay a reduced rate of SMC under paragraph (c) of this section effective on the date of readmission if all of the following are true:

(A) SMC is reduced or discontinued under paragraph (b) of this section;

(B) The veteran is given an irregular discharge or release from hospital, domiciliary, or nursing home care; and

(C) The veteran is readmitted to hospital, domiciliary, or nursing home care less than 6 months after discharge or release.

(ii) *Readmission 6 months or more after a period of hospital, domiciliary, or nursing home care.* If a veteran described in paragraph (e)(2)(i)(A) and (B) of this section is readmitted to hospital, domiciliary, or nursing home care 6 months or more after discharge or release, VA will consider the readmission to be a new admission subject to the provisions of paragraph (b) of this section.

(f) *Entitlement to special monthly compensation based on the need for regular aid and attendance established while a veteran is receiving hospital, domiciliary, or nursing home care.* (1) If a veteran becomes entitled to SMC under § 5.332 while receiving hospital care effective on or after the date of admission into such care, then VA will not pay that benefit until the date of discharge or release from hospital care. This does not affect payments for periods prior to admission. For purposes of this paragraph (f)(1), *hospital care* means treatment in any hospital, including a private hospital, at U.S. Government expense.

(2) If a veteran becomes entitled to SMC under any other provision of this part based on the need for regular aid and attendance while receiving hospital, domiciliary, or nursing home care effective on or after the date of admission into such care, then VA will pay reduced SMC under paragraphs (c)(2) through (4) of this section unless entitlement is based on one of the exceptions in paragraph (d) of this section. This does not affect payments for periods prior to admission.

(Authority: 38 U.S.C. 501(a), 5503)

§ 5.721 Resumption of special monthly compensation based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

(a) *Temporary absence from hospital, domiciliary, or nursing home care.*

(1) *Temporary absence for 30 days or more.* If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for 30 days or more, VA will resume any payment reduced or discontinued under § 5.720. The effective date of the resumed payment is the date the temporary absence begins. If the veteran returns to hospital, domiciliary, or nursing home care, then VA will reduce or discontinue special monthly compensation under § 5.720 effective the date that the veteran returns to such care.

(2) *Temporary absence for less than 30 days.* If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for less than 30 consecutive days, VA will not resume any payments reduced or discontinued under § 5.720. If the veteran is later discharged or released, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(b) *Discharge or release.* If a veteran is discharged or released from hospital, domiciliary, or nursing home care, VA will resume any payment reduced or discontinued under § 5.720 effective the date the veteran was discharged or released. Payment will be resumed at the rate in effect before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required.

(Authority: 38 U.S.C. 501(a), 5503)

§ 5.722 Adjustment of Improved Pension while a veteran is receiving domiciliary or nursing home care.

(a) *General provisions.*—(1) *Veterans affected.* Except as provided in paragraph (b) or (f) of this section, VA will reduce Improved Pension paid to a veteran who receives domiciliary or nursing home care continuously for 3 calendar months or who receives such care along with hospital care, as provided in paragraph (e)(2) of this section, and who:

(i) Does not have a spouse or child; or

(ii) Is married or has a child but is receiving Improved Pension as a veteran without dependents.

(2) *Rate payable.* VA will reduce Improved Pension under this section to $90 per month.

(3) *Effective date of reduction.* Except as provided in paragraph (f) of this section, a reduction under paragraph (a)(1) of this section will be effective on the first day of the fourth calendar month after the month of admission to domiciliary or nursing home care.

(b) *Exceptions.* VA will not reduce Improved Pension under this section if a veteran is:

(1) Receiving domiciliary or nursing home care for Hansen's disease;

(2) Maintained in a State soldiers' home;

(3) Receiving domiciliary or nursing home care in a State home and the only payment made by VA to the State for the State home is the per diem rate under 38 U.S.C. 1741; or

(4) Receiving pension as a veteran without a dependent because it is reasonable that part of his or her child's net worth be consumed for the child's maintenance before the child can be established as a dependent. See § 5.414(e).

(c) *Apportionment of benefits to a spouse.* Improved pension in excess of the $90 may be apportioned to the veteran's spouse under § 5.772(c)(2)(ii).

(d) *Readmission.*—(1) *Less than 6 months after prior period of domiciliary or nursing home care.* If a veteran is readmitted to domiciliary or nursing home care less than 6 months after a period of domiciliary or nursing home care for which Improved Pension was reduced under this section, VA will reduce Improved Pension to $90 per month effective the first day of the month after the month of readmission.

(2) *Six months or more after prior period of domiciliary or nursing home care.* If a veteran is readmitted 6 months or more after a period of domiciliary or

nursing home care for which Improved Pension was reduced under this section, the readmission will be considered a new admission subject to the provisions of paragraph (a) of this section.

(e) *Transfers.*—(1) *Transfer from hospital care.* If a veteran is receiving hospital care and is transferred to domiciliary or nursing home care, VA will not consider the period of hospital care as domiciliary or nursing home care.

(2) *Transfers from domiciliary or nursing home care.* (i) If a veteran is transferred from domiciliary or nursing home care to hospital care then back to domiciliary or nursing home care, VA will consider the entire period as continuous domiciliary or nursing home care unless the period of hospital care exceeds 6 months.

(ii) If a veteran is transferred from domiciliary or nursing home care to hospital care and then dies while hospitalized, VA will consider the entire period as continuous domiciliary or nursing home care unless the period of hospital care exceeds 6 months.

(iii) VA will consider domiciliary or nursing home care completed on the date of transfer to hospital care if a veteran is discharged or released from VA care after his or her hospital stay.

(iv) VA will consider domiciliary or nursing home care completed on the date of transfer to hospital care if the period of hospital care exceeds 6 months.

(f) *Nursing home care for a prescribed program of rehabilitation.*—(1) *Delay in reduction.* The reduction required by this section for a veteran receiving nursing home care will be delayed for up to 3 additional calendar months after the first day of the fourth calendar month referred to in paragraph (a)(3) of this section, or the first day of the month following the month of readmission referred to in paragraph (d)(1) of this section, if the Under Secretary for Health, or his or her designee, certifies that the primary purpose for the veteran's additional period of nursing home care is to provide a prescribed program of rehabilitation, under 38 U.S.C. chapter 17, designed to restore the veteran's ability to function within the veteran's family and community.

(2) *Continued nursing home care for rehabilitation.* The delay in reduction may be extended beyond the 3-month period provided by paragraph (f)(1) of this section if both of the following are true:

(i) The veteran continues to receive nursing home care; and

(ii) The Under Secretary for Health, or his or her designee, certifies that the primary purpose for the veteran's continued nursing home care is to provide a prescribed program of rehabilitation, under 38 U.S.C. chapter 17, designed to restore the veteran's ability to function within the veteran's family and community.

(3) *Rehabilitation ends.* The veteran's Improved Pension will be reduced under this section effective the first day of the calendar month after the date on which the program of rehabilitation ends.

(g) *Entitlement to Improved Pension established while a veteran is receiving domiciliary or nursing home care.* If a veteran becomes entitled to Improved Pension while receiving domiciliary or nursing home care, VA will reduce pension, or pay a reduced rate of pension, in accordance with this section.

(Authority: 38 U.S.C. 501(a), 5503)

§ 5.723 Adjustment of Improved Pension while a veteran, surviving spouse, or surviving child is receiving Medicaid-covered care in a nursing facility.

(a) *General provision.* Until November 30, 2016, VA will reduce Improved Pension being paid to a veteran without a spouse or child, to a surviving spouse without a child, or to a surviving child, to $90 per month when that beneficiary is receiving Medicaid-covered care in a nursing facility. VA will not reduce Improved Pension under this section if a veteran is receiving Medicaid-covered care in a State home to which VA makes per diem payments under 38 U.S.C. 1741.

(b) *Effective date of reduction.* Except as provided in paragraph (c) of this section, the effective date of reduction of Improved Pension payments under this section will be the latest of:

(1) The first day of the month after the month in which Medicaid-covered care begins;

(2) The first day of the month after the month during which the 60-day period prescribed in § 5.83(b) expires; or

(3) The first day of the month after the month for which VA last paid benefits.

(c) *Willful concealment.* If a beneficiary willfully conceals information that would lead to a reduction of Improved Pension payments under this section, and VA subsequently reduces Improved Pension under this section, the effective date of the reduction will be the first day of the month after the month in which the willful concealment occurred. In such a case, the beneficiary will be liable for any payments in excess of $90 per month made after the effective date of the reduction if the willful concealment prevented VA from reducing benefits during that period.

(d) *Entitlement to Improved Pension established while a veteran, surviving spouse, or child is receiving Medicaid-covered care in a nursing facility.* If a veteran, surviving spouse, or child described in paragraph (a) of this section becomes entitled to Improved Pension while receiving Medicaid-covered care in a nursing facility, then VA will not pay more than $90 per month while he or she receives such care.

(Authority: 38 U.S.C. 5503(d))

§ 5.724 Adjustment or discontinuance of Improved Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.

(a) *Reduction or discontinuance of Improved Pension.* (1) If a veteran who is receiving Improved Pension based on the rate for regular aid and attendance receives hospital, domiciliary, or nursing home care for at least 1 calendar month, VA will pay Improved Pension based on the housebound rate.

(2) The resulting reduction or discontinuance of Improved Pension will be effective the first day of the second calendar month after the date of admission.

(3) VA will not reduce or discontinue Improved Pension under this paragraph (a) if an exception in paragraph (b) of this section applies.

Cross Reference: §§ 5.400(b) and (c) for the housebound and regular aid and attendance rates; 5.722 for reductions of Improved Pension after 3 calendar months of domiciliary or nursing home care.

(b) *Exceptions.* VA will not reduce or discontinue Improved Pension under this section if:

(1) The need for regular aid and attendance is caused by disability resulting from:

(i) Loss of use of both lower extremities and loss of anal and bladder sphincter control;

(ii) Hansen's disease; or

(iii) Blindness pursuant to § 5.390(b)(1) or (2); or

(2) The veteran is receiving hospital, domiciliary, or nursing home care for Hansen's disease.

(c) *Readmission after discharge or release.*—(1) *Regular discharge or release.* If a veteran is readmitted to hospital, domiciliary, or nursing home care after a regular discharge or release, then VA will consider the readmission to be a new admission subject to the provisions of paragraph (a) of this section.

(2) *Irregular discharge or release.* (i) If a veteran whose Improved Pension was

reduced or discontinued under this section is readmitted to hospital, domiciliary, or nursing home care less than 6 months after an irregular discharge or release, then VA will pay Improved Pension based on the housebound rate effective on the date of the readmission.

(ii) If a veteran is readmitted to hospital, domiciliary, or nursing home care 6 months or more after an irregular discharge or release, then VA will consider the readmission to be a new admission subject to the provisions of paragraph (a) of this section.

(d) *Entitlement to Improved Pension based on the need for regular aid and attendance established while a veteran is admitted to hospital, domiciliary, or nursing home care.* If a veteran who is admitted to hospital, domiciliary, or nursing home care becomes entitled to Improved Pension based on the need for regular aid and attendance, with an effective date on or after the date of admission, then VA will pay Improved Pension based on the housebound rate. VA will not reduce or discontinue benefits under this paragraph (d) if an exception in paragraph (b) of this section applies.

(Authority: 38 U.S.C. 501(a), 5503)

§ 5.725 Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

(a) *Temporary absence from hospital, domiciliary, or nursing home care for 30 days or more.*—(1) *Improved Pension based on the need for regular aid and attendance.* If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for 30 days or more, VA will resume any payment discontinued under § 5.724. The effective date of the resumed payment is the date the temporary absence began. If the veteran returns to hospital, domiciliary, or nursing home care, then VA will discontinue Improved Pension based on the need for regular aid and attendance under § 5.724 effective the date that the temporary absence ends.

(2) *Improved Pension.*—(i) *General.* If a beneficiary is on temporary absence from any domiciliary or nursing home care facility, or a Medicaid-covered nursing facility, for 30 days or more, VA will resume any payment reduced under § 5.722 or § 5.723. The payment will be resumed at the rate that is appropriate based on the beneficiary's income. The effective date of the resumed payment is the date that the temporary absence began. If the beneficiary returns to such facility, then VA will reduce Improved Pension under § 5.722 or § 5.723 effective the date that the temporary absence ends.

(ii) *Apportionment of benefits to a spouse.* If benefits reduced under § 5.722 have been apportioned to a veteran's spouse, the apportionment will be discontinued on the day that the temporary absence began, unless it is determined that the apportionment will continue under § 5.771.

(b) *Temporary absence for less than 30 days.*—(1) *Improved Pension based on the need for regular aid and attendance.* If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for less than 30 consecutive days, VA will not resume any payments discontinued under § 5.724. If the veteran is later discharged or released from hospital, domiciliary, or nursing home care, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(2) *Improved Pension.* If a beneficiary is on temporary absence from domiciliary care, nursing home care, or Medicaid-covered nursing facility care, for less than 30 consecutive days, VA will not resume any payments reduced under § 5.722 or § 5.723. If the beneficiary is later discharged or released from domiciliary care, nursing home care, or Medicaid-covered nursing facility care, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(c) *Discharge or release.*—(1) *Improved Pension based on the need for regular aid and attendance.* If a veteran is discharged or released from hospital, domiciliary, or nursing home care, VA will resume any payment reduced or discontinued under § 5.724 effective the date the veteran is discharged or released. Payment will be resumed at the rate in effect before the reduction or discontinuance based on such care unless the evidence of record shows that a different rate is required.

(2) *Improved Pension.* If a beneficiary is discharged or released from domiciliary care, nursing home care, or Medicaid-covered nursing facility care, VA will resume any payment reduced under § 5.722 or § 5.723 effective the date the beneficiary is discharged or released. Payment will be resumed at the rate in effect before the reduction or discontinuance based on domiciliary care, nursing home care, or Medicaid-covered nursing facility care, unless the evidence of record shows that a different rate is required.

(3) *Apportionment of benefits to a spouse.* If benefits reduced under § 5.722 have been apportioned to a veteran's spouse, the apportionment will be discontinued on the day that the veteran is discharged or released from domiciliary or nursing home care, unless it is determined that the apportionment will continue under § 5.771, Special apportionments.

(Authority: 38 U.S.C. 5503)

§ 5.726 Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care.

(a) *General provisions.*—(1) *Veterans affected.* Except as provided in paragraph (b) of this section, VA will reduce Section 306 Pension paid to a veteran who receives hospital, domiciliary, or nursing home care continuously for 2 calendar months and who:

(i) Does not have a spouse or child; or

(ii) Is married or has a child, but is receiving Section 306 Pension as a veteran without dependents.

(2) *Proof of dependents.* If VA requests evidence about a spouse or child but such evidence is not received before the effective date of the reduction, then VA will reduce the veteran's Section 306 Pension under this section on the basis of no dependents. If the evidence is received within 1 year after the date of VA's request, VA will pay the full rate from the date of reduction.

(3) *Rate payable.* VA will reduce Section 306 Pension under this section to $50 per month.

(4) *Effective date of reduction.* A reduction under paragraph (a) of this section will be effective on the first day of the third calendar month after the month of admission to hospital, domiciliary, or nursing home care.

(5) *Calculation of period.* For purposes of calculating continuous periods of hospital, domiciliary, or nursing home care under this section, authorized absences for periods of 96 hours or less will be included as periods of hospital, domiciliary, or nursing home care. For authorized absences for periods of more than 96 hours, the entire period will be excluded from the total number of days, but will not be considered a break in the continuous period of hospital, domiciliary, or nursing home care. Sixty total days of hospital, domiciliary, or nursing home care will be considered 2 calendar months of such care.

(b) *Exceptions.* VA will not reduce Section 306 Pension under this section if a veteran is:

(1) Receiving hospital, domiciliary, or nursing home care for Hansen's disease;

(2) Maintained in a State soldiers' home; or

(3) Receiving hospital, domiciliary, or nursing home care in a State home and the only payment made by VA to the State for the State home is the per diem rate under 38 U.S.C. 1741.

(c) *Apportionment of benefits to a spouse.* Benefits in excess of the $50 per month may be apportioned to the veteran's spouse under § 5.772(c)(2)(i).

(d) *Readmission.*—(1) *Less than 6 months after admission.* If a veteran is readmitted to hospital, domiciliary, or nursing home care less than 6 months after a period of hospital, domiciliary, or nursing home care for which Section 306 Pension was reduced under this section, VA will reduce Section 306 Pension effective the first day of the month after the month of readmission.

(2) *Six months or more after admission.* If a veteran is readmitted 6 months or more after a period of hospital, domiciliary, or nursing home care for which Section 306 Pension was reduced under this section, the readmission will be considered a new admission subject to the provisions of paragraph (a) of this section.

(Authority: 38 U.S.C. 5503; Pub. L. 95–588, § 306, 92 Stat. 2497)

§ 5.727 Reduction of Old-Law Pension while a veteran is receiving hospital, domiciliary, or nursing home care.

(a) *General provisions.*—(1) *Veterans affected.* Except as provided in paragraph (b) of this section, VA will reduce Old-Law Pension being paid to a veteran who has received hospital, domiciliary, or nursing home care continuously for 6 calendar months and who does not have a spouse or child.

(2) *Proof of dependents.* If VA requests evidence about a spouse or child but such evidence is not received within 60 days, then VA will reduce the veteran's Old-Law Pension under this section on the basis of no dependents. If the evidence is received within 1 year after the date of VA's request, VA will pay the full rate from the date of reduction.

(3) *Rate payable.* VA will reduce Old-Law Pension under this section to either $30 per month or 50 percent of the amount of Old-Law Pension otherwise payable to the veteran, whichever amount is greater.

(4) *Effective date of reduction.*—(i) *General.* The effective date of reduction under paragraph (a) of this section is the first day of the seventh calendar month after the month of admission to hospital, domiciliary, or nursing home care. VA excludes any month (others than the month of admission) that contains an authorized absence from its calculation of the effective date.

(ii) *Effect of irregular discharge prior to reduction.* The reduction will be effective on that date even if a veteran is irregularly discharged or released from hospital, domiciliary, or nursing home care and is readmitted to such care before that effective date. If the veteran is readmitted after the first day of the seventh calendar month after the month of admission to hospital, domiciliary, or nursing home care, the readmission will be considered a new admission subject to the provisions of paragraph (a) of this section.

(b) *Exceptions.* VA will not reduce Old-Law Pension under this section if a veteran is:

(1) Receiving hospital, domiciliary, or nursing home care for Hansen's disease;

(2) Maintained in a State soldiers' home; or

(3) Receiving hospital, domiciliary, or nursing home care in a State home and the only payment made by VA to the State for the State home is the per diem rate under 38 U.S.C. 1741.

(c) *Readmission.*—(1) *Readmission after regular discharge or release.* If a veteran is readmitted to hospital, domiciliary, or nursing home care after a regular discharge or release, VA will consider the readmission to be a new admission subject to the provisions of paragraph (a) of this section unless the veteran was discharged or released for purposes of admission to another facility for hospital, domiciliary, or nursing home care.

(2) *Readmission after irregular discharge or release.*—(i) *Less than 6 months after discharge or release.* If a veteran is readmitted to hospital, domiciliary, or nursing home care less than 6 months after being irregularly discharged or released from a prior period of hospital, domiciliary, or nursing home care for which Old-Law Pension was reduced under this section, VA will reduce Old-Law Pension effective the first day of the month after the month of readmission.

(ii) *Six months or more after discharge or release.* If a veteran is readmitted 6 months or more after being irregularly discharged or released from a prior period of hospital, domiciliary, or nursing home care for which Old-Law Pension was reduced under this section, the readmission will be considered a new admission subject to the provisions of paragraph (a) of this section.

(Authority: Pub. L. 95–588, § 306, 92 Stat. 2497)

§ 5.728 Reduction of Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.

(a) *Reduction of Old-Law Pension or Section 306 Pension.* (1)(i) *Old-Law Pension.* If a veteran who is receiving Old-Law Pension at the regular aid and attendance rate ($135.45 monthly) receives hospital, domiciliary, or nursing home care for at least 1 calendar month, VA will reduce benefits to the housebound rate ($100 monthly).

(ii) *Section 306 Pension.*—(A) *General.* If a veteran who is receiving Section 306 Pension based on the regular aid and attendance rate receives hospital, domiciliary, or nursing home care for at least 1 calendar month, VA will pay benefits based on the housebound rate. VA will reduce benefits by $104 per month, which is the difference between the aid and attendance allowance ($165) and the housebound allowance ($61).

(B) *Reduced aid and attendance allowance.* If a veteran who is receiving Section 306 Pension at a reduced regular aid and attendance rate (under former 38 U.S.C. 521(d)(2), as in effect on December 31, 1978) receives hospital, domiciliary, or nursing home care for at least 1 calendar month, VA will reduce benefits to $61 per month.

(2) The resulting reduction of these benefits will be effective the first day of the second calendar month after the month of admission.

(3) VA will not reduce benefits under this paragraph (a) if an exception in paragraph (b) of this section applies.

Cross Reference: § 5.471 for the housebound and regular aid and attendance rates.

(b) *Exceptions.* VA will not reduce Old-Law Pension or Section 306 Pension under this section if:

(1) The need for regular aid and attendance is caused by disability resulting from:

(i) Loss of use of both lower extremities and loss of anal and bladder sphincter control;

(ii) Hansen's disease; or

(iii) 5/200 visual acuity or less in both eyes with corrective lenses or due to concentric contraction of the visual field to 5 degrees or less in both eyes; or

(2) The veteran is receiving hospital, domiciliary, or nursing home care for Hansen's disease.

(c) *Readmission after discharge or release.*—(1) *Regular discharge or release.* If a veteran is readmitted to hospital, domiciliary, or nursing home care after a regular discharge or release, then VA will consider the readmission to be a new admission subject to the

provisions of paragraph (a) of this section.

(2) *Irregular discharge or release.* (i) If a veteran whose Old-Law Pension or Section 306 Pension was reduced under this section is readmitted to hospital, domiciliary, or nursing home care less than 6 months after an irregular discharge or release, then VA will reduce Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance effective on the date of the readmission.

(ii) If a veteran is readmitted to hospital, domiciliary, or nursing home care 6 months or more after an irregular discharge or release, then VA will consider the readmission to be a new admission subject to the provisions of paragraph (a) of this section.

(Authority: 38 U.S.C. 501(a); Pub. L. 95–588, § 306, 92 Stat. 2497)

§ 5.729 Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance during a veteran's temporary absence from hospital, domiciliary, or nursing home care or after released from such care.

(a) *Temporary absence from hospital, domiciliary, or nursing home care for 30 days or more.*—(1) *General.* If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for 30 days or more, VA will resume any Section 306 Pension payment reduced under § 5.726 or § 5.728. The effective date of the resumed payment is the date that the temporary absence begins. If the veteran returns to hospital, domiciliary, or nursing home care, then VA will reduce Section 306 Pension effective the date that the temporary absence ends.

(2) *Apportionment of benefits to a spouse.* If benefits reduced under § 5.726 have been apportioned to a veteran's spouse, the apportionment will be discontinued on the day that the temporary absence begins, unless it is determined that the apportionment will continue under § 5.771.

(b) *Temporary absence from hospital, domiciliary, or nursing home care for less than 30 days.* Except as provided in paragraph (c) of this section, if a veteran is on temporary absence from hospital, domiciliary, or nursing home care for less than 30 consecutive days, VA will not resume any Section 306 Pension payments reduced under § 5.726 or § 5.728. If the veteran is later discharged or released from hospital, domiciliary, or nursing home care, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(c) *Adjustment based on need.* (1) If a veteran has been under hospital, domiciliary, or nursing home care for more than 6 months and the combined periods of absence from such care exceed a total of 30 days, VA will retroactively pay the amounts that were unpaid under § 5.726 during such temporary absences if:

(i) The director of the facility providing hospital, domiciliary, or nursing home care requests payment on behalf of a veteran; and

(ii) Payment is necessary to meet the veteran's financial needs.

(2) If the conditions in paragraph (c)(1) of this section are met, payment will be restored even if the veteran has not been discharged or released from hospital, domiciliary, or nursing home care.

(d) *Discharge or release.*—(1) *General.* If a veteran is discharged or released from hospital, domiciliary, or nursing home care, VA will resume any Section 306 Pension payment reduced under § 5.726 or § 5.728 effective the date the veteran was discharged or released. Payment will be resumed at the rate in effect before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required.

(2) *Apportionment of benefits to a spouse.* If benefits reduced under § 5.726 have been apportioned to a veteran's spouse, the apportionment will be discontinued on the day that the veteran is discharged or released from hospital, domiciliary, or nursing home care, unless it is determined that the apportionment will continue under § 5.771.

(Authority: 38 U.S.C. 5503; Pub. L. 95–588, § 306, 92 Stat. 2497)

§ 5.730 Resumption of Old-Law Pension and Old-Law Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

(a) *Temporary absence from hospital, domiciliary, or nursing home care for 30 days or more.* If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for 30 days or more, VA will resume any Old-Law Pension payment reduced under § 5.727 or § 5.728. The effective date of the resumed payment for Old-Law Pension reduced under § 5.727 is the date of reduction. The effective date of the resumed payment for Old-Law Pension reduced under § 5.728 is the date the temporary absence begins. If the veteran returns to hospital, domiciliary, or nursing home care, then VA will reduce Old-Law Pension effective the date that the temporary absence ends.

(b) *Temporary absence from hospital, domiciliary, or nursing home care for less than 30 days.* If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for less than 30 consecutive days, VA will not resume any Old-Law Pension payments reduced under § 5.727 or § 5.728. If the veteran is later discharged or released from hospital, domiciliary, or nursing home care, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(c) *Regular discharge or release.* If a veteran is regularly discharged or released from hospital, domiciliary, or nursing home care, VA will resume any Old-Law Pension payment reduced under § 5.727 or § 5.728 effective the date that the veteran was discharged or released. Payment will be resumed at the rate in effect before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required. VA will also pay any amounts that were unpaid during the veteran's hospital, domiciliary, or nursing home care.

(d) *Irregular discharge or release.* If a veteran is irregularly discharged or released from hospital, domiciliary, or nursing home care, VA will resume any Old-Law Pension payment reduced under § 5.727 or § 5.728 effective the date the veteran was discharged or released. Payment will be resumed at the rate in effect before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required. If a veteran's irregular discharge or release is not changed to a regular discharge or release, VA will not pay any Old-Law Pension that was unpaid during the veteran's hospital, domiciliary, or nursing home care until 6 months after the date the veteran was discharged or released.

(Authority: Pub. L. 95–588, § 306, 92 Stat. 2497)

5.731–5.739 [Reserved]

Payments to a Beneficiary Who Is Eligible for More Than One Benefit: General Provisions

§ 5.740 Definitions relating to elections of benefits.

(a) *Election* means any writing expressing a choice between two or more VA benefits to which the person is entitled, or between VA and other Federal benefits to which the person is entitled.

(b) *Initial election* means the first election a person makes between two or more benefits.

(c) *Reelection* means an election a person makes between benefits that were the subject of an initial election.

(d) *Timely filed* with respect to elections means that an election is filed no later than 1 year after VA's notice that such an election is required, except as provided in §§ 5.745(d)(1), 5.750(a)(2), 5.757(a) through (c), and 5.759(b).

(Authority: 38 U.S.C. 501(a), 5103(b))

Cross Reference: § 5.535, Adjustments to a parent's dependency and indemnity compensation when income changes.

§ 5.741 Persons who may make an election of benefits.

(a) *General rule.* VA will accept an election signed by a claimant or beneficiary, or if applicable, by any one of the following persons acting on behalf of a claimant or beneficiary:

(1) The spouse of a claimant or beneficiary if the claimant or beneficiary has been declared to be an incompetent veteran under § 13.57 of this chapter;

(2) The custodian of a claimant or beneficiary if the claimant or beneficiary is a minor under § 13.58 of this chapter;

(3) A fiduciary designated by VA under § 13.55 of this chapter;

(4) A court-appointed fiduciary, under § 13.59 of this chapter; or

(5) The chief officer of the health-care institution in which the veteran is receiving care and treatment, and whom VA has designated as a payee, under §§ 13.55(b)(6) and 13.61 of this chapter.

(b) *Elections from a Member of Congress or duly authorized representative.* This paragraph (b) applies if VA receives a communication from a Member of Congress or from a claimant or beneficiary's duly authorized representative indicating that a claimant or beneficiary wishes to elect a VA benefit. (If the communication is from a service organization, attorney, or agent, there must be a power of attorney in effect at the time the communication was written.) If VA receives such a communication, VA will provide notice to the claimant or beneficiary that a person listed in paragraph (a) of this section must sign such an election. If a properly signed election is then timely filed under § 5.740(d), VA will consider the properly signed election to have been filed on the date it received the communication from the Member of Congress or the duly authorized representative.

(Authority: 38 U.S.C. 501(a), 5103(b)(1))

§ 5.742 Finality of elections of benefits; cancellation of certain elections of benefits.

This section explains when an election or reelection becomes final. A final election or reelection ordinarily may be changed only by cancellation under paragraph (d) or (e) of this section or by reelection, if authorized under this part. Reelections are subject to the finality rules stated in paragraphs (a) through (e) of this section.

(a) *Finality of an election when benefits are received by check.* Except as otherwise provided in this section, if the beneficiary receives payment of the elected benefit by check, the election is final when the beneficiary (or a person authorized to act on the beneficiary's behalf under § 5.741) negotiates the first check for the elected benefit.

(b) *Finality of an election when benefits are received by direct deposit or electronic funds transfer.* Except as otherwise provided in this section, if the beneficiary receives payment of the elected benefit by direct deposit or electronic funds transfer, the election is final when the applicable financial institution receives the second payment of the elected benefit.

(c) *Finality of an election when a beneficiary dies after filing an election.* If a beneficiary died after filing an election, but before the beneficiary had negotiated the check or before the applicable financial institution had received the second payment for the elected benefit, the election is final even though it would not be considered final under paragraph (a) or (b) of this section.

(d) *Cancellation of an election made by an incompetent person.* If VA finds that a beneficiary was mentally incompetent when he or she elected a benefit, the beneficiary, or another person listed in § 5.741(a), who is acting on behalf of the beneficiary, may cancel that election. There is no deadline to cancel an election under this paragraph (d).

(e) *Cancellation of elections that were based on erroneous VA information.* A beneficiary may cancel an election that was based on erroneous information provided by VA. For this right to cancellation to apply, VA must make a determination that it previously provided erroneous information. This determination must be based on the same evidence that VA used when it previously provided the erroneous information. There is no deadline to cancel an election under this paragraph (e).

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

§ 5.743 General effective dates for awarding, reducing, or discontinuing VA benefits because of an election.

(a) *General effective date of award; offset*—(1) *Effective date of award.* Unless otherwise provided in this part, the effective date of an award of an elected benefit will be the same as the effective date VA would assign for the awarded benefit if no election were required. Unless otherwise provided in this part, if a beneficiary elects a different benefit, the effective date of an award of the elected VA benefit is the date VA receives the election.

(2) *Offset.* Payments of the elected benefit are subject to an offset. The payments will be offset by any payments the beneficiary received for another benefit for the same period. This offset will occur only if the two benefits cannot be received concurrently.

(Authority: 38 U.S.C. 5110, 5304)

(b) *Effective date of reduction or discontinuance.* Unless otherwise provided in this part, VA will reduce or discontinue payments of a benefit because the beneficiary elected a different VA benefit or a non-VA benefit, effective on the effective date of the other benefit.

(Authority: 38 U.S.C. 5112, 5304)

§ 5.744 [Reserved]

Payments From Service Departments and the Effects of Those Payments on VA Benefits

§ 5.745 Entitlement to concurrent receipt of military retired pay and VA disability compensation.

(a) *Definition of ''military retired pay''.* For purposes of this part, ''military retired pay'' is payment received by a veteran that is classified as retired pay by the Service Department, including, but not limited to retainer pay, based on the recipient's service as a member of the Armed Forces or as a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration (including its predecessor agencies, the Coast and Geodetic Survey and the Environmental Science Services Administration).

(b) *Payment of both military retired pay and disability compensation or Improved Pension*—(1) *Disability compensation.* Subject to paragraphs (b)(2) and (3) of this section, a veteran who is entitled to military retired pay and disability compensation for a service-connected disability rated 50 percent or more disabling, or a combination of service-connected disabilities rated 50 percent or more disabling, under the Schedule for Rating Disabilities in part 4, subpart B of this chapter, is entitled to receive both payments subject to the phase-in period described in paragraph (c) of this section.

(2) *Chapter 61 disability retirees retiring with 20 or more years of service.* Disability retired pay payable under 10 U.S.C. Chapter 61 to a veteran with 20 or more years of creditable service may be paid concurrently with disability compensation to a qualifying veteran subject to the following elements:

(i) Any waiver required during the phase-in period under paragraph (c)(1)(ii) of this section; and

(ii) If the veteran's disability retired pay exceeds the amount of retired pay the veteran would have received had the veteran retired based on length of service, the veteran must waive that excess amount of disability retired pay in order to receive VA disability compensation.

(3) *Chapter 61 disability retirees retiring with less than 20 years of service.* A veteran who receives disability retired pay under 10 U.S.C. Chapter 61 with less than 20 years of creditable service is not eligible for concurrent receipt.

(4) *Improved Pension.* A veteran may receive Improved Pension and military retired pay at the same time without having to waive military retired pay. However, in determining entitlement to Improved Pension, VA will treat military retired pay in the same manner as countable income from other sources.

(Authority: 10 U.S.C. 1414)

(c) *Waiver*—(1) *When a waiver is necessary.* (i) A waiver of military retired pay is necessary in order to receive disability compensation when a veteran is eligible for both military retired pay and disability compensation but is not eligible under paragraphs (b)(1) or (2) of this section to receive both benefits at the same time.

(ii) Except as provided in paragraph (c)(2) of this section, a veteran who is eligible to receive both military retired pay and disability compensation at the same time under paragraphs (b)(1) or (2) of this section must file a waiver in order to receive the maximum allowable amount of disability compensation during the phase-in period. The phase-in period ends on December 31, 2013. After the phase-in period, a veteran retired under 10 U.S.C. chapter 61 who is eligible for concurrent receipt must still file a waiver under the circumstances described in paragraph (b)(2)(ii) of this section.

(2) *When a waiver is not necessary.* Unless paragraph (b)(2)(ii) of this section applies, a veteran who is entitled to receive disability compensation at the 100 percent rate does not need to file a waiver of military retired pay. The phase-in period does not apply to this group of veterans. This includes a veteran who is entitled to receive disability compensation based on a VA determination of individual unemployability (IU) as well as a veteran rated 100 percent disabled under the Schedule for Rating Disabilities in part 4 of this chapter.

(3) *How to file a waiver of military retired pay.* A veteran may request a waiver of military retired pay in any written, signed statement, including, but not limited to, a VA form, which reflects a desire to waive all or some military retired pay. The statement must be filed with VA or with the Federal agency that pays the veteran's military retired pay. VA will treat a claim for VA disability compensation filed by a veteran who is entitled to military retired pay as a waiver.

(Authority: 10 U.S.C. 1414; 38 U.S.C. 5305)

(d) *Elections and the right to reelect either benefit.* (1) A veteran who has filed a waiver of military retired pay under this section has elected to receive disability compensation. A veteran may reelect between benefits covered by this section at any time by filing a written, signed statement to VA or to the Federal agency that pays the veteran's military retired pay.

(2) An election between military retired pay and disability compensation under this section that is filed no later than 1 year after the date of notification of VA entitlement will be considered ''timely filed'' for effective date purposes. If the veteran is incompetent, the 1-year period will begin on the date that notification is sent to the next friend or fiduciary. In initial determinations, elections may be applied retroactively if the claimant was not advised of his or her right of election and its effect.

(e) *Effective date rules for elections under this section.* (1) If an election is timely filed under paragraph (d)(2) of this section, the effective date of the election will be the date of entitlement to the elected benefit.

(2) If a waiver is properly filed under paragraph (c) of this section, the effective date of the waiver will be the day following discontinuance or reduction of retired pay.

(3) If a reelection is made under paragraph (d)(1) of this section, the effective date of the election will be the date that the reelection is received by VA.

(Authority: 38 U.S.C. 5304(a), 5305)

§ 5.746 Prohibition against receipt of active military service pay and VA benefits for the same period.

(a) *Definition of ''active military service pay''.* For purposes of this section, *active military service pay* means pay that a veteran receives for active duty, active duty for training, or inactive duty training. Active military service pay does not include pay for time spent by a member of the Reserve Officer Training Corps in drills as part of his or her activities as a member of the corps.

(b) *Prohibition against receipt of VA benefits at the same time as active military service pay.* VA will not pay VA disability compensation or pension to a veteran for any period for which the veteran receives active military service pay.

(c) *Effective date of discontinuance of payments for VA benefits during active duty status.* Unless the veteran elects to receive VA benefits instead of active military service pay, VA will discontinue payments effective the day the veteran begins active duty service. If VA does not know the exact date of the veteran's return to active duty, VA will discontinue payments effective the first day of the month after the month for which it last paid benefits. If the exact date of the veteran's return to active duty thereafter becomes known, VA will then discontinue payments effective as of that date.

(d) *Resumption of payments for VA benefits on release from active duty.*—(1) *Effective date.* If otherwise in order, VA will resume payments effective the day after the date of release from active duty if VA receives a claim to resume payments no later than 1 year after the date of release. Otherwise, the effective date is 1 year before the date VA receives the claim to resume payments.

(2) *Rate*—(i) *Static service-connected disabilities.* If the evidence of record shows that the level of disability had become static at the time of entry into active duty, VA will resume payments for a service-connected disability at the same disability level that was in effect immediately before entering active duty.

(ii) *Non-static service-connected disabilities.* Except as provided in paragraph (d)(2)(i) of this section, VA will resume payments based on the degree of disability found to exist when the award is resumed. VA will ascertain the degree of disability by considering all the facts, including, but not limited to, facts provided in records from the service department relating to the most recent period of active military service.

(3) *Application of § 5.693.* Resumptions under paragraph (d) of this section are not subject to § 5.693, except to the extent that the disability rating is increased.

(4) *Prior service-connection awards.* In determining whether disability compensation payments should be

resumed under paragraph (d) of this section, VA will not disturb prior determinations of service connection except as provided in § 5.83(a), or § 5.177.

(5) *New claims for service connection.* If the veteran incurs or aggravates a disability during the subsequent period of service, VA will not grant service connection for the new disability unless it receives a claim for service connection for that disability.

(e) *Waiver of VA benefits during active duty for training or inactive duty for training*—(1) *Waiver of VA benefits.* A veteran who is a Reservist and a National Guard member may waive his or her VA pension or disability compensation for periods of active duty for training or inactive duty for training. See § 5.23. Waivers may cover anticipated periods of training; however, each waiver is effective for not more than 1 year.

(2) *Readjustments.* VA may authorize retroactive payments of previously waived VA pension or disability compensation if readjustment is in order because the veteran did not receive service pay for a period of training duty as anticipated. However, VA must receive a claim for readjustment no later than 1 year after the end of the fiscal year during which VA benefits were waived.

(Authority: 10 U.S.C. 12316; 38 U.S.C. 501(a), 5304(c))

Cross Reference: § 5.1, for the definition of ''reservist''.

§ 5.747 Effect of military readjustment pay, disability severance pay, and separation pay on VA benefits.

(a) *Lump-sum readjustment pay.* This paragraph (a) applies when entitlement to disability compensation was established after September 14, 1981.

(1) *Recoupment of lump-sum readjustment pay.* A veteran who has received a lump-sum readjustment payment may also receive disability compensation for disability incurred in, or aggravated by, service before the date of receipt of the lump-sum readjustment payment. However, the lump-sum readjustment payment will be recouped from the disability compensation.

(2) *Disability compensation for disability incurred or aggravated in subsequent service is not subject to recoupment.* The veteran must receive the full amount of the monthly disability compensation including additional amounts for a dependent, payable for a service-connected disability that was incurred in or aggravated in a period of service that is subsequent to the period on which the readjustment pay was based.

(Authority: 10 U.S.C. 1174(h)(2); 38 U.S.C. 501(a))

(b) *Disability severance pay*—(1) *Recoupment of disability severance pay when VA disability compensation is awarded for a severance disability.* When VA disability compensation is awarded based on the same disability or disabilities for which the veteran received disability severance pay, VA will recoup from the disability compensation award the full amount of the disability severance pay.

(2) *Rate of recoupment of disability severance pay.* Generally, VA will recoup disability severance pay from VA disability compensation at the rate payable for the initial determination of the degree of the disability for which the veteran was awarded disability severance pay. However, the veteran must receive the full amount of the monthly disability compensation, including additional amounts for a dependent, payable for any additional nonseverance pay disabilities.

(i) *Initial determination of the degree of disability.* The *initial determination of the degree of disability* means the first regular schedular compensable rating determined under the Schedule for Rating Disabilities in part 4 of this chapter. The initial determination of the degree of disability must be made without consideration in whole or in part of a need for hospitalization or a period of convalescence. It does not include a temporary 100 percent rating assigned under § 4.28, § 4.29, or § 4.30 of this chapter.

(ii) *Rate of recoupment before an initial determination of the degree of disability.* When a veteran is receiving a temporary rating assigned under § 4.28, § 4.29, or § 4.30 of this chapter and VA has not yet made an initial determination of the degree of disability, VA will recoup at the rate payable, based on that temporary rating, for the disability or disabilities for which the severance pay was granted.

(iii) *Rate of recoupment after an initial determination of the degree of disability.* After making an initial determination of the degree of disability, VA will recoup disability compensation at the monthly rate payable for the degree of disability assigned. VA will not thereafter change the rate of recoupment based on reevaluations of the veteran's disability that lead to an increased rating.

(3) *Disability severance pay for a combat zone veteran.* The veteran must receive the full amount of the monthly disability compensation, including additional amounts for a dependent, if the veteran separated under 10 U.S.C. 61 after January 28, 2008, and the veteran's disabilities were incurred:

(i) In the line of duty in a combat zone; or

(ii) During performance of duty in combat-related operations as designated by the Department of Defense.

(Authority: 10 U.S.C. 1174(h) and 1212(d); 38 U.S.C. 501(a), 1161)

(c) *Separation pay and special separation benefits.* This paragraph (c) applies when entitlement to disability compensation was established after September 14, 1981.

(1) *Recoupment of separation pay and special separation benefits.* A veteran who has received separation pay or special separation benefits may also receive disability compensation for a disability incurred in or aggravated by service before the date of receipt of separation pay or special separation benefits. However, the separation pay or special separation benefits will be recouped from the disability compensation.

(2) *Disability compensation for disability incurred or aggravated in subsequent service is not subject to recoupment.* The veteran must receive the full amount of the monthly disability compensation, including additional amounts for a dependent, payable for a service-connected disability that was incurred in or aggravated in a period of service that is subsequent to the period on which the separation pay or special separation benefits were based.

(Authority: 10 U.S.C. 1174, 1174a, 38 U.S.C. 501(a))

(d) *Amount recouped*—(1) *Lump-sum readjustment pay, disability severance pay, and separation pay*—(i) *Payments received before October 1, 1996.* VA will recoup from VA disability compensation the total amount of lump-sum readjustment pay, disability severance pay, and separation pay a veteran received before October 1, 1996, regardless of the amount of Federal income tax withheld from such payments.

(ii) *Payments received after September 30, 1996.* VA will recoup from VA disability compensation the total amount of lump-sum readjustment pay, disability severance pay, and separation pay a veteran received after September 30, 1996, less the amount of Federal income tax withheld from such payments. The Federal income tax withholding amount is the flat withholding rate for Federal income tax withholding.

(2) *Special separation benefits.* VA will recoup from VA disability

compensation the total amount of special separation benefits under 10 U.S.C. 1174(a) less the amount of Federal income tax withheld from such payments. The Federal income tax withholding amount is the flat withholding rate for Federal income tax withholding.

(Authority: 10 U.S.C. 1174, 1212(d), 38 U.S.C. 501(a))

§ 5.748 Concurrent receipt of VA disability compensation and retired pay by certain officers of the Public Health Service.

Disability compensation may be paid concurrently with retired pay to an officer of the commissioned corps of the Public Health Service, who was receiving disability compensation on December 31, 1956, as follows:

(a) An officer who incurred a disability before July 29, 1945, but retired for reasons unrelated to disability before such date;

(b) An officer who incurred a disability before July 29, 1945, but retired unrelated to disability between July 4, 1952, and December 31, 1956; or

(c) An officer who incurred a disability between July 29, 1945, and July 3, 1952, but retired unrelated to disability between July 4, 1952, and December 31, 1956.

(Authority: Sec. 501(b), Pub. L. 84–881, 70 Stat. 881; E.O. 9575, 10 FR 7895, June 29, 1945; E.O. 10349, 17 FR 3769, Apr. 29, 1952)

§ 5.749 [Reserved]

Payments From Other Federal Agencies and the Effects of Those Payments on VA Benefits for a Veteran and Survivor

§ 5.750 Election between VA benefits and compensation under the Federal Employees' Compensation Act for death or disability due to military service.

(a) *General rules*—(1) *Election required.* A person who is entitled to compensation from the U.S. Department of Labor's Office of Workers' Compensation Programs under the Federal Employees' Compensation Act (FECA) for a disability or death incurred before January 1, 1957, due to service in the Armed Forces, and who is also entitled to VA pension, disability compensation, or dependency and indemnity compensation (DIC) based on the same disability or death (including compensation or DIC payable under 38 U.S.C. 1151, Benefits for persons disabled by treatment or vocational rehabilitation) must elect whether to receive FECA compensation or the applicable VA benefit. An election under this paragraph (a)(1) is irrevocable once it becomes final under § 5.742. There is no right of reelection, with the exception of the situation addressed in paragraph (a)(2) of this section. If a beneficiary elects to receive FECA compensation, his or her VA benefits will be discontinued effective the end of the month following the month in which VA receives notice of the election from the Office of Workers' Compensation.

(2) *Right to reelect dependency and indemnity compensation in lieu of compensation under FECA at any time.* A person who is receiving benefits under FECA based on death in military service may reelect at any time to receive DIC in lieu of FECA compensation. However, such an election of DIC is irrevocable once the reelection becomes final under § 5.742.

(3) *Future increases in impairment.* If a veteran makes an election of FECA compensation instead of VA disability compensation for a particular disability, and there is subsequent increased impairment based on that disability, the award of increased disability compensation based on the increased impairment will be considered a new benefit and the veteran may elect to receive FECA compensation or VA disability compensation as to that increased impairment. If the veteran elects VA disability compensation for the increase, VA will pay only the difference between the rate payable for the increased rating and the rate payable for the prior rating.

(b) *Effect of a surviving spouse's election of compensation under FECA or VA benefits on the rights of a child*—(1) *Cases in which a spouse's entitlement controls a child's entitlement.* If a child's entitlement to VA benefits is controlled by the surviving spouse's entitlement, the surviving spouse's election controls the rights of the veteran's child, even if the child is not in the custody of the surviving spouse and even if the child is not entitled to receive any benefits under FECA. If the surviving spouse elects to receive FECA compensation, the child's VA benefits will be discontinued on the same day that the surviving spouse's VA benefits are discontinued.

(2) *Cases in which a child has independent entitlement.* If a child is entitled to DIC or other VA benefits independent of the surviving spouse's entitlement, the child may receive such benefits at the same time that the surviving spouse receives FECA compensation.

(Authority: 5 U.S.C. 8116(b); 38 U.S.C. 501(a), 1316(b), 1317(a))

Cross Reference: § 5.1, for the definition of ''custody of a child''.

§ 5.751 Election between VA benefits and compensation under the Federal Employees' Compensation Act for death or disability due to Federal civilian employment.

(a) *When both VA benefits and compensation under the Federal Employees' Compensation Act (FECA) are based upon the same disability or death*—(1) *Election required.* Except as otherwise provided in this section, a person who is entitled to compensation from the U.S. Department of Labor's Office of Workers' Compensation Programs under FECA, for a disability or death due to Federal civilian employment, and who is also entitled to VA disability compensation or dependency and indemnity compensation (DIC) based on the same disability or death, must elect whether to receive FECA compensation or the applicable VA benefit. If a beneficiary elects to receive FECA compensation, his or her VA benefits will be discontinued effective the end of the month following the month in which VA receives notice of the election from the Office of Workers' Compensation.

(2) *No election is required for VA awards approved before September 13, 1960.* Any award approved before September 13, 1960, authorizing VA benefits concurrently with an award of FECA compensation for a disability or death due to Federal civilian employment is not subject to the election requirement in paragraph (a)(1) of this section.

(b) *When VA benefits and FECA compensation are each based on a different disability or death.* There is no prohibition against concurrent payment of FECA compensation and VA disability compensation or DIC if entitlement to each benefit is based on a different disability or death. The election described in paragraph (a)(1) of this section is not required in such cases.

(c) *Election is irrevocable.* An election to receive FECA compensation or VA benefits under this section is irrevocable once the election becomes final under § 5.742, Finality of elections; cancellation of certain elections. There is no right of reelection.

(d) *Future increases in disability.* If a veteran makes an election of FECA compensation instead of VA disability compensation for a particular disability, and there is subsequent increased impairment based on that disability, the award of increased disability compensation based on the increased disability will be considered a new benefit and the veteran may elect to receive FECA compensation or VA

disability compensation as to that increased disability.

(e) *Effect of a surviving spouse's election of compensation under FECA or VA benefits on the rights of a child*—(1) *Cases in which a spouse's entitlement controls a child's entitlement.* If a child's entitlement to VA benefits is controlled by the surviving spouse's entitlement, the surviving spouse's election controls the rights of the veteran's child, even if the child is not in the custody of the surviving spouse and even if the child is not entitled to receive any benefits under FECA. If the surviving spouse elects to receive FECA compensation, the child's VA benefits will be discontinued on the same day that the surviving spouse's VA benefits are discontinued.

(2) *Cases in which a child has independent entitlement.* If a child is entitled to DIC or other VA benefits independent of the surviving spouse's entitlement, the child may receive such benefits at the same time that the surviving spouse receives FECA compensation.

(Authority: 5 U.S.C. 8116(b); 38 U.S.C. 501(a))

§ 5.752 Procedures for elections between VA benefits and compensation under the Federal Employees' Compensation Act.

(a) *Procedures before VA receipt of an election between compensation under the Federal Employees' Compensation Act (FECA) and VA benefits.* When there is evidence showing that a claimant is receiving benefits from the U.S. Department of Labor's Office of Workers' Compensation Programs (OWCP) under FECA for the same disability or death for which VA benefits are claimed, VA will:

(1) Advise OWCP of the pertinent facts in the case, including the disabilities for which VA benefits are payable, and request that OWCP obtain the election; and

(2) Deny the VA claim, advise the claimant of the facts VA furnished to OWCP, and inform the claimant that OWCP will contact the claimant concerning rights of election.

(b) *Procedures when there is an election of VA benefits instead of compensation under FECA.* If OWCP informs VA that the claimant has elected VA benefits, VA will pay benefits effective the date of receipt of the claim for VA benefits (or other effective date assigned under this chapter based on such claim). VA will offset FECA payments made during the period between the effective date of the VA award and the date of election.

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

§ 5.753 Payment of VA benefits and civil service retirement benefits for the same period.

VA will pay VA benefits to an eligible claimant or beneficiary at the same time that the claimant or beneficiary is receiving civil service retirement benefits. However, VA will consider payments of civil service retirement benefits as income where income is a factor in entitlement to VA benefits except as otherwise provided in this part.

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

§ 5.754 Effect of payment of compensation under the Radiation Exposure Compensation Act of 1990 on payment of certain VA benefits.

(a) *Disability compensation.*—(1) *Receipt of payment under Radiation Exposure Compensation Act of 1990.* A radiation-exposed veteran, as defined in § 5.268(a), who receives a payment under the Radiation Exposure Compensation Act of 1990, as amended (42 U.S.C. 2210 note) (RECA), will not be denied disability compensation to which the veteran is entitled under § 5.268 (discussing presumptive service connection for radiation exposed veterans) for months beginning after March 26, 2002.

(2) *Non-radiation exposed veteran.* A veteran who is not a ''radiation-exposed veteran,'' as defined in § 5.268(a), is not entitled to VA disability compensation for disability caused by a disease that is attributable to exposure to radiation for which the veteran has received a payment under RECA.

(Authority: 38 U.S.C. 1112(c)(4))

(b) *Dependency and indemnity compensation (DIC).* A person who receives a payment under RECA based upon a veteran's death will not be denied DIC to which the person is entitled under §§ 5.510 through 5.512 and 5.520 through 5.522 for months beginning after March 26, 2002.

(Authority: 38 U.S.C. 1310(c))

(c) *Offset of RECA against VA benefits.* Notwithstanding paragraphs (a)(1) or (b) of this section, the amount of a RECA payment will be deducted from the amount of disability compensation payable pursuant to § 5.268.

(Authority: 38 U.S.C. 1310(c))

(d) *Effective date of discontinuance of VA benefits.* This paragraph (d) applies when VA must discontinue VA disability compensation to a person because that person received RECA compensation. In such a case, VA will discontinue its benefits effective the first day of the month that RECA benefits are issued.

(Authority: 42 U.S.C. 2210 note)

§ 5.755 [Reserved]

Rules Concerning the Receipt of Multiple VA Benefits

§ 5.756 Prohibition against concurrent receipt of certain VA benefits based on the service of the same veteran.

(a) *Veteran.* VA may not pay a veteran an award of disability compensation and an award of disability pension at the same time based on the veteran's service.

(b) *Survivor.* VA may not pay a survivor more than one award of death pension, death compensation, or dependency and indemnity compensation (DIC) based on the service of the same veteran.

(Authority: 38 U.S.C. 5304(a)(1))

§ 5.757 Elections between VA disability compensation and VA pension.

(a) *Elections between disability compensation and Improved Pension.* A person who is entitled to receive both disability compensation and Improved Pension may elect or reelect at any time to receive either benefit unless otherwise provided in this part, regardless of whether it is the greater or lesser benefit.

(b) *Elections between dependency and indemnity compensation and death pension.* A person who is entitled to receive both dependency and indemnity compensation and death pension may elect or reelect at any time to receive either benefit unless otherwise provided in this part, regardless of whether it is the greater or lesser benefit.

(c) *Elections between disability compensation and Old-Law Pension or Section 306 Pension.* A person who is entitled to receive both disability compensation and Old-Law Pension or Section 306 Pension may elect at any time to receive either benefit. Such person may reelect at any time to receive the other benefit unless otherwise provided in this part, regardless of which is the greater or lesser benefit.

(d) *Effect of a veteran's election of disability compensation or pension on other beneficiaries.* A veteran's election of disability compensation or pension under this section controls the right of any dependent in that case, even though the election results in the reduction of the benefit payable to the dependent.

(e) *Effect of a surviving spouse's election on the rights of a child*—(1) *General rule: the election of the surviving spouse controls the claims of the child.* An election by a surviving

spouse controls the claims of a child including a child over age 18 and any child not in the custody of the surviving spouse, even though the election results in the reduction of the benefit payable to a child.

(2) *Exception: when a surviving spouse elects death compensation.* When a surviving spouse elects death compensation instead of Improved Death Pension, an otherwise eligible child is not precluded from receiving Improved Death Pension if the child is not in the custody of a surviving spouse. See § 5.417.

(3) *Exception: when a surviving spouse elects Improved Death Pension.* A surviving spouse's election of Improved Death Pension does not affect the benefits of a surviving child who was receiving a separate apportioned award of Old-Law Pension or Section 306 Pension on December 31, 1978.

(f) *Change from one law to another.*—(1) *General.* Except as otherwise provided, where payments of pension or disability compensation are being made to a person under one law, the right to receive benefits under another law being in suspension, and a higher rate of pension or disability compensation becomes payable under the other law, benefits at the higher rate will not be paid for any date before the date of receipt of an election.

(2) *Incarcerated veterans.* An election to receive disability compensation in lieu of pension is not required for an incarcerated veteran who does not have a dependent spouse or child.

(Authority: 38 U.S.C. 501(a), 1542, 5304)

Cross Reference: § 5.1, for the definition of ''custody of a child''.

§ 5.758 Electing Improved Pension instead of Old-Law Pension or Section 306 Pension.

(a) *Right to elect Improved Pension.* Except as otherwise provided in this section, a pension beneficiary who was entitled on December 31, 1978, to receive Old-Law Pension or Section 306 Pension, may elect at any time to receive Improved Pension instead. An election to receive Improved Pension instead of Old-Law Pension or Section 306 Pension is irrevocable once the election becomes final under § 5.742. There is no right to reelection.

(b) *When a veteran's spouse is also a veteran who is eligible to elect Improved Pension.* If a veteran who is eligible to elect Improved Pension under this section has a spouse who is also a veteran who is eligible to elect Improved Pension under this section, neither veteran may receive Improved Pension unless both elect to receive it.

(c) *When a beneficiary chooses to receive Old-Law Pension or Section 306 Pension instead of Improved Pension.* If a pension beneficiary who is eligible to elect Improved Pension under this section does not do so, VA will continue to pay that beneficiary Old-Law Pension or Section 306 Pension at the monthly rate in effect on December 31, 1978, unless that rate must be reduced or discontinued under § 5.470, Reasons for discontinuing or reducing Old-Law Pension or Section 306 Pension, or under any other regulation in this part.

(d) *Effect of a surviving spouse's election of Improved Pension on the rights of a child.* A surviving spouse's election of Improved Pension does not affect the benefits of a surviving child who was receiving, on December 31, 1978, a separate apportioned award of Old-Law Pension or Section 306 Pension.

(Authority: 38 U.S.C. 501(a); Sec. 306(a) and (b), Pub. L. 95–588, 92 Stat. 2508)

§ 5.759 Election between death compensation and dependency and indemnity compensation.

(a) *Election between benefits is required.* A person who is eligible for both death compensation and dependency and indemnity compensation (DIC) must elect to receive one or the other benefit.

(1) *Persons currently receiving death benefits.* (i) A person who is currently receiving death compensation may elect to receive DIC.

(ii) An election to receive DIC instead of death compensation is irrevocable once the election becomes final under § 5.742. There is no right to reelection.

(2) *Persons claiming entitlement to service-connected death benefits.* VA will treat a claim for service-connected death benefits as a claim for DIC, subject to confirmation by the claimant, unless the claimant specifically requests death compensation.

(b) *Limitation of election.* An election of DIC may not be filed or withdrawn after the death of the surviving spouse, child, or parent. See § 5.742(c) (concerning the finality of an election of DIC when the beneficiary dies before negotiating a DIC check).

(Authority: 38 U.S.C. 1317(a))

Cross Reference: § 5.512, Eligibility for death compensation or death pension instead of dependency and indemnity compensation.

§ 5.760 Electing Improved Death Pension instead of dependency and indemnity compensation.

A surviving spouse who is entitled to receive dependency and indemnity compensation (DIC) may elect to receive Improved Death Pension instead of DIC. Such surviving spouse may subsequently reelect either benefit.

(Authority: 38 U.S.C. 1317(b))

§ 5.761 Concurrent receipt of disability compensation, pension, or death benefits by a surviving spouse based on the service of more than one veteran.

(a) *Concurrent receipt of disability compensation or pension and death benefits.* Except as otherwise provided in § 5.464, if a surviving spouse is receiving disability compensation or pension in his or her own right as a veteran, the surviving spouse is not barred from receiving:

(1) An apportionment of disability compensation or pension based on another veteran's disability; or

(2) Death pension, death compensation, or dependency and indemnity compensation (DIC) due to the death of another veteran.

(b) *Entitlement to death benefits based on the death of more than one veteran.* Except as otherwise provided in this regulation or in § 5.464, if a beneficiary is receiving death pension, death compensation, or DIC as the surviving spouse of one veteran, the beneficiary is not barred from receiving death pension, death compensation, or DIC due to the death of a different veteran.

(c) *Limitation: a surviving spouse is entitled to payment of only one award of death benefits at a time based on the death of more than one veteran to whom the surviving spouse was married*—(1) *Payment limitation.* VA may not pay more than one death pension, death compensation, or DIC award at a time to a surviving spouse based on the death of more than one veteran to whom the surviving spouse was married.

(2) *Election.* A surviving spouse who is eligible for death pension, death compensation, or DIC because of the deaths of more than one veteran to whom he or she was married may elect or reelect benefits based on the death of any one such deceased spouse. Benefits payable in the elected case will be offset by any payments the surviving spouse received based on the death of the other spouse for the same period. The offset will occur only if the surviving spouse was entitled to benefits in the elected case before the date of receipt of the election under § 5.512 or § 5.431.

(Authority: 38 U.S.C. 5304(b)(1), (3))

§ 5.762 Payment of multiple VA benefits to a surviving child based on the service of more than one veteran.

(a) *A surviving child is entitled to concurrent receipt of disability compensation or pension and death benefits.* If a surviving child is receiving

disability compensation or pension in his or her own right as a veteran, the surviving child is not barred from receiving:

(1) An apportionment of disability compensation or pension based on another veteran's disability; or

(2) Death pension, death compensation, or dependency and indemnity compensation (DIC) due to the death of another veteran.

(b) *A surviving child is entitled to more than one award of death benefits based on the death of more than one veteran.* Except as otherwise provided in paragraph (c) of this section or in § 5.464, if a surviving child is receiving death pension, death compensation, or DIC as the surviving child of one veteran, the surviving child is not barred from receiving death pension, death compensation, or DIC due to the death of a different veteran.

(c) *Exception: child with more than one parent in the same parental line.*—(1) *Definition. Same parental line* means that the child has more than one veteran father or more than one veteran mother for VA purposes. For example, the child's father and stepfather are both veterans.

(2) *A surviving child is entitled to payment of no more than one death benefit due to the death of more than one parent in the same parental line.* Except for insurance and as provided in this paragraph (c), VA cannot pay more than one death benefit to or for a surviving child because of the death of more than one parent in the same parental line.

(3) *Exception: more than one death benefit is payable when the death of both parents in the same parental line occurred before June 9, 1960.* If both fathers or both mothers died before June 9, 1960, a child who receives DIC for one parent may receive death pension for the other parent. Unless both fathers or both mothers died before January 1, 1957, such a child may not receive DIC or death compensation for the other parent. If both parents died before January 1, 1957, there is no prohibition on concurrent receipt of death benefits.

(4) *Surviving child's right to elect or reelect.* If a surviving child is entitled to benefits because of the death of more than one parent in the same parental line, the child has the right to elect or reelect to receive benefits because of the death of either such parent.

(5) *Benefits that are awarded as a result of a surviving child's reelection are subject to an offset.* VA will grant benefits to the electing child according to the child's reelection. However, VA will offset the new award by subtracting the amount of any payments for the same period which VA previously made under the prior award to or for that child.

(6) *Effect of a surviving child's election on a beneficiary of the other parent in the same parental line.* (i) When a surviving child elects benefits because of the death of one veteran, and a surviving spouse or another surviving child are eligible for benefits because of the death of another veteran in the same parental line, VA will determine the benefit rate to the surviving spouse or the other surviving child as if the surviving child making the election did not exist.

(ii) *Effective date.* If VA determines that benefits payable to the surviving spouse or the other surviving child should be increased, reduced, or discontinued as a result of the election or reelection, such increase, reduction, or discontinuance is effective the first day of the month after the month for which VA last paid benefits.

(Authority: 38 U.S.C. 5304(b))

§ 5.763 Payment of multiple VA benefits to more than one child based on the service of the same veteran.

(a) *Scope.* This section applies when two or more children are eligible to receive the same type of VA benefit based on the service of a veteran, and at least one child is also eligible to receive a different type of VA benefit based on the service of the same veteran. The types of VA benefits referred to in this section are as follows:

(1) Dependency and indemnity compensation (DIC); and

(2) Survivors' and Dependents' Educational Assistance (DEA).

(b) *General rule.* This paragraph (b) applies when one child is eligible for more than one type of VA benefit as provided in paragraph (a) of this section and that child chooses to receive a benefit that is different than the type the remaining child receives. Except as provided in paragraph (c) of this section, VA cannot:

(1) Increase the rate of payment to the remaining child; or

(2) Pay a rate to each remaining child that is greater than the rate payable if all children were receiving the same type of VA benefit.

(c) *Exception to general rule.* The limitation in paragraph (b) of this section does not apply if the child elects DEA. Unless the child electing DEA is under age 18 or became permanently incapable of self-support before reaching age 18 under § 5.227, VA will pay benefits to the remaining child as if the child electing DEA did not exist. See 38 CFR 21.3023(b) (pertaining to restrictions on concurrent receipt of DEA and other VA benefits).

(Authority: 38 U.S.C. 3512, 3562)

§ 5.764 Payment of Survivors' and Dependents' Educational Assistance and VA death pension or dependency and indemnity compensation for the same period.

(a) *Child who has reached age 18*—(1) *Election is required.* (i) A child who has reached age 18 and did not become permanently incapable of self-support before reaching age 18 (see § 5.227) may not receive VA death pension or dependency and indemnity compensation (DIC) at the same time as Survivors' and Dependents' Educational Assistance under 38 U.S.C. chapter 35 (DEA), and must elect between death pension or DIC and DEA. There is no right of reelection.

(ii) A veteran receiving compensation may not receive additional disability compensation for a child who has reached age 18 and did not become permanently incapable of self-support before reaching age 18 (see § 5.227) at the same time the child receives DEA.

(iii) A veteran receiving pension may not receive increased benefits based on a child who has reached age 18 and did not become permanently incapable of self-support before reaching age 18 (see § 5.227) at the same time the child receives DEA. See §§ 5.400(c) and 5.416.

(2) *Effect of election on another beneficiary when there is more than one parent in the same parental line.* In cases where a child has more than one parent in the same parental line, if the child elects to receive benefits based on one parent, VA will consider the child's entitlement for purposes of determining the entitlement and rate of another survivor of that parent. For benefits based on the other parent's service, VA will determine the entitlement and rate payable to the survivor of that parent as if the child did not exist.

(3) *Effective date.* VA will discontinue the electing child's VA death pension or DIC effective the day preceding the beginning date of the DEA allowance. VA will increase payments, pay a reduced rate, or discontinue VA death pension or DIC to the remaining beneficiaries effective the beginning date of the DEA award to the child.

(b) *Child who is under age 18 or helpless.* Generally, a helpless child or a child who is under age18 may receive VA death pension or DIC at the same time as DEA under 38 U.S.C. chapter 35.

(c) *Surviving spouse.* A surviving spouse may receive VA death pension or DIC at the same time as DEA under 38 U.S.C. chapter 35.

(d) *Additional criteria.* Provisions concerning concurrent receipt of DEA and VA death pension or DIC are set forth in § 21.3023 of this chapter.

(Authority: 38 U.S.C. 3562)

§ 5.765 Payment of compensation to a parent based on the service or death of multiple veterans.

Neither receipt by a parent of dependency and indemnity compensation on account of the death of a veteran, nor receipt by a parent of pension or compensation on account of his or her military service, will bar receipt by a parent of pension, disability compensation, or dependency and indemnity compensation on account of the death or disability of any other person.

(Authority: 38 U.S.C. 5304(b))

§§ 5.766–5.769 [Reserved]

Subpart M—Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries

Determining Eligibility for Apportionments

§ 5.770 Apportionment claims.

(a) *General.*—(1) *Veteran.* All or part of the pension or disability compensation payable to any veteran may be apportioned:

(i) For his or her spouse, child, or dependent parents if the veteran is incompetent and is being furnished hospital treatment, nursing home, or domiciliary care by the U.S., or any political subdivision thereof.

(ii) If the veteran is not residing with his or her spouse or the veteran's child is not residing with the veteran, and the veteran is not reasonably discharging his or her responsibility for the spouse's or child's support.

(2) *Surviving spouse.* Where a child of a deceased veteran is not living with the veteran's surviving spouse, the dependency and indemnity compensation (DIC) or pension otherwise payable to the surviving spouse may be apportioned.

(b) *Apportionment to a child on active duty.* Except as provided in § 5.774(e)(2), no apportionment of disability or death benefits will be made or changed solely because a child has entered active duty.

(c) *Apportionment if beneficiary providing for dependents.* No apportionment will be made where the veteran, the veteran's spouse when paid ''as wife'' or ''as husband'', surviving spouse, or fiduciary is providing for dependents. The additional benefits for such dependents will be paid to the veteran, spouse, surviving spouse, or fiduciary.

(d) *Apportionment of death benefits.* Any amounts payable for children under §§ 5.780 and 5.781 will be equally divided among the children.

(e) *Apportionment to a child not residing with surviving spouse.* The amount payable for a child in custody of and residing with the surviving spouse will be paid to the surviving spouse. Amounts payable to a surviving spouse for a child in his or her custody but residing with someone else may be apportioned if the surviving spouse is not reasonably contributing to the child's support.

(Authority: 38 U.S.C. 5307, 5502(d))

§ 5.771 Special apportionments.

(a) *General.* Without regard to any provision regarding apportionment other than § 5.774(b), (c), and (f), where hardship is shown to exist, pension, disability compensation, or dependency and indemnity compensation may be specially apportioned between the veteran and his or her dependent or between the surviving spouse and a child. Such an apportionment will be based on the facts in the individual case. The apportionment may not cause undue hardship to the person from whose benefits the apportionment is made.

(b) *Factors that determine a special apportionment.* In determining the basis for special apportionment, consideration will be given to such factors as:

(1) The amount of benefits payable;

(2) The net worth, income, and expenses of the beneficiary and any dependent on whose behalf apportionment is claimed; and

(3) The special needs of the veteran, his or her dependent, and the apportionment claimant.

(c) *Apportioned amount.* The amount apportioned should generally be consistent with the total number of dependents involved. Ordinarily, apportionment of more than 50 percent of the veteran's benefits would constitute undue hardship while apportionment of less than 20 percent of his or her benefits would not provide a reasonable amount for any apportionee.

(Authority: 38 U.S.C. 5307)

§ 5.772 Veteran's benefits apportionable.

A veteran's benefits may be apportioned:

(a) *General.* If the veteran is not residing with his or her spouse or his or her child, the veteran is not reasonably discharging his or her responsibility for the spouse's or child's support, and a claim for apportionment is filed by or for the spouse or child.

(b) *Pending appointment of fiduciary.* Pending the appointment of a guardian or other fiduciary.

(c) *Veteran receiving hospital, domiciliary, or nursing home care.* (1) *Incompetent veteran.* (i) *Spouse or child.* Where an incompetent veteran without a fiduciary is receiving hospital treatment, nursing home, or domiciliary care provided by the U.S. or a political subdivision, his or her benefit may be apportioned for a spouse or child unless such benefit is paid to a spouse (''as wife'' or ''as husband'') for the use of the veteran and his or her dependents.

(ii) *Dependent parent.* Where an incompetent veteran without a fiduciary is receiving hospital treatment, nursing home, or domiciliary care provided by the U.S. or a political subdivision, his or her disability compensation may be apportioned for a dependent parent, unless such benefit is paid to a spouse (''as wife'' or ''as husband'') for the use of the veteran and his or her dependents.

(2) *Competent veteran.*—(i) *Section 306 Pension.* Where the amount of Section 306 Pension payable to a married veteran is reduced to $50 monthly under § 5.726, an apportionment may be made to such veteran's spouse upon an affirmative showing of hardship. The amount of the apportionment generally will be the difference between $50 and the total amount of pension payable on December 31, 1978.

(ii) *Improved Pension.* Where the amount of Improved Pension payable to a married veteran under 38 U.S.C. 1521(b) is reduced to $90 monthly under § 5.722, an apportionment may be made to such veteran's spouse upon an affirmative showing of hardship. The amount of the apportionment generally will be the difference between $90 and the rate payable if pension were being paid under 38 U.S.C. 1521(c), including the additional amount payable under 38 U.S.C. 1521(e) if the veteran is so entitled.

(d) *Apportionment of additional disability compensation for dependent parent.* Where additional disability compensation is payable for a parent and the veteran or his or her guardian neglects or refuses to contribute such an amount to the support of the parent, the additional disability compensation will be paid to the parent upon receipt of a claim.

(Authority: 38 U.S.C. 501(a), 5307, 5502, 5503(a); Pub. L. 95–588, § 306, 92 Stat. 2497)

Cross Reference: §§ 5.711, Payment to dependents due to the disappearance of

a veteran for 90 days or more; 5.722, Adjustment of Improved Pension while a veteran is receiving domiciliary or nursing home care; 5.725, Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care; 5.726, Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care; 5.729, Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance during a veteran's temporary absence from hospital, domiciliary, or nursing home care or after released from such care; 5.792, Institutional awards; 5.814, Apportionment when a primary beneficiary is incarcerated.

§ 5.773 Veterans disability compensation.

Rates of apportionment of disability compensation will be determined under § 5.771.

§ 5.774 Benefits not apportionable.

VA will not apportion benefits:

(a) If the total benefit payable does not permit payment of a reasonable amount to any apportionee.

(b) If a court of proper jurisdiction has found the veteran's spouse guilty of adultery.

(c) If VA determines that the veteran's spouse has lived with another person and has openly held himself or herself out to the public to be the spouse of that person unless:

(1) The spouse subsequently reconciled with the veteran and later became estranged from the veteran; or

(2) The spouse had entered into the relationship with the other person in good faith. For purposes of this paragraph (c)(2), *good faith* means that the spouse had a reasonable basis to believe that the marriage to the veteran was legally terminated (for example, due to trickery on the part of the veteran).

(d) If another person legally adopts a veteran's child, except VA may apportion the additional disability compensation payable to a veteran for the child or the additional dependency and indemnity compensation payable to a surviving spouse for the child.

(e)(1) If the apportionment is claimed for a child who is on active duty.

(2) If a child is receiving apportioned benefits directly and then enters active duty. The apportionment will be discontinued and such benefits will be paid to the veteran. The effective date of the discontinuance will be the first day of the month after the month for which VA last paid the apportionment.

Note to paragraph (e)(2): In accordance with § 5.770(b), if a child is included in an existing apportionment to an estranged spouse and then enters active duty, no adjustment in the apportioned award will be made based on the child's entry into service.

(f)(1) To any beneficiary's dependent who:

(i) Is determined by VA to have been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the U.S. or its allies; or

(ii) Participated in the acts that caused forfeiture for fraud or treasonable acts.

(2) After September 1, 1959, if a veteran or other primary beneficiary:

(i) forfeited benefits for fraud or for a treasonable act; or

(ii) was convicted of subversive activity after September 1, 1959.

Cross Reference: §§ 5.676, Forfeiture for fraud, 5.677, Forfeiture for treasonable acts, and 5.678, Forfeiture for subversive activity.

(g) Unless the estranged spouse of a veteran files a claim for an apportionment. If there is a child of the veteran not in his or her custody, an apportionment will not be authorized unless a claim for an apportionment is filed by or for the child.

(Authority: 38 U.S.C. 5307, 6103(b), 6104(c), 6105(a))

§§ 5.775–5.779 [Reserved]

§ 5.780 Eligibility for apportionment of pension.

(a) *Disability pension.* Disability pension will be apportioned to the veteran's spouse or child, if the veteran is not residing with his or her spouse, or if the veteran's child is not residing with the veteran, and the veteran is not reasonably discharging his or her responsibility for the spouse's or child's support. Apportionment of these benefits will be made under § 5.771.

(b) *Death pension.*—(1) *Old-Law Death Pension or Section 306 Death Pension.* Old-Law Death Pension or Section 306 Death Pension will be apportioned to a child of a deceased veteran who is not in the custody of the surviving spouse. Apportionment of these benefits will be made at the rates approved by the Under Secretary for Benefits except when the facts and circumstances in a case warrant apportionment under § 5.771.

(2) *Improved Death Pension.* Improved Death Pension will be apportioned to the veteran's child if a child of the deceased veteran is not in the custody of the surviving spouse. Apportionment of these benefits will be made under § 5.771.

(Authority: 38 U.S.C. 5307)

§ 5.781 Eligibility for apportionment of a surviving spouse's dependency and indemnity compensation.

(a) *Conditions under which apportionment may be made.* The surviving spouse's award of dependency and indemnity compensation (DIC) will be apportioned where there is a child under 18 years of age and not in the custody of the surviving spouse. The surviving spouse's award of DIC will not be apportioned under this paragraph (a) for a child over age 18 years.

(b) *Rates payable.* The DIC share for each child under 18 years of age, including those in the surviving spouse's custody as well as those who are not in such custody, will be the additional allowance payable for each dependent child, except when the facts and circumstances in a case warrant special apportionment under § 5.771. Current and historical DIC rates can be found on the Internet at *http://www.va.gov* or are available from any Veterans' Service Center. The share for the surviving spouse will be the difference between the children's share and the total amount payable.

§ 5.782 Effective date of apportionment grant or increase.

(a) *General rule.* Except as provided in paragraph (b) of this section, the effective date of an apportionment or an increased apportionment is the first day of the month after the month in which VA receives an apportionment claim or a claim for an increased apportionment.

(b) *Exceptions to general rule.*—(1) *Claim for benefits is pending.* This paragraph (b)(1) applies if a veteran or surviving spouse (primary beneficiary) has a claim for benefits pending on the date that VA receives an apportionment claim. The effective date of the apportionment will be the effective date of the primary beneficiary's award, or the date the apportionment claimant's entitlement arose, whichever is later.

(2) *Apportionment claimant not yet established as the beneficiary's dependent.* This paragraph (b)(2) applies if VA receives an apportionment claim within 1 year of the award of benefits to the primary beneficiary and the apportionment claimant has not been established as a dependent on the primary beneficiary's award. The effective date of the apportionment will be the effective date of the primary beneficiary's award, or the date the apportionment claimant's entitlement arose, whichever is later.

(3) *Veteran's or surviving spouse's benefits are reduced or discontinued.* Except as provided in paragraph (b)(4)

of this section, this paragraph (b)(3) applies if a veteran's or surviving spouse's benefits have been reduced or discontinued but an apportionment of the benefits that would otherwise be payable to the primary beneficiary is authorized. In this situation, the effective date of the apportionment is the same as the date on which the primary beneficiary's benefits were reduced or discontinued, if VA receives the apportionment claim within 1 year after that date and the apportionment claimant is otherwise shown to be entitled to an apportionment from that date.

(4) *The primary beneficiary is incarcerated.* The effective date of an apportionment or increased apportionment when the primary beneficiary is incarcerated is specified in § 5.814(e).

(Authority: 38 U.S.C. 501(a), 5110)

§ 5.783 Effective date of reduction or discontinuance of apportionment.

(a) *General rule.* Except as otherwise provided in this part, if VA reduces or discontinues an apportionment because the basis for the apportionment no longer exists, then the effective date of the reduction or discontinuance will be the first day of the month after the month in which the basis for the apportionment ceased to exist.

(b) *Exceptions to general rule.*—(1) *Death, divorce, or marriage of an apportionee.* The effective date of discontinuance of an apportionment due to the death, divorce, or marriage of the apportionee is the first day of the month of the event, except the effective date of discontinuance of an apportionment of Old-Law Pension or Section 306 Pension will be January 1 of the calendar year immediately after the event.

Note to paragraph (b)(1): The effective date of discontinuance of the dependency allowance on the primary beneficiary's award due to the death, divorce, or marriage of the apportionee is determined in accordance with § 5.184 or § 5.477.

(2) *Death or marriage of dependent of apportionee.* The effective date of discontinuance of an apportionment due to the death or marriage of a child included in an existing apportionment to an estranged spouse or another custodian of the child is the first day of the month after the month of the event.

(3) *Primary beneficiary dies or entitlement ends.* The effective date of discontinuance of an apportionment because the primary beneficiary dies or loses entitlement to the primary benefit is the same effective date that applies to the discontinuance of the primary benefit.

(4) *Primary beneficiary no longer incarcerated.* The effective date of discontinuance or reduction of an apportionment because the primary beneficiary is no longer incarcerated is specified in § 5.815 or § 5.816, depending on the primary benefit being apportioned.

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

§ 5.784 Special rules for apportioned benefits on death of beneficiary or apportionee.

(a) *Payment to person receiving apportionment when the beneficiary dies.* If an apportionment has not been paid and the beneficiary dies, then VA will pay the apportionee the unpaid apportionment through the first day of the month of the beneficiary's death. Except as provided in paragraph (b) of this section, the unpaid apportionment is not subject to payment as accrued benefits.

(b) *Person receiving apportioned share of benefits dies.*—(1) *Receiving apportionment of veteran's benefits.* If a person receiving an apportionment of a veteran's benefits dies, then VA will pay any unpaid apportionment to the veteran, if living. If the veteran is not living, then the unpaid apportionment is payable only as accrued benefits to dependents of the veteran, under § 5.551(b)(1). If there is no eligible dependent claimant, then the unpaid apportionment is payable only as accrued benefits to the person who bore the expense of the deceased apportionee's last sickness or burial under § 5.551(e).

(2) *Receiving apportionment of surviving spouse's death benefits.* If a child receiving an apportionment of a surviving spouse's dependency and indemnity compensation (DIC) or death pension dies, then the unpaid apportionment is payable only as accrued benefits to the veteran's surviving child who is entitled to death DIC or pension, under § 5.551(d)(1). If there is no eligible surviving child claimant, then the unpaid apportionment is payable only as accrued benefits to the person.

(Authority: 38 U.S.C. 5112(b)(1), 5121(a), 5502(d))

§§ 5.785–5.789 [Reserved]

Incompetency and Payments to Fiduciaries and Minors

§ 5.790 Determinations of incompetency and competency.

(a) *Definition of mental incompetency.* A mentally incompetent person is one who because of injury or disease lacks the mental capacity to: (1) contract; or

(2) manage his or her own affairs, including disburse funds without limitation.

(b) *Authority.* (1) Agencies of original jurisdiction have sole authority to make official determinations of incompetency and competency for purposes of insurance (38 U.S.C. 1922) and, subject to § 13.56 of this chapter, disbursement of benefits. Such determinations are final and binding on field stations for these purposes.

(2) Where the beneficiary is rated incompetent, the Veterans Service Center Manager or Pension Management Center Manager will:

(i) Develop information as to the beneficiary's social, economic, and industrial adjustment;

(ii) Appoint or recommend appointment of a fiduciary as provided in § 13.55 of this chapter;

(iii) Select a method of disbursing payment as provided in § 13.56 of this chapter or, in the case of a married beneficiary, appoint the beneficiary's spouse to receive payments as provided in § 13.57 of this chapter; and

(iv) Authorize disbursement of the benefit.

(3) If, in the course of fulfilling the responsibilities assigned in paragraph (b)(2) of this section, the Veterans Service Center Manager or Pension Management Center Manager develops evidence indicating that the beneficiary may be capable of administering the funds payable without limitation, he or she will refer that evidence to the agency of original jurisdiction with a statement as to his or her findings. The agency of original jurisdiction will consider this evidence, together with all other evidence of record, to determine whether its prior determination of incompetency should remain in effect. Reexamination may be requested as provided in § 5.102, if necessary to properly evaluate the beneficiary's mental capacity to contract or manage his or her own affairs.

(c) *Medical opinion.* Unless the medical evidence is clear and convincing as to the person's incompetency, the agency of original jurisdiction will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities. Considerations of medical opinions will be in accordance with the principles in paragraph (a) of this section. A determination of incompetency should be based upon all evidence of record, and there should be a consistent relationship between the percentage of disability, facts relating to commitment or hospitalization, and the determination of incompetency.

(d) *Presumption in favor of competency.* When the evidence is in equipoise regarding a beneficiary's mental capacity to contract or to manage his or her own affairs, including to disburse funds without limitation, VA will give the benefit of the doubt to the beneficiary and find that he or she is competent. See § 5.3(b)(3).

(e) *Due process.* Whenever it is proposed to make an incompetency determination, the beneficiary will be notified of the proposed action and of the right to a hearing as provided in § 5.83. Such notice is not necessary if the beneficiary has been declared incompetent by a court of competent jurisdiction or if a guardian has been appointed for the beneficiary based upon a court finding of incompetency. If a hearing is requested, it must be held prior to a rating decision of incompetency. Failure or refusal of the beneficiary after proper notice to request or cooperate in such a hearing will not preclude a rating decision based on the evidence of record.

(f) *Effective date.*—(1) *Incompetency determination.* The effective date of a determination of incompetency is the date of the rating decision finding incompetency. (This paragraph (f)(1) does not apply to an incompetency determination made for insurance purposes under 38 U.S.C. 1922.)

(2) *Competency determination.* If a beneficiary previously determined to be incompetent is later determined to be competent, the effective date of the determination of competency is the date the evidence of record shows the beneficiary regained competence.

(Authority: 38 U.S.C. 501(a), 5502)

§ 5.791 General fiduciary payments.

(a) *Payments to a fiduciary and to or on behalf of a beneficiary.*—(1) *Payment to a fiduciary.* VA may pay benefits to a duly recognized fiduciary on behalf of a person who is mentally incompetent or who is a minor.

(2) *Direct payment to or on behalf of a beneficiary.* If the Veterans Service Center Manager or Pension Management Center Manager determines that it is in the best interest of a mentally incompetent or minor beneficiary, VA may pay benefits, regardless of any legal disability on the part of the beneficiary, directly to:

(i) The beneficiary; or

(ii) A relative of the beneficiary, or another person, for the use of the beneficiary.

(3) *Direct payment to certain minors.* Unless otherwise contraindicated by evidence of record, payment will be made directly to the following classes of minors without any referral to the Veterans Service Center Manager or Pension Management Center Manager:

(i) Those who are serving in or have been discharged from the military forces of the U.S.; and

(ii) Those who qualify for survivors benefits as a surviving spouse.

(4) *Immediate payment to spouse of incompetent veteran.* Unless otherwise contraindicated by evidence of record, if a veteran has no guardian, VA may immediately pay benefits to the spouse of an incompetent veteran for the use of the veteran and his or her dependents prior to referral to the Veterans Service Center Manager or Pension Management Center Manager. See § 13.57 of this chapter.

Cross Reference: Part 13 of this title regarding VA fiduciary activities.

(b) *Payment to the parent of the child.* Where a child is in the custody of a natural parent, adoptive parent, or stepparent, benefits payable to the child may be paid to the parent as custodian of the child.

(c) *Payment to custodian-in-fact.* All or any part of a benefit due a minor or incompetent adult, payment of which is suspended or withheld because payment may not be properly made to an existing fiduciary, may be paid temporarily to the person having custody and control of the beneficiary. See § 13.63 of this chapter.

(d) *Payment to bonded officer of Indian reservation.* Any benefits due an incompetent adult or minor Indian, who is a recognized ward of the Government, may be awarded to the superintendent or other bonded officer designated by the Secretary of the Interior to receive funds under 25 U.S.C. 14. See § 13.62 of this chapter.

(e) *Effective date for payment to a fiduciary.* The effective date of payment to a fiduciary is the first day of the month after the month for which VA last paid benefits to the beneficiary.

Note to paragraph (e): The initial payment to the fiduciary will include amounts withheld for possible apportionments as well as money in Personal Funds of Patients.

(Authority: 38 U.S.C. 5502)

§ 5.792 Institutional awards.

(a) *General.* When an incompetent veteran entitled to pension or disability compensation is a patient in a hospital or other institution, VA may pay all or part of the benefit to the chief officer of the hospital or institution for the veteran's use and benefit if the Veterans Service Center Manager or Pension Management Center Manager determines that such payment will:

(1) Adequately provide for the needs of the veteran; and

(2) Obviate the need for appointment of another type of fiduciary.

Cross Reference: Section 13.61 of this chapter, Payment to the chief officer of institution.

(b) *Non-VA hospital or institution.* (1) In an institutional award of pension or disability compensation, VA may pay to the chief officer of a non-VA hospital or institution on behalf of the veteran an amount determined under § 13.61 of this chapter.

(2) Any excess funds held by the chief officer of a non-VA institution under this section that are not necessary for the benefit of the veteran will be returned to VA or to a fiduciary, if one has been appointed.

(3) If payments are being made to the chief officer of a non-VA hospital or institution, VA will deposit all sums otherwise payable in excess of the institutional award and any apportionments in Personal Funds of Patients.

(c) *Excess funds.* Upon the death of an institutionalized incompetent veteran with no surviving heirs, excess funds will be returned to VA.

(d) *Apportionment.* An institutionalized incompetent veteran's benefits may be apportioned to his or her dependents under § 5.771.

(e) *Effective date for payment of institutional award.* The effective date of payment to the chief officer of a hospital or institution is:

(i) The first day of the month after the month for which VA last paid benefits; or

(ii) On an initial or resumed award, the date of entitlement to benefits, subject to any amounts paid or withheld for apportionment of benefits.

(f) *Effective date for discontinuance of institutional award.* The effective date of discontinuance of payment to the chief officer of the hospital or institution is the first day of the month after the month:

(1) A fiduciary is appointed;

(2) The veteran is discharged from the hospital or institution; or

(3) The veteran is rated competent.

(Authority: 38 U.S.C. 501(a), 5307, 5502)

§ 5.793 Limitation on payments for a child.

If a fiduciary has been appointed for a child because the child is a minor, then VA will not pay benefits to that fiduciary for any period beginning on the date that the child attains the age of majority under the law of the State where the child resides. For any period beginning on that date, if payment is otherwise in order, then VA will pay benefits as follows:

(a) *Competent child reaches age of majority.* If the child is competent, then

VA will pay benefits directly to the child. Under these circumstances, VA will retroactively pay the child any benefits that were not paid for a period before the child attained the age of majority.

(b) *Incompetent child reaches age of majority.* If the child is incompetent, then VA will pay benefits to a fiduciary appointed for the child as a mentally incompetent adult unless benefits are paid directly to the child under § 5.791(a)(2)(i).

§ 5.794 Beneficiary rated or reported incompetent.

(a) *General.* VA will not routinely suspend payments directly to a beneficiary who is or may be incompetent while any of the following is pending:

(1) Development of the issue of incompetency;

(2) Certification of a fiduciary by the Veterans Service Center Manager or Pension Management Center Manager; or

(3) A recommendation by the Veterans Service Center Manager or Pension Management Center Manager that payments should be paid directly to the beneficiary.

(b) *Application.* This policy applies to all cases including, but not limited to, cases in which:

(1) Notice or evidence is received that a guardian has been appointed for the beneficiary;

(2) Notice or evidence is received that the beneficiary has been committed to a hospital; or

(3) The beneficiary has been rated incompetent by VA.

§ 5.795 Change of name of fiduciary.

If a fiduciary changes his or her name because of marriage or divorce, VA will accept the fiduciary's statement of the name change.

§ 5.796 Child's benefits to a fiduciary of an incompetent surviving spouse.

If benefits are payable to a surviving spouse for a child and the child is separated from the surviving spouse because of the surviving spouse's incompetency, no apportionment of benefits to the child is required. If the fiduciary is adequately taking care of the needs of the child from the surviving spouse's estate, either voluntarily or pursuant to a decree of court, VA may pay all amounts payable for the child to the fiduciary.

§ 5.797 Testamentary capacity for VA insurance purposes.

When VA refers a case to an agency of original jurisdiction involving the testamentary capacity of the insured to perform a testamentary act (execute a designation or change of beneficiary or execute a designation or change of option), the following considerations will apply:

(a) *Testamentary capacity* means that degree of mental capacity necessary to enable a person to perform a testamentary act. This generally requires that the insured:

(1) Reasonably comprehend the nature and significance of his or her testamentary act, that is, the subject and extent of his or her disposition;

(2) Recognize the object of his or her bounty; and

(3) Appreciate the consequences of his or her testamentary act, uninfluenced by any material delusion as to the property or persons involved.

(b) VA will consider all evidence of record, with emphasis being placed on evidence pertaining to the mental condition of the insured at the time, or nearest to the time, that the insured performed the testamentary act.

(c) There is a general but rebuttable presumption that every insured person possesses testamentary capacity when performing a testamentary act. Therefore, reasonable doubt should be resolved in favor of testamentary capacity. See § 5.3(b)(2).

§ 5.798 Payment of disability compensation previously not paid because an incompetent veteran's estate exceeded $25,000.

If a veteran who was denied payment of disability compensation under § 3.853 of this chapter is subsequently rated competent for a continuous period of more than 90 days, the withheld disability compensation will be paid to the veteran in a lump-sum.

Cross Reference: § 3.853 of this title, Incompetents; estate over $25,000 (denying payment of disability compensation to an incompetent veteran who had no dependents and had an estate that exceeded $25,000, during the period from November 1, 1990, through September 30, 1992).

(Authority: 38 U.S.C. 5505, as in effect before Nov. 2, 1994)

§§ 5.799–5.809 [Reserved]

Payments to Incarcerated Beneficiaries

§ 5.810 Incarcerated beneficiaries—general provisions and definitions.

(a) *Definitions.*—(1) *Incarceration* means confinement in a Federal, State, or local prison, jail, or other penal institution, including a private detention facility pursuant to an agreement with a Federal, State, or local unit of government. ''Incarceration'' does not include house arrest, parole, probation, work release, participation in a community control program, commitment to a halfway house or residential re-entry center, or confinement in a foreign country's prison.

(2) *Felony,* for purposes of §§ 5.811 through 5.817, means any offense punishable by death or incarceration for a term exceeding 1 year, unless specifically categorized as a misdemeanor under the law of the prosecuting jurisdiction.

(b) *Classification of foreign offenses.* A felony includes an offense that is prosecuted by a foreign country if the offense is equivalent to a felony under the laws of the U.S. A misdemeanor includes an offense that is prosecuted by a foreign country if the offense is equivalent to a misdemeanor under the laws of the U.S.

(c) *Length of incarceration.* The 60-day periods of incarceration described in §§ 5.811 through 5.813 begin on the day after the beneficiary is convicted of a felony (or misdemeanor for pension), if the beneficiary is incarcerated as of that date, even if the beneficiary is not sentenced on that date. For beneficiaries who are reincarcerated, such as after conditional release on probation or parole, VA will begin counting a new 60-day period on the first full day of reincarceration.

(d) *Requirement to inform VA.* A claimant or beneficiary must inform VA when he or she becomes incarcerated for:

(1) Conviction of a felony if the person is claiming or receiving compensation, pension, or dependency or indemnity compensation; or

(2) Conviction of a misdemeanor if the person is claiming or receiving pension.

(e) *Notice to the incarcerated beneficiary.* VA will send notice to the incarcerated beneficiary that dependents may be entitled to an apportionment while the beneficiary is incarcerated. The notice will also include information explaining the conditions under which VA may resume payments to the incarcerated beneficiary after the beneficiary is released from incarceration.

(f) *Effective dates.* Payments of disability compensation, dependency and indemnity compensation, or pension will be reduced or discontinued (whichever is appropriate under §§ 5.811 through 5.813) on the 61st day of incarceration after conviction of a felony. Payments of pension will also be reduced on the 61st day of incarceration after conviction of a misdemeanor.

(Authority: 38 U.S.C. 501(a), 1505, 5313)

§ 5.811 Limitation on disability compensation during incarceration.

(a) *General.* VA will limit the amount of disability compensation paid to a veteran who has been incarcerated for more than 60 days after conviction of a felony if:

(1) The veteran committed the felony after October 7, 1980;

(2) The veteran was incarcerated on October 1, 1980, for conviction of the felony and was awarded disability compensation after September 30, 1980 (This paragraph (a)(2) applies only to the payment of disability compensation after September 30, 1980.); or

(3) The veteran was incarcerated on October 7, 1980, for conviction of the felony and remained incarcerated for that felony on December 27, 2001. (This paragraph (a)(3) applies only to the payment of disability compensation after March 31, 2002.)

(b) *Retroactive awards.* Whenever disability compensation is awarded to an incarcerated person, any amounts due for periods prior to the date of reduction under this section will be paid to the incarcerated person.

(c) *Amount payable during incarceration.*—(1) *Veteran rated 20 percent or more disabled.* For an incarcerated veteran who is rated 20 percent or more disabled for service-connected disabilities, VA will limit disability compensation to no more than the rate payable under 38 U.S.C. 1114(a) for a veteran rated 10 percent disabled.

(2) *Veteran rated less than 20 percent disabled.* For an incarcerated veteran who is entitled to compensation and is rated less than 20 percent disabled for service-connected disabilities, VA will limit disability compensation to no more than one-half the rate payable under 38 U.S.C. 1114(a) for a veteran rated 10 percent disabled. This paragraph (c)(2) applies even if such a veteran is entitled to special monthly compensation under 38 U.S.C. 1114(k) or (q).

Cross Reference: For the rule on total-disability ratings based on individual unemployability that would first become effective while a veteran is incarcerated, see § 5.284(b).

(Authority: 38 U.S.C. 501(a), 1114, 5313; Pub. L. 107–103, § 506, 115 Stat. 996–97)

§ 5.812 Limitation on dependency and indemnity compensation during incarceration.

(a) *General.* VA will limit dependency and indemnity compensation (DIC) paid to a beneficiary who has been incarcerated for more than 60 days after conviction of a felony if:

(1) The beneficiary committed the felony after October 7, 1980; or

(2) The beneficiary was incarcerated on October 1, 1980, for conviction of the felony and was awarded DIC after September 30, 1980. (This paragraph (a)(2) applies only to the payment of DIC after September 30, 1980.)

(b) *Amount payable during incarceration.* VA will limit DIC to no more than one-half the rate of disability compensation payable under 38 U.S.C. 1114(a) to a veteran rated 10 percent disabled.

(c) *Parents' DIC—Effect on non-incarcerated parent.* If two parents are both entitled to DIC and were living together before the benefits payable to one were reduced due to incarceration, VA will determine entitlement to DIC for the other parent as if they were not living together.

(d) *Retroactive awards.* Whenever DIC is awarded to an incarcerated person, any amounts due for periods prior to the date of reduction under this section will be paid to the incarcerated person.

(Authority: 38 U.S.C. 501(a), 1114, 5313)

§ 5.813 Discontinuance of pension during incarceration.

(a) *General provision.* VA will discontinue pension payments to or for a person who has been incarcerated for more than 60 days after conviction of a felony or of a misdemeanor. This section applies to any pension that VA administers under a public or private law.

(b) *Veteran entitled to pension and disability compensation.* When an incarcerated veteran is disqualified from receiving pension payments under this section but is also entitled to disability compensation, VA will pay disability compensation in lieu of pension under either of the circumstances described in paragraphs (b)(1) or (2) of this section.

(1) If the veteran does not have a spouse or child, then the award of disability compensation in such cases will be effective on the date pension is discontinued under this section.

(2) If the veteran has a spouse or child but elects to receive disability compensation after VA has notified the veteran of the effect of electing disability compensation on the amount available for apportionment, then the award of disability compensation will be effective on the later of the date VA received the veteran's election or the date of discontinuance of pension under paragraph (a) of this section. (If the veteran does not elect disability compensation, pension will nevertheless be discontinued under paragraph (a) of this section.)

(Authority: 38 U.S.C. 501(a), 1505)

§ 5.814 Apportionment when a primary beneficiary is incarcerated.

(a) *Notice to dependents of incarcerated beneficiary.* (1) When VA limits or discontinues benefits under §§ 5.811 through 5.813, VA will send notice to any dependent of the right to apply for an apportionment if VA is aware of the dependent's existence and can obtain the necessary address.

(2) If an apportionment is awarded, VA will send notice to the apportionee that VA will immediately discontinue the apportionment when the incarcerated beneficiary is released. The notice will also inform the apportionee that if the apportionee and the incarcerated beneficiary do not live together when the incarcerated beneficiary is released, the apportionee may submit a new apportionment claim.

(b) *Apportionment of disability compensation or dependency and indemnity compensation.*—(1) *Eligibility for apportionment.* (i) VA may apportion an incarcerated veteran's unpaid disability compensation to the veteran's spouse, child, or dependent parent.

(ii) VA may apportion an incarcerated surviving spouse's unpaid dependency and indemnity compensation (DIC) to a child.

(iii) VA may apportion an incarcerated child's unpaid DIC to the surviving spouse or to another child.

(2) *Amount of apportionment.* The apportionment amount of a beneficiary's unpaid disability compensation or DIC benefits will be based on individual need. In determining individual need, VA will consider factors such as:

(i) The amount of benefits available to be apportioned;

(ii) The net worth, income, and expenses of the apportionment claimant(s); and

(iii) The special needs of the apportionment claimant(s).

(c) *Apportionment of veteran's pension.*—(1) *Requirements.* VA may apportion an incarcerated veteran's unpaid pension to the veteran's spouse or child if all of the following conditions are met:

(i) The veteran would continue to be entitled to pension if not for the incarceration;

(ii) The annual income of the spouse or child is such that Improved Death Pension would be payable;

(iii) If the veteran was receiving Old-Law Pension, the spouse or child was recognized by VA as the veteran's dependent before July 1, 1960; and

(iv) If the veteran was receiving Section 306 Pension, the spouse or child was recognized by VA as the veteran's dependent before January 1, 1979.

(2) *Amount of apportionment.* VA will apportion an amount of such unpaid pension equal to the lesser of:

(i) The amount of Improved Death Pension that would be payable to the apportionee; or

(ii) The amount of pension that the veteran received for the month before incarceration.

(d) *Allocation of death pension.* The effective date rules in paragraph (e) of this section and in § 5.816(c) apply to the allocation of death pension under this paragraph (d).

(1) If a surviving spouse is disqualified from receiving pension payments under § 5.813, VA may pay a child the rate of Improved Death Pension that would be payable if the incarcerated surviving spouse did not exist.

(2) If a surviving child is disqualified from receiving pension payments under § 5.813, VA may pay a surviving spouse or another child the rate of Improved Death Pension that would be payable if the incarcerated child did not exist.

(e) *Effective date of apportionment because of incarceration.*—(1) *General.* Except as provided in paragraph (e)(2) of this section, the effective date of an apportionment or allocation is the date VA receives an apportionment claim.

(2) *Specific effective dates.*—(i) *Disability compensation, dependency and indemnity compensation, and disability pension.* The effective date of an apportionment of disability compensation, dependency and indemnity compensation (DIC), or disability pension is the date of the reduction or discontinuance of benefits to the incarcerated primary beneficiary (that is, the 61st day of incarceration following conviction) if VA receives an apportionment claim no later than 1 year after the notice required by § 5.810(e) (notifying the incarcerated beneficiary that his or her dependents may be entitled to an apportionment) and if any necessary evidence is received by VA no later than 1 year after the date of VA's request for the evidence.

(ii) *Death pension.* The effective date of an allocation of death pension is the date of the discontinuance of benefits to the incarcerated primary beneficiary (that is, the 61st day of incarceration following conviction) if evidence of income is received by VA no later than 1 year after the date of VA's request for the evidence.

(3) *Retroactive awards.* If VA retroactively grants an apportionment or allocation under this section, VA will:

(i) Not re-pay to the apportionee any benefits previously paid to the primary beneficiary; and

(ii) Consider any amounts that were paid to the primary beneficiary, but were due to the apportionee, as having been paid to the apportionee.

(Authority: 38 U.S.C. 501(a), 1505, 5313)

§ 5.815 Resumption of disability compensation or dependency and indemnity compensation upon a beneficiary's release from incarceration.

(a) *Effective date of benefit resumption.* Except as provided in paragraph (d) of this section, if the beneficiary remains entitled to disability compensation or dependency and indemnity compensation (DIC):

(1) The effective date of resumption of the full benefit rate upon a beneficiary's release from incarceration is the date of release if VA is informed of the release less than 1 year after the release. Payment of the full benefit rate is subject to paragraphs (b) and (c) of this section.

(2) The effective date of resumption of the full benefit rate is the date VA is informed of the release if VA is informed of the release 1 year or more after the release. Payment of the full benefit rate is subject to paragraphs (b) and (c) of this section.

(b) *Benefits were apportioned and all apportionees reunited.* This paragraph (b) applies if VA apportioned benefits under § 5.814(b) and the released beneficiary is reunited with all apportionees. For purposes of paragraphs (b) and (c) of this section, a dependent parent apportionee, receiving an apportionment under § 5.814(b), will be considered as having been reunited with the beneficiary.

(1) *Effective date of apportionment discontinuance.* As soon as VA is informed that the beneficiary has been released, VA will discontinue the apportionment effective the first day of the month after the month for which VA last paid the apportionment.

(2) *Retroactive payments to released beneficiary.* For the period from the effective date of resumption of the full benefit rate to the effective date of the discontinuance of the apportionment, VA will retroactively pay the released beneficiary the full benefit rate minus an amount equal to the sum of:

(i) The apportionment rate paid to the apportionee for that period; and

(ii) The incarcerated rate paid to the beneficiary for that period.

(c) *Released beneficiary not reunited with all apportionees.* This paragraph (c) applies if VA apportioned benefits under § 5.814(b) and the released beneficiary is not reunited with all apportionees. For purposes of paragraphs (b) and (c) of this section, a dependent parent apportionee, receiving an apportionment under § 5.814(b), will be considered as having been reunited with the beneficiary.

(1) *Effective date of apportionment reduction or discontinuance.* As soon as VA is informed that the beneficiary has been released, VA will:

(i) Discontinue the apportionment to an apportionee with whom the beneficiary is reunited effective the first day of the month after the month for which VA last paid the apportionment; and

(ii) Reduce an apportionment to an apportionee with whom the beneficiary is not reunited to the additional amount payable to the beneficiary for the apportionee effective the first day of the month after the month for which VA last paid the apportionment. VA will pay the beneficiary the full benefit rate minus the new apportionment amount effective on date of the apportionment reduction.

(2) *Retroactive payments to released beneficiary.* For the period from the effective date of resumption of the full benefit rate to the effective date of the discontinuance or reduction of the apportionment, VA will retroactively pay the released beneficiary the full benefit rate minus an amount equal to the sum of:

(i) The apportionment rate paid to the apportionee for that period; and

(ii) The incarcerated rate paid to the beneficiary for that period.

(d) *Conviction overturned on appeal.* If a conviction is overturned on appeal and the beneficiary remains entitled to disability compensation or DIC, the effective date of resumption of the full benefit rate is the date of reduction of benefits. Payment of the full benefit rate is subject to paragraphs (b) and (c) of this section.

(Authority: 38 U.S.C. 501(a), 5313)

§ 5.816 Resumption of pension upon a beneficiary's release from incarceration.

(a) *Effective date of benefit resumption.* If the beneficiary remains entitled to pension:

(1) The effective date of resumption of pension upon a beneficiary's release from incarceration is the date of release if VA is informed of the release less than 1 year after the release. Payment of pension is subject to paragraphs (b) and (c) of this section.

(2) The effective date of resumption of pension is the date VA is informed of the release if VA is informed of the release 1 year or more after the release. Payment of pension is subject to paragraphs (b) and (c) of this section.

(b) *Disability pension was apportioned.* This paragraph (b) applies if VA apportioned a veteran's disability

pension under § 5.814(c) or disability compensation under § 5.814(b) because the veteran elected to receive disability compensation in lieu of disability pension under § 5.813(b)(2).

(1) *Effective date of apportionment discontinuance.* As soon as VA is informed that the beneficiary has been released, VA will discontinue the apportionment effective the first day of the month after the month for which VA last paid the apportionment.

(2) *Retroactive payments to released beneficiary.* For the period from the effective date of resumption of pension to the effective date of the discontinuance of the apportionment, VA will retroactively pay the released beneficiary the full benefit rate minus an amount equal to the sum of:

(i) The apportionment rate paid to the apportionee for that period; and

(ii) The incarcerated rate paid to the beneficiary for that period (under § 5.813(b) if the veteran was entitled to disability compensation at the incarcerated rate).

(c) *Death pension was allocated.* This paragraph (c) applies if VA allocated death pension under § 5.814(d).

(1) *Effective date of reduction or discontinuance.* As soon as VA is informed that the beneficiary has been released, VA will reduce or discontinue the rate of Improved Death Pension paid to a surviving spouse or surviving child under § 5.814(d), effective the first day of the month after the month for which VA last allocated Improved Death Pension.

(2) *Retroactive pension payments to released beneficiary.* For the period from the effective date of resumption of pension to the effective date of the reduction or discontinuance of pension to a surviving spouse or surviving child, VA will retroactively pay the released beneficiary the full benefit rate minus an amount equal to the difference between:

(i) The rate paid to the surviving spouse or surviving child under § 5.814(d) for that period; and

(ii) The rate that would have been payable to the surviving spouse or surviving child for that period if the released beneficiary's pension had not been discontinued under § 5.813.

(Authority: 38 U.S.C. 501(a), 1505)

§ 5.817 Fugitive felons.

(a) *General rule.* VA will not pay or apportion disability compensation, dependency and indemnity compensation, or Improved Pension to, for, or on behalf of a person for any period during which that person is a fugitive felon.

(b) *Definitions.*—(1) *Fugitive felon* means a person who is:

(i) Fleeing to avoid prosecution for a felony or for an attempt to commit a felony;

(ii) Fleeing custody or confinement after conviction of a felony or conviction of an attempt to commit a felony; or

(iii) Fleeing to avoid custody or confinement for violating a condition of probation or parole imposed for commission of a felony under Federal or State law.

(2) *Felony.* For purposes of this § 5.817, *felony* refers to an offense that is classified as a felony under the laws of the place from which the person flees; however, it also includes an offense classified as a high misdemeanor that would be a felony offense under Federal law.

(Authority: 38 U.S.C. 5313B)

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
1.9(b)(1)	5.1 definition of ''VA''.
3.1(a)	5.1 definition of ''Armed Forces''.
3.1(b)	5.1 definition of ''Reserve component''.
3.1(c)	5.1 definition of ''Reserve'' or ''reservist''.
3.1(d)	5.1 definition of ''Veteran''.
3.1(e)	5.20.
3.1(f)	5.20.
3.1(g)	5.1 definition of ''Secretary Concerned''.
3.1(h)	5.1 definition of ''Disharged or released from active military service''.
3.1(i)	5.1 definition of ''State''.
3.1(j)	5.191.
3.1(k)	5.1 definition of ''Service-connected'', 5.241(a), 5.241(b).
3.1(l)	5.1 definition of ''Nonservice connected''.
3.1(m) (first sentence)	5.660(b).
3.1(m) (second sentence)	5.660(d).
3.1(m)(1)	5.660(c).
3.1(m)(2)	5.660(c).
3.1(m)(3)	5.660(c).
3.1(n)	5.1 definition of ''Willful misconduct''.
3.1(n) (introduction first sentence)	5.1 definition of ''Willful misconduct''.
3.1(n) (introduction second sentence)	5.661(f).
3.1(n)(1)	5.1 definition of ''Willful misconduct''.
3.1(n)(2)	5.1 definition of ''Willful misconduct''.
3.1(n)(3)	5.661(b)(1).
3.1(o)	5.1 definition of ''Political subdivision of the U.S.''.
3.1(p)	5.1 definition of ''Claim''.
3.1(q)	5.1 definition of ''Notice''.
3.1(r)	5.151.
3.1(s)	No part 5 provision.
3.1(t)	No part 5 provision.
3.1(u)	5.460(a).
3.1(v)	5.460(b).
3.1(w)	5.370(d).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

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Part 3 provision	Part 5 provision
3.1(x)	No part 5 provision.
3.1(y) (introduction)	5.140(b)(1).
3.1(y)(1)	5.140(a).
3.1(y)(2)	5.140(b).
3.1(y)(3)	5.140(a).
3.1(y)(4)	5.140(b).
3.1(y)(5)	5.140(b).
3.1(z)	5.1 definition of ''Nursing home''.
3.1(aa)(1)	5.1 definition of ''Fraud''.
3.1(aa)(2)	5.1 definition of ''Fraud''.
3.2	5.20.
3.3(a)(1)	No part 5 provision.
3.3(a)(2)	No part 5 provision.
3.3(a)(3)	5.371(b), 5.372(a).
3.3(a)(3)(i)	5.372(b).
3.3(a)(3)(ii)	5.372(b).
3.3(a)(3)(iii)	5.372(b).
3.3(a)(3)(iv)	5.372(b).
3.3(a)(3)(v)	5.371(d).
3.3(a)(3)(vi)(A)	5.380.
3.3(a)(3)(vi)(B)(*1*)	5.380.
3.3(a)(3)(vi)(B)(*2*)	5.380.
3.3(a)(3)(vi)(B)(3)	No part 5 provision.
3.3(a)(3)(vi)(B)(4)	No part 5 provision.
3.3(b)(1)	No part 5 provision.
3.3(b)(2)	No part 5 provision.
3.3(b)(3)	No part 5 provision.
3.3(b)(4)	5.371(c).
3.3(b)(4)(i)	5.372(b).
3.3(b)(4)(ii)	5.372(c).
3.3(b)(4)(iii)	5.371(d).
3.4(a)	5.240(a).
3.4(a), 3.4(b)(1)	5.240(a).
3.4(b)(2)	5.240(b).
3.4(c)(1)	5.560(b).
3.4(c)(2)	No part 5 provision.
3.5(a)	5.510(a).
3.5(b)	5.510(b)(1)(ii).
3.5(c)	5.512.
3.5(d)	5.510(c).
3.6(a)	5.21(a).
3.6(b)(1)	5.22(a), 5.23(a)(1), 5.23(b)(1).
3.6(b)(2)	5.25(a)(1).
3.6(b)(3)	5.25(b).
3.6(b)(4)	5.24(a).
3.6(b)(5)	5.24(b)(1).
3.6(b)(6)	5.29(a)(1).
3.6(b)(7)	5.22(b), 5.24(a), 5.29(a)(2).
3.6(c)(1)	5.23(a)(2).
3.6(c)(2)	5.25(a)(2).
3.6(c)(3)	5.23(b)(2).
3.6(c)(4)	5.24(c)(1).
3.6(c)(5)	5.24(b)(2).
3.6(c)(6)	5.25(c).
3.6(d)(1)	5.23(a)(3), 5.25(a)(3).
3.6(d)(2)	5.23(a)(3), 5.25(a)(3).
3.6(d)(3)	5.24(c)(2).
3.6(d)(4)	5.23(b)(3).
3.6(d)(4)(i)	5.23(b)(4).
3.6(d)(4)(ii)	5.23(b)(4).
3.6(d)(4)(iii)	5.25(c).
3.6(e)	5.29(b).
3.7(a)	5.21(a).
3.7(b)	5.31(c).
3.7(c)	5.28.
3.7(d)	5.28.
3.7(e)	5.28.
3.7(f)	5.24(a).
3.7(g)	5.25(b)(1).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

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Part 3 provision	Part 5 provision
3.7(h)	5.28.
3.7(i)	5.28.
3.7(j)	5.28.
3.7(k)	5.28.
3.7(l)	5.28.
3.7(m)	5.23(b), 5.26(a)(3).
3.7(n)	5.28.
3.7(o)	5.26.
3.7(p)	5.28.
3.7(q)	5.25(a).
3.7(r)	5.23(a).
3.7(s)	5.28.
3.7(t)	5.28.
3.7(u)	5.28.
3.7(v)	5.28.
3.7(w)	5.28.
3.7(x)	5.27(a), 5.27(b), 5.27(c).
3.7(y)	5.28.
3.10	5.523.
3.11	5.663.
3.12(a)	5.30(a), 5.30(c), 5.37(a) (first sentence).
3.12(b)	5.30(d), 5.33.
3.12(c)(1)–(5)	5.31(c).
3.12(c)(6)	5.32, 5.33.
3.12(d)	5.30(f).
3.12(e)	5.34(c).
3.12(f)	5.35(b).
3.12(g)	5.35(c), 5.35(d).
3.12(h)	5.36(a).
3.12(i)	5.31(f), 5.36(b), 5.36(c).
3.12(j)	5.31(e).
3.12(k)(1)	5.30(c).
3.12(k)(2)	5.30(e).
3.12(k)(3)	5.30(e).
3.12a(a)(1)	5.39(c)(1).
3.12a(a)(2)	5.39(a), 5.39(d).
3.12a(b)	5.39(a).
3.12a(c)(1)	5.39(b)(1).
3.12a(c)(2)	5.39(b)(2).
3.12a(d)	5.39(d).
3.12a(e)	5.39(f).
3.13(a)	5.37(b).
3.13(b)	5.37(c).
3.13(c)	5.37(d).
3.14(a)	5.38(b).
3.14(b)	5.38(c).
3.14(c)	5.38(b).
3.14(d)	5.30(c).
3.15	5.21(b), 5.39(e).
3.16	No part 5 provision.
3.17	No part 5 provision.
3.20	5.695.
3.21	5.690.
3.22(a), 3.22(b), 3.22(c)	5.521.
3.22(d)	5.520(b).
3.22(e)	5.522(a), 5.522(b).
3.22(f)	5.522(c)(4).
3.22(g)	5.522(c)(2), 5.522(c)(5), 5.522(d).
3.22(h)	No part 5 provision.
3.23(a)	5.370, 5.400, 5.401(b).
3.23(a)(1)	5.400(a).
3.23(a)(2)	5.400(c).
3.23(a)(3)	5.400(b).
3.23(a)(4)	5.400(d).
3.23(a)(5)	5.400(e).
3.23(a)(6)	5.400(g).
3.23(a)(7)	5.400(f).
3.23(b)	5.370, 5.371(d).
3.23(c)	No part 5 provision.

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

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Part 3 provision	Part 5 provision
3.23(d)(1)	5.416(a), 5.416(b).
3.23(d)(2)	5.390.
3.23(d)(3)	5.391.
3.23(d)(4)	5.370, 5.410(b)(1), 5.411(a), 5.411(c), 5.416(b), 5.416(c).
3.23(d)(5)	5.370, 5.410(b)(2), 5.411(a), 5.411(c), 5.416(c).
3.23(d)(6)	5.411(a).
3.23(d)(6) (second sentence)	5.411(b).
3.24(a)	5.370, 5.371(a), 5.371(c), 5.411(c).
3.24(b)	5.400, 5.400(h), 5.401(b), 5.414(c)(3)(i), 5.435(a).
3.24(c)	5.435(b)(1), 5.435(b)(2).
3.25	5.536.
3.26	No part 5 provision.
3.27(a)	5.401(a).
3.27(b)	5.536(b).
3.27(c)	5.589(a), 5.590(a).
3.27(d)	5.580(b)(4).
3.27(e)	5.536(b), 5.401(b).
3.28	5.471.
3.29(a)	5.691(b).
3.29(b)	5.421, 5.691(c).
3.29(c)	5.691(b).
3.30 (introduction)	5.425, 5.537.
3.30 (except (e))	5.425.
3.30(e)	5.537(b).
3.31 (introduction)	5.693(b).
3.31(a)	5.693(a).
3.31(b)	5.693(c), 5.693(c)(1).
3.31(c)	5.693(c).
3.31(c)(1)	5.693(c)(3).
3.31(c)(2)	5.693(c)(8), 5.693(d).
3.31(c)(3)	5.693(c)(4), 5.693(c)(7).
3.31(c)(4)	5.693(c)(5).
3.31(c)(5)	5.693(c)(6).
3.32 (introduction)	5.697(a).
3.32(a)(1)	5.697(a)(1).
3.32(a)(2)	5.697(a)(2).
3.32(b)	5.697(b).
3.40	5.610.
3.41	5.611.
3.42	5.613.
3.43(a)	5.617(a).
3.43(b)	5.617(b).
3.43(c)	5.617(c).
3.50(a)	No part 5 provision.
3.50(b) (except (b)(2))	5.201(a), 5.203(b)(1).
3.50(b)(2)	5.203(a)(2).
3.52 (introduction)	5.200(a).
3.52(a)	5.200(b)(1).
3.52(b)	5.200(b)(2).
3.52(c)	5.200(b)(3).
3.52(d)	5.200(b)(4).
3.53(a) (first sentence)	5.201(b) (introduction), 5.201(b)(2)(i).
3.53(a) (second sentence)	5.201(b)(4).
3.53(b) (first sentence)	5.201(b)(5).
3.53(b) (second sentence)	5.201(b)(3).
3.53(b) (last sentence)	5.201(b)(6).
3.54 (introduction)	5.430 (introduction), 5.520(b)(1)(i).
3.54(a)(1)	5.430(a).
3.54(a)(2)	5.430(c).
3.54(a)(3)	5.430(b).
3.54(b)	5.561(b) and (c), except (c)(1).
3.54(c)(1)	5.520(b)(1)(iv).
3.54(c)(2)	5.520(b)(1)(ii).
3.54(c)(3)	5.520(b)(1)(iii).
3.54(d)	5.1 definition of ''Child born of the marriage and child born before the marriage''.
3.54(e)	5.201(b)(1).
3.55(a)(1)	5.203(c).
3.55(a)(2)	5.203(d)(1)–(3).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

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Part 3 provision	Part 5 provision
3.55(a)(3)	5.203(e)(1) except (e)(1)(iii), 5.203(e)(2).
3.55(a)(4)	No part 5 provision.
3.55(a)(5)	5.203(d)(4).
3.55(a)(6)	5.203(e)(1)(iii).
3.55(a)(7)	No part 5 provision.
3.55(a)(8)	5.203(d)(4).
3.55(a)(9)	No part 5 provision.
3.55(a)(10)(i)	5.203(f).
3.55(a)(10)(ii)	No part 5 provision.
3.55(b)	5.228(b).
3.57(a)	5.220 (except 5.220(b)(1)).
3.57(a)(1)(ii)	5.220(b)(1).
3.57(a)(1)(iii)	5.220(b)(2), 5.696(a).
3.57(b)	5.226(a), 5.226(b).
3.57(c) (introduction)	5.222(a), 5.222(c), 5.222(d).
3.57(c)(1)	No part 5 provision.
3.57(c)(2)	5.223(b).
3.57(c)(3)	No part 5 provision.
3.57(d)	5.1 definition of ''Custody of a child''.
3.57(d)(1)	5.417(a).
3.57(d)(2)	5.417(b), 5.435.
3.57(d)(3)	5.417(c), 5.417(d).
3.57(e)(1)	5.225(a).
3.57(e)(2)	5.225(b)(1).
3.57(e)(3)	5.225(d).
3.57(e)(4)	5.225(b)(2).
3.58	5.224(a).
3.59(a)	5.238(a).
3.59(b) (first sentence)	5.238(a).
3.59(b) (second and third sentences)	5.238(d)(1), 5.238(d)(2)(i).
3.60	5.416(a).
3.100	5.5.
3.102 (first sentence)	5.4(b).
3.102 (third sentence)	5.3(b)(2).
3.102 (second and seventh sentences)	5.3(b)(3).
3.102 (fourth sentence)	No part 5 provision.
3.102 (fifth sentence)	No part 5 provision.
3.102 (six sentence)	5.3(b)(5).
3.103(a) (first sentence)	5.83(b).
3.103(a) (second sentence)	5.4(a), 5.4(b).
3.103(a) (last sentence)	No part 5 provision.
3.103(b)(1)	5.83(a), 5.83(b).
3.103(b)(2)	5.83(a).
3.103(b)(3)	5.83(c).
3.103(b)(4)	5.84.
3.103(c)(1)	5.82(a) (introduction), 5.82(a)(1), 5.82(c), 5.82(d)(1), 5.82(e)(2).
3.103(c)(2)	5.82(b), 5.82(d)(2), 5.82(e)(1).
3.103(d)	5.81.
3.103(e)	5.80.
3.103(f)	5.83(b).
3.104(a)	5.160(a).
3.104(b)	5.160(b).
3.105 (introduction first sentence)	5.162(a), 5.164, 5.177(c), 5.177(i).
3.105 (introduction second sentence)	5.177(b).
3.105 (introduction last sentence)	5.177(a).
3.105(a) (first and second sentences)	5.162(c).
3.105(a) (third and last sentences)	5.162(f).
3.105(b)	5.163.
3.105(c)	5.177(d).
3.105(d) (first and second sentences)	5.175(b)(1).
3.105(d) (third and fourth sentences)	5.175(b)(2).
3.105(d) (fifth through last sentences)	5.83(a), 5.177(c).
3.105(e) (first sentence)	5.313(b) (first sentence).
3.105(e) (second and last sentences)	5.83(a), 5.177(e).
3.105(f) (first sentence)	No part 5 provision.
3.105(f) (second and last sentences)	5.83(a), 5.177(f).
3.105(g)	5.83(a), 5.591(b)(5).
3.105(h) (first sentence)	No part 5 provision.
3.105(h) (second sentence)	5.83(a).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.105(h) (last sentence)	5.177(h), 5.705.
3.105(i)(1)	5.82(f) (introduction), 5.82(f)(2), 5.82(f)(3), 5.82(f)(4), 5.83(i)(1)(ii).
3.105(i)(2)	5.82(e)(4), 5.82(f)(1), 5.82(f)(5).
3.106(a)	5.683(a), 5.683(b), 5.683(c).
3.106(b)	5.683(e)(1).
3.106(c)	5.683(e)(2).
3.106(d)	5.683(d)(1).
3.106(e)	5.683(d)(2).
3.107	5.525.
3.108	5.132(a).
3.109(a)(1) (first sentence)	No part 5 provision.
3.109(a) (except (a)(1) first sentence)	5.90(b) (except (b)(2)).
3.109(b)	5.99.
3.110	5.100.
3.112	5.692.
3.114	5.152.
3.115(a)	5.133(a).
3.115(b)	5.133(c).
3.150	5.50.
3.151(a)	5.51.
3.151(b)	5.383(c).
3.152	5.52.
3.153	5.131(a).
3.154	5.53.
3.155	5.54.
3.156(a)	5.55.
3.156(b)	5.153.
3.156(c)	5.165.
3.157	5.56.
3.158(a)	5.136.
3.158(b)	No part 5 provision.
3.158(c)	5.712.
3.159 (except (a)(1) and (2))	5.90.
3.159(a)(1) and (2)	5.1 definition of ''Competent evidence''.
3.160	5.57.
3.161	No part 5 provision.
3.200	5.135.
3.201(a)	5.131(b).
3.201(b)	5.131(c).
3.202(a)	5.132(b), 5.132(d).
3.202(b)	5.132(c).
3.202(b)(5)	No part 5 provision.
3.202(c)	5.132(e).
3.203(a)	5.40(a).
3.203(a)(1)	5.40(c).
3.203(a)(2)	5.40(b).
3.203(a)(3)	5.40(c).
3.203(b)	No part 5 provision.
3.203(c)	5.40(d), 5.633(b)(2), 5.643.
3.203(c) (last sentence)	5.39(c)(2).
3.204(a)(1)	5.181(b).
3.204(a)(2)	5.181(c).
3.204(b)	5.181(c), 5.229 (introduction).
3.204(c)	5.181(d).
3.205(a)	5.192(c), except (c)(6)(i).
3.205(b) (except last sentence)	5.192(b).
3.205(b) (last sentence)	5.193.
3.205(c)	5.200(b)(2).
3.206 (introduction)	5.194(a).
3.206(a)	5.194(b)(1), 5.194(b)(2).
3.206(b)	5.194(c)(1).
3.206(c)	5.194(c)(2).
3.207(a)	5.196(a)(2).
3.207(b)	5.196(b).
3.208	5.373.
3.209(a)	5.229(a).
3.209(b)	5.229(b).
3.209(c)	5.229(c).
3.209(d)	5.229(d).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.209(e)	5.229(e).
3.209(f)	5.229(f).
3.209(g)	5.229(b), 5.229(g).
3.210(a)	5.221.
3.210(b)	5.221.
3.210(c) (introduction)	5.222(a), 5.222(c), 5.222(d).
3.210(c)(1) (introduction)	5.222(b), 5.224(b).
3.210(c)(1)(i)	5.222(b).
3.210(c)(1)(ii)	5.224(b).
3.210(c)(2)	5.223(a), 5.223(b)(2), 5.223(b)(3).
3.210(d)	5.226(a), 5.226(b).
3.211(a)	5.500(b).
3.211(b)	5.500(d).
3.211(c)	5.500(e).
3.211(d)	5.500(c).
3.211(e) (first sentence)	5.501(b).
3.211(e) (second sentence)	5.501(c).
3.211(f)	5.501(d).
3.211(g)	5.501(d).
3.212(a)	5.502(a), 5.503(b).
3.212(b)	5.502(b), 5.502(c).
3.212(c)	5.502(c).
3.213(a) (first sentence)	5.181(a).
3.213(a)	5.181(b), 5.182(a).
3.213(b) (first sentence)	5.184(d).
3.213(b) (except first sentence)	No part 5 provision.
3.213(c)	5.181(c), 5.182(b).
3.214	5.203(a)(1).
3.215	5.203(d)(4).
3.216	5.101(a), 5.101(b)(1), 5.101(b)(2), 5.101(e), 5.101(f).
3.217(a)	5.130(a) (except (a)(3)).
3.217(a) (note)	5.130(a).
3.217(b)	5.130(b).
3.250(a)(1)	5.300(a)(1).
3.250(a)(2) (first sentence)	5.300(b) (introduction).
3.250(a)(2) (last sentence)	5.300(b)(2)(i).
3.250(a)(3)	5.300(b).
3.250(b)	5.300(b)(1), 5.300(c).
3.250(b)(1)	5.300(b)(1)(i).
3.250(b)(2)	5.300(b)(2)(ii), 5.302(c).
3.250(c)	5.300(b)(1)(ii).
3.250(d)	5.300(e).
3.251(a)(1)	5.510(d), 5.615(b).
3.251(a)(2)	5.536(c).
3.251(a)(3)	5.615(a), 5.615(b).
3.251(a)(4)	5.536(d).
3.251(a)(5)	5.536(e).
3.251(b)	5.531(a), 5.534(a).
3.252(a)	5.470(a)(4).
3.252(b)	5.470(a)(5).
3.252(c)	5.472(b)(1), 5.472(b)(4).
3.252(d)	5.475(c).
3.252(e)(1)	No part 5 provision.
3.252(e)(2)	5.473(c)(1).
3.252(e)(3)	5.473(c)(2).
3.252(e)(4)	5.475(b)(2)(ii).
3.252(f)	No part 5 provision.
3.256(a)	5.709(a), 5.709(b).
3.256(b)(1)	5.708(a)(1).
3.256(b)(2)	No part 5 provision.
3.256(b)(3)	5.708(b).
3.256(b)(4)	5.708(b).
3.256(c)	5.708(e)(1).
3.257	No part 5 provision.
3.260 (introduction)	5.472(b)(4), 5.534(a).
3.260(a)	No part 5 provision.
3.260(b)	5.478(a), 5.531(e).
3.260(c)	5.534(b).
3.260(d)	5.534(b).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.260(e)	No part 5 provision.
3.260(f)	5.475(a), 5.475(b), 5.534(b), 5.534(c), 5.536(g).
3.260(g)	5.472(b)(3), 5.691(a).
3.261 (introduction)	(introduction), 5.472(a), 5.706(a).
3.261(a)(1)	No part 5 provision.
3.261(a)(2)	No part 5 provision.
3.261(a)(3)	5.302(c).
3.261(a)(4)	5.473(d).
3.261(a)(5)	No part 5 provision.
3.261(a)(6)	4.472(f)(1), 5.533(b).
3.261(a)(7)	5.304(a), 5.472(f)(8), 5.531(b)(2)(i).
3.261(a)(8)	No part 5 provision.
3.261(a)(9)	No part 5 provision.
3.261(a)(10)	No part 5 provision.
3.261(a)(11)	No part 5 provision.
3.261(a)(12)	5.304(c), 5.472(f)(3), 5.533(a).
3.261(a)(13)	5.304(f), 5.472(f)(4), 5.533(f).
3.261(a)(14)	5.706(b)(23).
3.261(a)(15)	5.745(b)(4).
3.261(a)(16)	No part 5 provision.
3.261(a)(17)	No part 5 provision.
3.261(a)(18)	No part 5 provision.
3.261(a)(19)	No part 5 provision.
3.261(a)(20)	5.304(d), except (d)(6), 5.304(e), 5.533(c), 5.533(d), 5.472(e), 5.472(f)(7).
3.261(a)(21)	No part 5 provision.
3.261(a)(22)	5.304(k), 5.472(c)(3), 5.472(f)(11), 5.532(e), 5.533(p).
3.261(a)(23)	No part 5 provision.
3.261(a)(24)	5.303(b)(1).
3.261(a)(25)	No part 5 provision.
3.261(a)(26)	5.472(f)(10), 5.531(b)(2)(ii).
3.261(a)(27)	No part 5 provision.
3.261(a)(28)	5.304(g).
3.261(a)(29)	No part 5 provision.
3.261(a)(30)	No part 5 provision.
3.261(a)(31)	5.304(i), 5.472(f)(5), 5.533(j).
3.261(a)(32)	5.706(b)(1).
3.261(a)(33)	5.706(b)(15), 5.706(21).
3.261(a)(34)	5.706(b)(15), 5.706(21).
3.261(a)(35)	5.706(b)(5).
3.261(a)(36)	5.706(b)(3).
3.261(a)(37)	5.706(b)(8) 5.706(b)(9).
3.261(a)(38)	5.412(h), 5.533(k).
3.261(a)(39)	5.706(b)(11)–(13).
3.261(a)(40)	5.706(b)(6).
3.261(a)(41)	5.706(b)(2).
3.261(a)(42)	5.706(b)(24).
3.261(b)(1)	5.474(b), 5.532(d), 5.707(c).
3.261(b)(2)	5.532(c).
3.261(b)(3)	5.474(c).
3.261(b)(4)	5.532(c).
3.261(b)(5)	5.474(d).
3.261(c)	5.706.
3.262(a) (introduction)	5.302(a), 5.472(b)(1), 5.531(a).
3.262(a)(1)	5.303(c), 5.472(c)(3), 5.532(e).
3.262(a)(2) (except last sentence)	5.303(a), 5.472(c)(1), 5.532(a).
3.262(a)(2) (last sentence)	5.304(j), 5.472(f)(9), 5.533(o).
3.262(a)(3)	5.472(c)(1), 5.532(a).
3.262(b) (introduction)	5.531(c).
3.262(b)(1)	5.531(c).
3.262(b)(2)	5.473(a), 5.473(b)(2).
3.262(c)	5.472(f)(1), 5.533(b)(1).
3.262(d)	5.472(g)(1), 5.472(h), 5.533(b)(2).
3.262(e) (introduction)	5.472(f)(12) (introduction), 5.533(g) (introduction), 5.533(g)(1), 5.706(b)(23).
3.262(e)(1)	5.472(f)(12).
3.262(e)(2)	5.472(f)(12).
3.262(e)(3)	5.302(a).
3.262(e)(4) (first sentence)	5.533(g) (introduction).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

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Part 3 provision	Part 5 provision
3.262(e)(4) (sentences two through four)	No part 5 provision.
3.262(f)	5.472(f)(12)(ii), 5.472(g)(1), 5.472(g)(2), 5.533(b)(2), 5.533(e), 5.533(g)(5).
3.262(g)(1)	5.533(g).
3.262(g)(2)	5.472(f)(12)(iii).
3.262(h) (first sentence)	5.472(b)(2)(i).
3.262(h) (except first sentence)	5.304(b), 5.472(b)(2)(ii), 5.531(b)(2)(iii).
3.262(i)(1)	5.303(b).
3.262(i)(2)	5.472(f)(12) (introduction), 5.472(f)(12)(iv), 5.533(g) (introduction), 5.533(g)(4).
3.262(j)(1)	5.472(f)(12) (introduction) 5.742(f)(12)(v), 5.533(g) (introduction), 5.533(g)(5).
3.262(j)(2)	5.472(f)(12) (introduction) 5.742(f)(12)(v), 5.533(g) (introduction), 5.533(g)(5).
3.262(j)(3)	5.472(f)(12)(v).
3.262(j)(4)	5.303(b) (introduction), 5.303(b)(1), 5.472(c)(2), 5.532(b), 5.533(g) (introduction), 5.533(g)(6).
3.262(k)(1)	5.302(d), 5.472(d)(1), 5.472(d)(2), 5.472(d)(4), 5.472(g)(3), 5.531(d)(1), 5.531(d)(2), 5.531(d)(4).
3.262(k)(2)	5.302(d), 5.302(e), 5.531(d)(1), 5.531(d)(2), 5.472(d)(1), 5.472(d)(2).
3.262(k)(3)	5.302(e), 5.472(d)(5).
3.262(k)(4)	5.304(h), 5.472(d)(6).
3.262(k)(5)	5.472(d)(7), 5.533(i).
3.262(k)(6)	5.474(d).
3.262(l) (introduction first sentence)	5.474(b)(4), 5.532(d)(4).
3.262(l) (introduction second and third sentences)	No part 5 provision.
3.262(l) (introduction fourth sentence)	5.474(b)(1)(ii) (first sentence), 5.532(d)(1)(iii) (first sentence).
3.262(l) (introduction fifth sentence)	5.707(c)(5).
3.262(l) (introduction sixth sentence)	4.474(b)(5), 5.532(d)(5).
3.262(l) (introduction) last sentence	5.474(b)(6), 5.532(d)(6).
3.262(l)(1)	5.474(b)(1)(i).
3.262(l)(2)	5.474(b)(2).
3.262(l)(3)	5.474(b)(3).
3.262(l)(4)	5.532(d)(1)(i).
3.262(m)	No part 5 provision.
3.262(n)	5.474(c).
3.262(o)	5.532(c).
3.262(p)	5.474(c)(5), 5.532(c)(3).
3.262(q)	5.706(b)(15), 5.706(21).
3.262(r)	5.472(f)(2).
3.262(s)	5.706(b)(5).
3.262(t) (introduction first sentence)	5.304 (introduction), 5.472 (introduction), 5.533 (introduction).
3.262(t) (introduction second sentence)	5.533(h).
3.262(t)(1)	5.533(h).
3.262(t)(2)	5.304(g), 5.472(f)(6).
3.262(u)	5.706(b)(3).
3.262(v)	5.706(b)(8).
3.262(w)	5.533(k).
3.262(x)	5.706(b)(11).
3.262(y)	5.706(b)(6).
3.262(z)	5.706(b)(2).
3.262(aa)	5.706(b)(24).
3.263(a)	5.476(b).
3.263(b)	5.476(a).
3.263(c)	No part 5 provision.
3.263(d)	5.476(c).
3.263(e)	5.706(b)(5).
3.263(f)	5.706(b)(3).
3.263(g)	5.706(b)(6).
3.263(h)	5.706(b)(2).
3.263(i)	5.706(b)(24).
3.270	No part 5 provision.
3.271(a) (introduction)	5.370(c), 5.410, 5.410(c) (introduction).
3.271(a)(1)	5.410(c)(1).
3.271(a)(2)	5.410(c)(3).
3.271(a)(3)	5.410(c)(2).
3.271(b)	5.410(e).
3.271(c)	5.413(f).
3.271(d)	5.410(f) (except (f)(3)).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

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Part 3 provision	Part 5 provision
3.271(e)	No part 5 provision.
3.271(f)(1)	5.423(a).
3.271(f)(2)	5.423(b).
3.271(g)	5.413(e).
3.271(h)	5.370(a).
3.272 (introduction first sentence)	5.412 (introduction).
3.272 (introduction last sentence)	5.413(a).
3.272(a)	5.412(b) (introduction), 5.706(b)(18)–(22).
3.272(b)	5.412(b)(1), 5.706(b)(18)–(22).
3.272(c)	5.412(c)(1).
3.272(d)	5.412(d).
3.272(e)	5.412(e).
3.272(f)	5.412(f).
3.272(g) (introduction)	5.413(b) (introduction).
3.272(g)(1) (introduction)	5.413(b) (introduction).
3.272(g)(1)(i)	5.413(b)(2)(i).
3.272(g)(1)(ii)	5.413(b)(2)(i).
3.272(g)(1)(iii)	5.413(b)(1).
3.272(g)(2) (introduction)	5.413(b) (introduction).
3.272(g)(2)(i)	5.413(b)(2)(ii).
3.272(g)(2)(ii)	5.413(b)(2)(ii).
3.272(g)(2)(iii)	5.413(b)(1).
3.272(g)(3)	5.413(b)(1), 5.413(b)(2)(iii).
3.272(h) (introduction)	5.413(c)(1)(i).
3.272(h)(1)(i)	5.413(c)(2)(iv).
3.272(h)(1)(ii)	5.413(c)(1)(i), 5.413(c)(1)(iii), 5.413(c)(2)(ii), 5.413(c)(2)(iii), 5.413(c)(3).
3.272(h)(2)	5.413(c)(2)(i), 5.413(c)(2)(iii).
3.272(i)	5.413(d).
3.272(j)	5.412(a).
3.272(k)(2)	5.706(b), 5.706(b).
3.272(l)	5.412(b), 5.412(b)(3).
3.272(m)	5.411(c).
3.272(n)	5.412(g).
3.272(o)	5.706(b)(5).
3.272(p)	5.706(b)(3).
3.272(q)	5.412(l)(1).
3.272(r)	5.706(b)(8).
3.272(s)	5.412(h).
3.272(t)	5.706(b)(11).
3.272(u)	5.706(b)(6).
3.272(v)	5.706(b)(2).
3.272(w)	5.706(b)(24).
3.272(x)	5.412(l)(8).
3.273 (introduction)	5.421.
3.273(a)	5.421.
3.273(b)	5.421.
3.273(c)	5.410(c)(2).
3.273(d)	5.410(c)(1), 5.410(c)(3).
3.274(a)	5.414(c)(1), 5.414(d)(1) (first sentence).
3.274(b)	5.414(e).
3.274(c)	5.414(c)(2), 5.414(d)(1) (first sentence).
3.274(d)	5.414(d)(1) (first sentence), 5.414(e).
3.274(e)	5.414(c)(3)(ii).
3.275(a)	No part 5 provision.
3.275(b)	5.414(a)(1), 5.414(b)(1), 5.414(b)(2).
3.275(c)	5.414(a)(2).
3.275(d)	5.414(d) (except (d)(1) (first sentence).
3.275(e)	5.414(b)(3).
3.275(f)	5.706(b)(5).
3.275(g)	5.706(b)(3).
3.275(h)	5.414(b)(4), 5.706(b)(7).
3.275(i)	5.706(b)(6).
3.275(j)	5.706(b)(2).
3.275(k)	5.706(b)(24).
3.276(a)	5.410(d).
3.276(b) (first and second sentences)	5.414(a)(2)(i).
3.276(b) (last sentence)	5.414(a)(2)(ii).
3.277(a)	5.709(a).
3.277(b)	5.182(a), 5.709(a), 5.709(b).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.277(c)(1)	5.708(a)(1).
3.277(c)(2)	5.708(b)(2)(ii).
3.277(c)(3)	5.708(b) (introduction), 5.708(b)(1), 5.208(b)(2)(i).
3.277(d)	5.708(e)(1).
3.300	5.365.
3.301(a)	5.660(a), 5.661(b)(1).
3.301(b)	5.661(b)(2).
3.301(c) (introduction)	No part 5 provision.
3.301(c)(1)	5.661(e).
3.301(c)(2)	5.661(c)(1).
3.301(c)(3)	5.661(c)(2).
3.301(d)	5.661(c)(1), 5.661(c)(2), 5.662(a).
3.302	5.661(d).
3.303(a) (first and second sentences)	5.241(a), 5.241(b).
3.303(a) (third sentence)	5.242(a).
3.303(b) (first through third sentences)	5.243(c).
3.303(b) (fifth sentence)	5.243(d).
3.303(c) (first through fifth sentences)	5.244(d).
3.303(c) (last sentence)	5.251(a).
3.303(d)	5.243(b).
3.304(a)	No part 5 provision.
3.304(b) (introduction first sentence)	5.244(a).
3.304(b)(1) (first sentence)	5.244(b)(1).
3.304(b)(2)	No part 5 provision.
3.304(b)(3)	5.242(b).
3.304(c) (last sentence)	5.91(b), 5.141(a).
3.304(d)	5.249(a)(1).
3.304(e) (first sentence)	5.141(c), 5.141(d).
3.304(e) (last two sentences)	5.141(e).
3.304(f) (introduction)	5.250(a).
3.304(f)(1)	5.250(c).
3.304(f)(2)	5.250(d).
3.304(f)(3)	5.250(e).
3.304(f)(4)	5.250(d).
3.304(f)(5)	5.250(f).
3.305	No part 5 provision.
3.306(a)	5.245(a).
3.306(b)	5.245(c).
3.306(b)(1)	5.245(b)(3).
3.306(b)(2)	5.245(b)(4).
3.306(c)	No part 5 provision.
3.307(a) (introduction)	5.261(a) (introduction).
3.307(a)(1) (first and second sentences)	5.261(b), 5.265(b).
3.307(a)(1) (last sentence)	5.262(c), 5.264(a) (introduction).
3.307(a)(2)	5.265(c).
3.307(a)(3)	5.261(a) (introduction), 5.261(a)(1), 5.261(c) (introduction).
3.307(a)(4)	5.265(a).
3.307(a)(5)	5.264(a) (introduction), 5.264(a)(2).
3.307(a)(6)(i)	5.262(b).
3.307(a)(6)(ii)	5.262(a)(2).
3.307(a)(6)(iii)	5.262(a)(1), 5.262(d).
3.307(a)(6)(iv)	5.262(a)(1), 5.262(d).
3.307(b)	5.260(b), 5.261(c).
3.307(c)	5.260(b).
3.307(d)(1) (first and second sentences)	5.260(c)(1).
3.307(d)(1) (third and last sentences)	5.265(e).
3.307(d)(2)	No part 5 provision.
3.308(a)	No part 5 provision.
3.308(b)	5.265(f).
3.309(a)	5.261(c) (table).
3.309(b)	5.265(a), 5.265(d).
3.309(c)(1)	5.264(a) (introduction), 5.264(b).
3.309(c)(2)	5.264(c).
3.309(d)(1)	5.268(b).
3.309(d)(2)	5.268(b).
3.309(d)(3)(i)	5.268(a).
3.309(d)(3)(ii)	5.268(c) (introduction).
3.309(d)(3)(ii)(A)	5.268(c)(1) (introduction).
3.309(d)(3)(ii)(B)	5.268(c)(2).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.309(d)(3)(ii)(C)	5.268(c)(3).
3.309(d)(3)(ii)(D)(*1*)	5.268(c)(4) (introduction).
3.309(d)(3)(ii)(D)(*1*)(*i*)	5.268(c)(4)(i).
3.309(d)(3)(ii)(D)(*1*)(*ii*)	5.268(c)(4)(ii).
3.309(d)(3)(ii)(D)(*2*)	5.268(c)(5).
3.309(d)(3)(ii)(D)(*3*)	5.268(c)(4) (Note).
3.309(d)(3)(ii)(E)	5.268(c)(6).
3.309(d)(3)(iii)	5.268(d).
3.309(d)(3)(iv) (introduction)	5.268(c)(1) (introduction).
3.309(d)(3)(iv)(A)–(D)	5.268(c)(1)(i)–(iv).
3.309(d)(3)(v)	5.268(e).
3.309(d)(3)(vi)	5.268(c)(2).
3.309(d)(3)(vii) (introduction)	5.268(c)(3) (introduction).
3.309(d)(3)(vii)(A)–(D)	5.268(c)(3)(i)–(iv).
3.309(e)	5.262(e).
3.309(e) (Note 2)	5.262(e) (Note 1).
3.309(e) (Note 1)	5.262(e) (Note 2).
3.310(a)	5.246.
3.310(b)	5.247.
3.310(c)	5.248.
3.311(a)(1) (except last sentence)	5.269(c)(1) (introduction first sentence) or NO PART 5.
3.311(a)(1) (last sentence)	5.269(c)(2).
3.311(a)(2) (introduction)	5.269(c)(1) (introduction last sentence) 5.269(d)(1).
3.311(a)(2)(i)	5.269(c)(1)(i).
3.311(a)(2)(ii)	5.269(c)(1)(ii).
3.311(a)(2)(iii)	5.269(c)(1)(iii), 5.269(e)(1).
3.311(a)(3)	5.269(e)(2)(ii).
3.311(a)(4)(i)	5.269(c)(4).
3.311(a)(4)(ii)	5.269(c)(3).
3.311(b)(1)	5.269(a) (except first sentence).
3.311(b)(2) (introduction)	5.269(b) (introduction).
3.311(b)(2)(i)–(xxiv)	5.269(b)(1).
3.311(b)(3)	5.269(b)(2).
3.311(b)(4)	5.269(b)(3).
3.311(b)(5)	5.269(b)(1).
3.311(c)(1) (introduction)	5.269(e)(1) (introduction first sentence), 5.269(f)(1).
3.311(c)(1)(i)	5.269(f)(1) (introduction second and last sentence).
3.311(c)(1)(ii)	5.269(f)(3).
3.311(c)(2)	5.269(f)(4) (introduction first sentence).
3.311(c)(3)	5.269(f)(2).
3.311(d)(1)	5.269(f)(4) (introduction second and third sentences).
3.311(d)(2)	5.269(f)(4)(i)–(vi).
3.311(d)(3)	5.269(f)(5), 5.269(f)(6).
3.311(e)	5.269(f)(1)(i)–(vi).
3.311(f)	5.269(g).
3.311(g)	5.269(h).
3.312	5.504.
3.313	5.263.
3.314	No part 5 provision.
3.315(a)	5.220(b)(1).
3.315(b)	5.368.
3.315(c)	5.368.
3.316(a)	5.267.
3.316(b)	5.260(c).
3.317(a)	5.266(a)–(c) (except (c)(3)).
3.317(b)	5.266(c)(3).
3.317(c)	5.271(a)–(c).
3.317(d)	5.271(d).
3.317 Table	5.271 Table.
3.317(e)(1)	5.266(d)(1).
3.317(e)(2)	5.266(d)(2); 5.271(c)(2)(ii).
3.318	5.270.
3.321(a)	5.280(a).
3.321(b)(1)	5.280(b)(1).
3.321(b)(2)	5.380(c)(5).
3.321(b)(3)	5.280(b)(3).
3.321(c)	5.280(c).
3.322	No part 5 provision.
3.323(a)	No part 5 provision.

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.323(a)(2)	No part 5 provision.
3.323(b)	5.380(a).
3.324	5.281.
3.326 (introduction)	5.91(a).
3.326(a) (first and second sentences)	5.103(a) (first sentence).
3.326(b)	5.91(a), 5.141(f).
3.326(c)	5.91(a).
3.327(a)	5.102(a), 5.102(b), 5.103(a) (second sentence).
3.327(b)(1) (first sentence)	5.102(c)(3).
3.327(b)(1) (second sentence)	5.102(c)(1).
3.327(b)(2)	5.102(c)(2).
3.327(c)	5.102(d).
3.328	5.92.
3.329	Reserved.
3.330	5.103(e).
3.331–3.339	Reserved.
3.340	5.283.
3.341	5.284.
3.342(a)	5.380(a).
3.342(b), except (b)(5)	5.380(c).
3.342(b)(5)	No part 5 provision.
3.342(c)	No part 5 provision.
3.343(a)	5.285(a).
3.343(b)	5.347.
3.343(c)	5.285(b).
3.344(a) (first sentence)	5.171(a).
3.344(a) (second sentence)	5.171(d)(5)(i), 5.171(d)(5)(ii).
3.344(a) (third sentence)	5.171(d)(5)(iii).
3.344(a) (fourth sentence)	5.171(d)(1).
3.344(a) (fifth sentence)	5.171(d)(2) (first sentence).
3.344(a) (sixth sentence)	5.171(d)(2) (second sentence).
3.344(a) (seventh sentence)	5.171(c)(2).
3.344(a) (eighth sentence)	No part 5 provision.
3.344(a) (ninth sentence)	5.171(d)(6) (first and second sentences).
3.344(a) (last sentence)	5.171(d)(6) (last sentence).
3.344(b)	5.171(e).
3.344(c) (first sentence)	5.171(b).
3.344(c) (second sentence)	No part 5 provision.
3.344(c) (last sentence)	5.171(c)(1).
3.350 (introduction)	5.322(a)(1) (introduction).
3.350(a) (introduction first sentence)	5.323(a).
3.350(a) (introduction second sentence)	5.323(b)(1).
3.350(a) (introduction third sentence)	5.323(b)(2)(i).
3.350(a) (introduction last sentence)	5.240(b) (second sentence), 5.323(b)(3).
3.350(a)(1)(i)	5.323(c)(2), 5.232(c)(3).
3.350(a)(1)(ii)	No part 5 provision.
3.350(a)(1)(iii)	5.323(c)(6).
3.350(a)(1)(iv)	5.323(c)(7).
3.350(a)(2)(i)	5.322(b), 5.322(c) (introduction).
3.350(a)(2)(i)(*a*)	5.322(c)(1)–(3).
3.350(a)(2)(i)(*b*)	5.322(c)(4).
3.350(a)(3)(i)	5.323(d)(1).
3.350(a)(3)(ii)	5.323(d)(2).
3.350(a)(4)	5.322(g).
3.350(a)(5)	5.323(e).
3.350(a)(6)	5.323(f).
3.350(b) (introduction)	5.324 (introduction), 5.324(a)–(e).
3.350(b)(1)	No part 5 provision.
3.350(b)(2) (except second sentence)	5.324(c).
3.350(b)(2) (second sentence)	5.322(f).
3.350(b)(3)	5.324(e).
3.350(b)(4) (first sentence)	5.324(d).
3.350(c)(1) (introduction)	5.326 (introduction).
3.350(c)(1)(i)	5.326(a).
3.350(c)(1)(ii)	5.326(b).
3.350(c)(1)(iii)	5.326(e).
3.350(c)(1)(iv)	5.326(g).
3.350(c)(1)(v)	5.326(i).
3.350(c)(2)	5.322(d).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.350(c)(3)	5.326(i).
3.350(d) (introduction) (first sentence)	5.328 (introduction).
3.350(d) (introduction) (except first sentence)	5.322(e)(1), 5.322(e)(2).
3.350(d)(1)	5.328(a).
3.350(d)(2)	5.328(c).
3.350(d)(3)	5.328(d).
3.350(d)(4)	5.328(e).
3.350(e)(1)	5.330 (introduction).
3.350(e)(1)(i)	5.330(a).
3.350(e)(1)(ii)	5.330(e) (introduction).
3.350(e)(1)(iii)	5.330(b).
3.350(e)(1)(iv)	5.330(c).
3.350(e)(2)	5.330(d).
3.350(e)(3) (first sentence)	5.330(e)(1).
3.350(e)(3) (last sentence)	5.330(e)(2).
3.350(e)(3) (second through fourth sentences)	No part 5 provision.
3.350(e)(4)	No part 5 provision.
3.350(f)	5.325 (introduction), 5.327 (introduction), 5.329, 5.331(a).
3.350(f)(1)(i)	5.325(a).
3.350(f)(1)(ii)	5.326(c).
3.350(f)(1)(iii)	5.325(b).
3.350(f)(1)(iv)	5.326(d).
3.350(f)(1)(v)	5.327(b).
3.350(f)(1)(vi)	5.325(c).
3.350(f)(1)(vii)	5.327(c).
3.350(f)(1)(viii)	5.326(f).
3.350(f)(1)(ix)	5.327(d).
3.350(f)(1)(x)	5.327(a).
3.350(f)(1)(xi)	5.328(b).
3.350(f)(1)(xii)	5.329.
3.350(f)(2) (introduction)	No part 5 provision.
3.350(f)(2)(i)	5.325(d).
3.350(f)(2)(ii)	5.326(h).
3.350(f)(2)(iii)	5.327(e).
3.350(f)(2)(iv)	5.331(b)(1).
3.350(f)(2)(v)	5.331(b)(2).
3.350(f)(2)(vi)	5.331(b)(3).
3.350(f)(2)(vii)	5.331(c).
3.350(f)(3)	5.331(d).
3.350(f)(4) (introduction)	5.331(e)(1).
3.350(f)(4)(i)	5.331(d)(2), 5.331(e)(2).
3.350(f)(4)(ii)	5.331(e)(3).
3.350(f)(5)	5.331(f).
3.350(g) (introduction)	5.346(b)(1)(i).
3.350(g)(1)	5.346(b)(1)(i).
3.350(g)(2)	5.346(b)(2).
3.350(h)(1) (first and second sentences)	5.332(b)(1), 5.332(b)(2), 5.332(b)(3).
3.350(h)(1) (last sentence)	5.332(a).
3.350(h)(2)	5.332(a), 5.332(c)(1)(i), 5.322(c)(1)(ii), 5.332(c)(1)(v).
3.350(h)(3) (first and second sentences)	5.332(b) (introduction), 5.332(c)(1) (introduction).
3.350(h)(3) (last sentence)	5.332(c)(1) (introduction).
3.350(i) (introduction)	5.333 (introduction).
3.350(i)(1)	5.333(a).
3.350(i)(2)	5.333(b).
3.351(a)(1)	5.390 (introduction), 5.391 (introduction).
3.351(a)(2)	5.321(a).
3.351(a)(3)	5.511(a).
3.351(a)(4)	5.511(c).
3.351(a)(5)	5.390 (introduction), 5.391 (introduction).
3.351(a)(6)	No part 5 provision.
3.351(b)	5.511(a).
3.351(c) (introduction)	5.390 (introduction), 5.321(b) (introduction).
3.351(c)(1)	5.321(b)(1), 5.321(b)(2), 5.511(b).
3.351(c)(2)	5.321(b)(3), 5.511(b)(3).
3.351(c)(3)	5.321(c), 5.511(a).
3.351(d)	5.391(a).
3.351(e)	5.511(c).
3.351(f)	5.370, 5.391(b).
3.352(a) (first, sixth, and seventh sentences)	5.320(a).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

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Part 3 provision	Part 5 provision
3.352(a) (second through fourth sentences)	5.320(b).
3.352(a) (fifth sentence)	5.320 (introduction).
3.352(a) (eighth and last sentences)	No part 5 provision.
3.352(b)(1) (introduction)	5.332(c) (introduction).
3.352(b)(1)(i)	5.332(c)(1)(i).
3.352(b)(1)(ii)	5.332(c)(1)(ii).
3.352(b)(1)(iii)	5.332(c)(1)(iii), 5.332(c)(1)(iv).
3.352(b)(2) (first sentence)	5.332(c)(2).
3.352(b)(2) (second sentence)	5.332(c)(3).
3.352(b)(2) (third sentence)	5.332(c)(4).
3.352(b)(3)	5.332(c)(5).
3.352(b)(4)	5.332(c)(6).
3.352(b)(5)	No part 5 provision.
3.352(c)	5.320(a) (introduction).
3.353	5.790.
3.354(a)	5.1 definition of ''Insanity''.
3.354(b)	5.33.
3.355	5.797.
3.356(a)	5.227(a).
3.356(b) (introduction first sentence)	5.220 (introduction), 5.220(b) (introduction), 5.220(b)(1).
3.356(b) (introduction second sentence)	5.227(c)(2)(i).
3.356(b) (introduction third sentence)	5.227(b)(2)(ii).
3.356(b)(1)	5.227(b)(1)(i).
3.356(b)(2) (first sentence)	5.227(d)(3).
3.356(b)(2) (last sentence)	5.227(b)(1)(ii).
3.356(b)(3) (except last sentence)	5.227(b)(2)(i), 5.227(c)(1).
3.356(b)(3) (last sentence)	5.227(b)(1)(iv).
3.356(b)(4)	5.227(b)(1)(iii).
3.357	5.367.
3.358	No part 5 provision.
3.359	5.363.
3.360(a)	5.361(a).
3.360(b)	5.361(c).
3.360(c)	5.361(b).
3.361 (except 3.361(a))	5.350.
3.361(a)	No part 5 provision.
3.362 (except 3.362(a))	5.352.
3.362(a)	No part 5 provision.
3.363 (except 3.363(a))	5.353.
3.363(a)	No part 5 provision.
3.370	5.340.
3.371	5.341.
3.372	5.342.
3.373	Reserved.
3.374	5.343.
3.375	5.344.
3.376	Reserved.
3.377	Reserved.
3.378	5.345.
3.379	No part 5 provision.
3.380	5.251(e).
3.381(a)	5.360(a)(2).
3.381(b) (first sentence)	5.360(b).
3.381(b) (second sentence)	5.360(c)(3).
3.381(c)	5.360(b)(2).
3.381(d) (first sentence)	5.360(b) (introduction); 5.360(b)(1).
3.381(d) (last sentence)	5.360(d) (introduction).
3.381(e) (introduction)	No part 5 provision.
3.381(e)(1)	5.360(d)(1).
3.381(e)(2)	5.360(d)(2).
3.381(e)(3)	5.360(d)(3).
3.381(e)(4)	5.360(d)(4).
3.381(e)(5)	5.360(e)(1).
3.381(e)(6)	5.360(e)(2).
3.381(f) (introduction)	5.360(e) (introduction).
3.381(f)(1)	5.360(e)(3).
3.381(f)(2)	No part 5 provision.
3.381(f)(3)	5.360(d)(5).
3.381(f)(4)	5.360(d)(6).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.381(g)	5.360(d)(7).
3.383(a) (introduction)	5.282(a).
3.383(a)(1)–(5)	5.282(b).
3.383(b)(1)	5.282(c)(1), 5.282(c)(2).
3.383(b)(2)	No part 5 provision.
3.383(c)	5.282(c)(3).
3.383(d)	5.282(c)(4).
3.384	5.1 definition of ''Psychosis''.
3.385	5.366.
3.400 (introduction)	5.150(a), 5.383(a)(1).
3.400(a)	No part 5 provision.
3.400(b)(1) (introduction)	5.383(a).
3.400(b)(1)(i)	No part 5 provision.
3.400(b)(1)(ii)(A)	5.383(a)(1).
3.400(b)(1)(ii)(B)	5.383(c).
3.400(b)(2)	5.311.
3.400(c)(1)	5.431(b), 5.538(a).
3.400(c)(2)	5.538(b).
3.400(c)(3)	No part 5 provision.
3.400(c)(4)(i)	5.538(c).
3.400(c)(4)(ii)	5.538(d).
3.400(c)(4)(iii)	No part 5 provision.
3.400(d)	Reserved.
3.400(e) (introduction)	5.782(b)(1).
3.400(e)(1)	5.782(a).
3.400(e)(2)	5.782(b)(3).
3.400(f)	5.752.
3.400(g)	5.34(d), 5.35(e), 5.591(a)(4).
3.400(h)(1)	5.150(a), 5.166.
3.400(h)(2)	5.55.
3.400(h)(3)	No part 5 provision.
3.400(h)(4)	No part 5 provision.
3.400(i)	5.351.
3.400(j)(1)	5.743(a).
3.400(j)(2)	No part 5 provision.
3.400(j)(3)	No part 5 provision.
3.400(j)(4)	No part 5 provision.
3.400(j)(5)	No part 5 provision.
3.400(j)(6)	No part 5 provision.
3.400(k)	5.167.
3.400(l)	No part 5 provision.
3.400(m)	No part 5 provision.
3.400(n)	5.791(e).
3.400(o)(1) (first sentence)	5.150(a).
3.400(o)(1) (second sentence)	5.150(b).
3.400(o)(2)	5.312(b).
3.400(p)	5.152.
3.400(q)(1)	5.153.
3.400(q)(2)	5.55(e).
3.400(r)	5.55.
3.400(s)	5.683(e)(1)(ii).
3.400(t)	No part 5 provision.
3.400(u)	5.235(b).
3.400(v)	5.205.
3.400(w)	5.203(b)(3).
3.400(x)	5.790(f)(1).
3.400(y)	5.790(f)(2).
3.400(z)	5.27(c).
3.401(a)(1)	5.335, 5.392.
3.401(a)(2)	5.720(f), 5.724(d).
3.401(a)(3)	5.336(a)(1), 5.336(a)(2).
3.401(b)(1)(i)	5.183(b)(1), 5.183(b)(2), 5.183(b)(3).
3.401(b)(1)(ii)	5.183(a)(1).
3.401(b)(2)	5.183(a)(2).
3.401(b)(3)	5.183(b)(4).
3.401(b)(4)	5.183(b)(5).
3.401(c)	No part 5 provision.
3.401(d)	5.792(e).
3.401(e)	5.745(e).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.401(f)	No part 5 provision.
3.401(g)	5.346(b)(1)(ii).
3.401(h)	No part 5 provision.
3.401(i)	No part 5 provision.
3.402 (introduction)	No part 5 provision.
3.402(a)	5.538(e).
3.402(b)	No part 5 provision.
3.402(c)	5.545(a).
3.402(c)(1)	5.392.
3.402(c)(2)	5.545(c).
3.403(a) (introduction)	5.234(a)(1).
3.403(a)(1)	5.234(b).
3.403(a)(2)	5.793.
3.403(a)(3)	5.230.
3.403(a)(4)	No part 5 provision.
3.403(a)(5)	5.183(b)(3).
3.403(b)	5.591(a) (introduction), 5.591(a)(1), 5.591(a)(3).
3.403(c)	5.591(a) (introduction), 5.591(a)(2), 5.591(a)(3).
3.404	5.545(a), 5.545(c).
3.405	5.614.
3.450 (except 3.450(a)(1)(ii), 3.450(f), (g))	5.770.
3.450(a)(1)(ii)	5.780(a).
3.450(f)	No part 5 provision.
3.450(g)	No part 5 provision.
3.451	5.771.
3.452	5.772.
3.453	5.773.
3.454(a)	No part 5 provision.
3.454(b) (except (b)(2))	5.772(c).
3.458	5.774.
3.459	No part 5 provision.
3.460 (second sentence of introduction)	No part 5 provision.
3.460(a)	No part 5 provision.
3.460(b)	5.780(b)(1).
3.460(c)	5.780(b)(2).
3.461(a)	5.781(a).
3.461(b)(1)	5.781(b).
3.461(b)(1) (last sentence)	No part 5 provision.
3.461(b)(2)	No part 5 provision.
3.461(b)(3)	No part 5 provision.
3.500 (introduction)	5.705(a).
3.500(a)	5.591(b) (introduction), 5.705(a).
3.500(b) (introduction)	5.167(a).
3.500(b)(1)	5.167(b).
3.500(b)(2)	5.167(c).
3.500(c)	No part 5 provision.
3.500(d)(1)	5.783(a).
3.500(d)(2)	No part 5 provision.
3.500(e) (first sentence)	5.743(b).
3.500(e) (second sentence)	5.750(a)(1), 5.751(a)(1).
3.500(e) (third sentence)	5.750(b)(1) (last sentence), 5.751(e)(1) (last sentence).
3.500(f)	5.433(b)(2), 5.434(a)(1)(ii), 5.434(a)(2), 5.434(a)(3), 5.434(b)(1)(ii), 5.434(b)(2)(ii).
3.500(g)(1)	5.694, 5.783(b)(1).
3.500(g)(2)(i)	No part 5 provision.
3.500(g)(2)(ii)	5.184(a), 5.314(d), 5.783(b)(2).
3.500(g)(3)	No part 5 provision.
3.500(h)	No part 5 provision.
3.500(i)	5.743(b).
3.500(j)	No part 5 provision.
3.500(k)	5.681(b)(1).
3.500(l)	No part 5 provision.
3.500(m)	5.791(e).
3.500(n)(1)	5.197(a), 5.783(b)(1).
3.500(n)(2)(i)	No part 5 provision.
3.500(n)(2)(ii)	5.197(b), 5.314(c), 5.783(b)(2).
3.500(n)(3)	5.203(b)(2).
3.500(o)	No part 5 provision.
3.500(p)	5.618(b).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.500(q)	5.683(c).
3.500(r)	5.177(c), 5.177(d), 5.177(e), 5.177(g), 5.591(b)(5).
3.500(s)(1)	5.681(b)(2).
3.500(s)(2)	5.681(b)(3).
3.500(t)	5.712.
3.500(u)	5.152.
3.500(v)	No part 5 provision.
3.500(w)	5.101(c).
3.500(x)	5.743(b), 5.754(d).
3.500(y)	No part 5 provision.
3.501 (introduction)	5.705(a).
3.501(a)	5.746(c).
3.501(b)(1)	5.720(b) (introduction third sentence), 5.724(a)(2), 5.728(a)(2).
3.501(b)(2)	5.720(b) (introduction third sentence).
3.501(b)(3)	5.336(b).
3.501(c)	5.711(d)(1).
3.501(d)(1)	No part 5 provision.
3.501(d)(2)	5.184(a), 5.477(a) (introduction), 5.477(a)(1).
3.501(e)(1)	5.177(f).
3.501(e)(2)	5.177(e).
3.501(f)	5.313(c).
3.501(g)(1)	5.177(f).
3.501(g)(2)	5.177(e).
3.501(h)	No part 5 provision.
3.501(i)(1)	5.727(a)(4)(i) (first sentence).
3.501(i)(2)(i)	5.726(a)(4).
3.501(i)(2)(ii)	No part 5 provision.
3.501(i)(2)(iii)	5.726(d)(1).
3.501(i)(3)	5.724(c).
3.501(i)(4)	No part 5 provision.
3.501(i)(5)(i)	5.722(a)(3).
3.501(i)(5)(ii)	5.722(d)(1).
3.501(i)(6)	5.723 (except 5.723(d)).
3.501(j)	5.792(f).
3.501(k)	No part 5 provision.
3.501(m)	No part 5 provision.
3.501(n)	No part 5 provision.
3.502	5.477(b).
3.502 (introduction)	5.541, 5.705(a).
3.502(a)(1)	No part 5 provision.
3.502(a)(2)	No part 5 provision.
3.502(b)	5.541.
3.502(c)	No part 5 provision.
3.502(d)	5.197.
3.502(e)(1)	5.545(b)(1).
3.502(e)(2)	No part 5 provision.
3.502(f)(1)	5.723(b).
3.502(f)(2)	5.723(c).
3.503(a) (introduction)	5.705(a).
3.503(a)(1)	5.231.
3.503(a)(2)	5.774(e)(2).
3.503(a)(3)(i)	5.234(c)(1).
3.503(a)(3)(ii)	5.234(c)(2).
3.503(a)(4)	5.197.
3.503(a)(5)	5.696(g).
3.503(a)(6)	5.233.
3.503(a)(7)	5.762(c).
3.503(a)(8)	5.764(a)(3) (first sentence).
3.503(a)(9)	5.434.
3.503(a)(10)	5.232.
3.503(b)	5.591(b)(3).
3.504	5.545(b)(1).
3.505	5.618(c).
3.551(a)	5.720(a), 5.722(b)(1), 5.726(a)(1), 5.726(b)(1), 5.727(b)(1).
3.551(b)(1)	5.727(a)(1), 5.727(a)(3)(i), 5.727(a)(4)(i).
3.551(b)(2)	5.727(c)(1).
3.551(b)(3)	5.727(a)(4)(ii), 5.727(c)(2).
3.551(c)(1)	5.726(a)(1), 5.726(a)(3), 5.726(a)(4).
3.551(c)(2)	5.726(d)(1).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.551(c)(3)	5.726(c).
3.551(d)	No part 5 provision.
3.551(e)	5.722(g).
3.551(e)(1)	5.722(a)(1), 5.722(a)(2), 5.722(a)(3).
3.551(e)(2)	5.722(d)(1).
3.551(e)(3)	5.722(c).
3.551(e)(4)	5.722(e).
3.551(e)(5)	No part 5 provision.
3.551(e)(6)	5.722(b)(4).
3.551(f)	5.726(a)(5).
3.551(g)	5.726(a)(2), 5.727(a)(2).
3.551(h)	5.722(f).
3.551(i)	5.723.
3.552(a)(1)	5.720(b), 5.720(d), 5.724(b).
3.552(a)(2)	5.720(d), 5.724(b).
3.552(a)(3) (first sentence)	5.720(c)(5).
3.552(a)(3) (second sentence)	5.720(c)(6).
3.552(b)(1)	5.720(b), 5.724(a), 5.728(a).
3.552(b)(2)	5.720(b), 5.720(c)(1).
3.552(b)(3)	5.720(a), 5.720(e), 5.724(c), 5.728(c).
3.552(c)	5.720(b)(1).
3.552(d)	5.720(c)(2).
3.552(e)	5.728(a), 5.728(b).
3.552(e) (third and fourth sentences)	5.724(a).
3.552(f)	5.720(c)(3).
3.552(g)	5.720(c)(3).
3.552(h)	5.720(c)(4).
3.552(i)	5.720(c)(2).
3.552(j)	5.728(a).
3.552(k)	5.720(f), 5.724(d).
3.552(k)(1)	5.726(e)(1).
3.552(k)(2)	5.726(e)(2).
3.552(k)(3)	5.726(e)(2).
3.553	Reserved.
3.554	Reserved.
3.555	Reserved.
3.556(a)	5.720(a), 5.729(a).
3.556(a)(1)	5.730(a).
3.556(b)	5.729(b), 5.730(b).
3.556(c)	5.729(c).
3.556(d)	5.730(d).
3.556(d) (first sentence)	5.729(d).
3.556(d) (third and fourth sentences)	5.729(b).
3.556(e)	5.729(d), 5.730(c).
3.556(f)	5.720(a).
3.557	Reserved.
3.558	No part 5 provision.
3.559	Reserved.
3.650(a) (introduction)	5.544(a).
3.650(a) (last paragraph)	5.544(d).
3.650(a)(1)	5.544(b)(1).
3.650(a)(2)	5.544(b)(2).
3.650(b)	5.544(c).
3.650(c)(1)	5.524(a)(1), 5.524(b), 5.524(c).
3.650(c)(2)	5.524(a), except for (a)(1).
3.650(c)(3)	No part 5 provision.
3.651(a)	5.710(a).
3.651(b)	5.710(b).
3.651(c)	5.710(c).
3.652(a)	5.104(a).
3.652(a)(1)	5.104(b), 5.104(c).
3.652(a)(2)	5.104(c).
3.652(b)	5.104(d).
3.653(a)	5.713(a), 5.713(b)(1).
3.653(b)	5.715(b) (introduction), 5.715(b)(1)(iii), 5.715(c), 5.715(d).
3.653(c)	5.714(c), 5.714(d).
3.653(c)(1)	5.714(b), 5.714(e).
3.653(c)(2)	No part 5 provision.
3.653(c)(3)	5.715(b)(2), 5.715(d).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.653(d)	5.715(e).
3.654(a) (first sentence)	5.746(b).
3.654(a) (second sentence)	5.746(a).
3.654(b)(1)	5.746(c).
3.654(b)(2) (first sentence)	5.746(d)(1).
3.654(b)(2) (second sentence)	5.746(d)(4).
3.654(b)(2) (third and fourth sentences)	5.746(d)(2)(ii).
3.654(b)(2) (last sentence)	5.746(d)(5).
3.654(c)	5.746(e).
3.655(a) (first sentence)	5.103(b) (introduction).
3.655(a) (second sentence)	5.103(f) (except last sentence).
3.655(a) (last sentence)	No part 5 provision.
3.655(b)	5.103(b)(1), 5.103(b)(2).
3.655(c)(1) (first sentence)	5.103(c), 5.103(d)(1).
3.655(c)(1) (second sentence)	5.103(d)(1).
3.655(c)(1) (last sentence)	5.103(d)(2).
3.655(c)(2)	5.103(d)(3).
3.655(c)(3)	5.103(d)(2), 5.103(d)(5).
3.655(c)(4)	5.103(d)(4).
3.656(a)	5.693(c)(9), 5.711(a), 5.711(b).
3.656(b)	5.711(d)(1).
3.656(c)	5.711(d)(2).
3.656(d)	5.693(c)(9), 5.711(c).
3.657 (introduction)	5.433(a), 5.539(a), 5.540(a).
3.657(a) (introduction)	5.433(b)(1), 5.422(b)(2), 5.539(b)(1), 5.539(b)(2).
3.657(a)(1)	5.433(b)(1), 5.539(b)(1).
3.657(a)(2)	5.433(b)(2), 5.539(b)(2).
3.657(b)	5.434.
3.657(b)(1)	5.540(b).
3.657(b)(2)	5.540(c)(1), 5.540(c)(2).
3.658(a)	5.750(a)(1).
3.658(b)	5.761.
3.659	5.762(c).
3.659(b)	5.764(a)(3) (second sentence).
3.660(a)(1)	5.182(a), 5.300(d), 5.709(a).
3.660(a)(2)	5.314(b), 5.314(c), 5.314(d), 5.422(a)(2), 5.477(a).
3.660(a)(2) (last sentence)	5.184(a).
3.660(a)(2) (second sentence)	5.543(a).
3.660(a)(2)	5.415.
3.660(a)(3)	5.543(b).
3.660(b)	5.422(b), 5.424(a), 5.424(b), 5.424(c).
3.660(b) (introduction)	5.535, 5.542(a).
3.660(b)(1)	5.535, 5.478(b), 5.542(a).
3.660(b)(2)	5.542(b).
3.660(c)	5.422(b).
3.660(c) (first sentence)	5.183(b)(1), 5.183(b)(2), 5.183(b)(3).
3.660(c) (second sentence)	5.183(a).
3.660(d)	5.315, 5.415.
3.661(a)(1)	5.708(d).
3.661(a)(2)	5.708(d).
3.661(b)(1)	No part 5 provision.
3.661(b)(2)(i)	5.708(e)(3).
3.661(b)(2)(ii)	5.708(g).
3.661(b)(2)(iii)	5.708(f).
3.662	Reserved.
3.663	Reserved.
3.664	Reserved.
3.665(a)	5.810(c), 5.810(e), 5.810(f), 5.811(a), 5.812(a), 5.814(a)(1).
3.665(b)	5.810(a).
3.665(c)	5.811(a), 5.812(a).
3.665(d)(1)	5.811(c).
3.665(d)(2)	5.811(c).
3.665(d)(3)	5.812(b).
3.665(e)	5.814(b).
3.665(f)	5.782(b)(4), 5.814(e).
3.665(g)	5.810(c).
3.665(h)	5.814(a)(2).
3.665(i)	5.815(a).
3.665(i)(1)	5.815(b).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

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Part 3 provision	Part 5 provision
3.665(i)(2)	5.815(c).
3.665(i)(3)	5.815(b), 5.815(c).
3.665(j)	5.811(c).
3.665(j)(3)(ii)	5.811(b).
3.665(k)	5.811(b), 5.812(d).
3.665(l)	5.812(c).
3.665(m)	5.815(d).
3.665(n)(1)	5.817(a).
3.665(n)(2)	5.817(b).
3.665(n)(3)	5.817(b).
3.665(n)(4)	No part 5 provision.
3.666 (introduction)	5.810(c), 5.810(e), 5.810(f), 5.813(a).
3.666(a)	5.782(c).
3.666(a)(1)	5.814(c).
3.666(a)(2)	5.814(c).
3.666(a)(3)	5.814(c).
3.666(a)(4)	5.814(e).
3.666(b)(1)	5.814(d).
3.666(b)(2)	5.814(d).
3.666(b)(3)	5.814(e).
3.666(b)(4)	5.814(d).
3.666(c)	5.816.
3.666(d)	5.813(b).
3.666(e)(1)	5.817(a).
3.666(e)(2)	5.817(b).
3.666(e)(3)	5.817(b).
3.666(e)(4)	No part 5 provision.
3.667(a)(1)	5.696(b).
3.667(a)(2)	5.696(b).
3.667(a)(3)	5.696(c).
3.667(a)(4)	5.696(c).
3.667(a)(5)	5.696(c), 5.696(d).
3.667(b)	5.696(f).
3.667(c)	5.696(g).
3.667(d)	5.696(h).
3.667(e)	5.551(a).
3.667(f)	5.696(i).
3.668	Reserved.
3.669(a)	5.676(b)(5), 5.677(b)(5), 5.678(b)(2)(i), 5.681(a)(1).
3.669(b)	5.681(a)(2).
3.669(b)(1)	5.676(b)(5).
3.669(b)(1) (last sentence)	5.681(b)(1).
3.669(b)(2)	5.677(b)(5).
3.669(b)(2) (last sentence)	5.681(b)(2).
3.669(c) (first sentence)	5.678(b)(2)(ii).
3.669(c) (last sentence)	5.681(b)(3).
3.669(d)(1)	5.676(c)(1), 5.677(c)(1), 5.682(b), 5.682(c).
3.669(d)(2)	5.682(d).
3.700 (introduction)	5.756.
3.700(a)(1)(i)	5.746(b).
3.700(a)(1)(ii)	5.24(c)(3), 5.746(a).
3.700(a)(1)(iii)	5.746(e).
3.700(a)(2)(i)	No part 5 provision.
3.700(a)(2)(ii)	No part 5 provision.
3.700(a)(2)(iii) (first sentence)	5.747(a)(1).
3.700(a)(2)(iii)	5.747(d).
3.700(a)(2)(iv)	5.747(a)(2).
3.700(a)(3)	5.747(b), 5.747(d).
3.700(a)(4)	5.464.
3.700(a)(5)(i)	5.747(d).
3.700(a)(5)(i) (first sentence)	5.747(c)(1).
3.700(a)(5)(ii)	5.747(c)(2).
3.700(b)(1)	5.761.
3.700(b)(2)	5.762(a), 5.762(b).
3.700(b)(3)	5.765.
3.701(a) (first and fourth sentences)	5.757(e)(1).
3.701(a) (first and third sentences)	5.757(d).
3.701(a) (first and second sentences)	5.757(a), 5.757(b).
3.701(a) (fifth sentence)	5.757(e)(3), 5.758(d).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.701(a) (sixth and seventh sentences)	No part 5 provision.
3.701(a)	5.757(c).
3.701(b)	5.740(a).
3.701(c)	5.757(f).
3.702(a)	5.759(a)(1)(i), 5.759(a)(2).
3.702(b)	No part 5 provision.
3.702(c)	5.759(b).
3.702(d)(1)	5.759(a)(1)(ii).
3.702(d)(1) (second sentence)	5.742(a), 5.742(c).
3.702(d)(2)	5.760.
3.702(e)	No part 5 provision.
3.702(f)	No part 5 provision.
3.703	5.762(c).
3.703(c)	5.764(a).
3.704(a)	5.763.
3.704(b)	5.536(h).
3.705	Reserved.
3.706	Reserved.
3.707	5.764(b), 5.764(c), 5.764(d).
3.707(a)	5.764(a).
3.708(a)(1)	5.750(a)(1).
3.708(a)(2)	5.750(a)(2).
3.708(a)(3)	5.750(b), 5.751(e).
3.708(a)(4)	5.750(a)(1).
3.708(b)(1) (first sentence)	5.751(a)(1).
3.708(b)(1) (second and third sentences, excluding intervening cross reference).	5.751(c).
3.708(b)(1) (second sentence)	5.751(a)(2).
3.708(b)(1) (last sentence)	5.751(e).
3.708(b)(2)	5.751(b).
3.710	5.753.
3.711	5.461(a), 5.461(b), 5.461(c).
3.711 (first sentence)	5.758(a).
3.711 (second sentence)	5.742(a).
3.711 (last sentence)	5.758(b).
3.712(a)	No part 5 provision.
3.712(b)	No part 5 provision.
3.713(a)	5.463.
3.713(b)	No part 5 provision.
3.714	No part 5 provision.
3.715	5.754(b), 5.754(c).
3.750	5.745.
3.750(d)(2)	5.740(d).
3.751	No part 5 provision.
3.752	Reserved.
3.753	5.748.
3.754	No part 5 provision.
3.800	No part 5 provision.
3.801(a)	5.581(a), 5.581(b).
3.801(b)	5.581(d).
3.801(c)(1)	5.581(f).
3.801(c)(2)	5.581(c)(1).
3.801(d)	5.581(c)(2).
3.801(e)	5.581(e)(1).
3.802(a)	5.580(a).
3.802(b)	5.580(b)(1), 5.580(b)(2), 5.580(c), 5.580(d).
3.802(c)	5.580(b)(3).
3.803	5.582.
3.803(d)	5.554.
3.804	5.583.
3.805	5.584.
3.806	5.585.
3.807(a)	No part 5 provision.
3.807(b)	No part 5 provision.
3.807(c)	5.586(b), 5.586(c).
3.807(d)	No part 5 provision.
3.808(a)	5.603(c)(1).
3.808(b)	5.603(c)(1), 5.603(c)(2).
3.808(c)	5.603(d)(1), 5.603(e).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

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Part 3 provision	Part 5 provision
3.808(d)	5.603(d)(3).
3.808(e)	5.603(b)(1).
3.809	5.604.
3.809a	5.605.
3.810(a) (introduction)	5.606(b), 5.606(c).
3.810(a)(1)	5.606(b)(1), 5.606(c)(1), 5.606(c)(2).
3.810(a)(2)	5.606(b)(2), 5.606(b)(3), 5.606(c)(1), 5.606(c)(2).
3.810(b)	5.606(d).
3.810(c)(1)	5.606(e)(1).
3.810(c)(2)	5.606(e)(2).
3.810(d)	5.606(f).
3.811	5.587.
3.812	5.588.
3.813	No part 5 provision.
3.814	5.589.
3.814(b)	Reserved.
3.814(e) (introduction)	5.591(a) (introduction).
3.814(e)(1)	5.591(a)(5).
3.814(e)(2)	5.591(a)(4).
3.814(f)	5.591(b) (introduction).
3.814(f) (introduction)	5.591(b)(4).
3.814(f)(1)	5.591(b)(1).
3.814(f)(2)	5.591(b)(2).
3.815(a)–(h)	5.590.
3.815(i) (introduction)	5.591(a) (introduction), 5.591(a)(2), 5.591(a)(6).
3.815(i)	5.591(a)(3).
3.815(i)(1)	5.591(a)(5).
3.815(i)(2)	5.591(a)(4).
3.815(j) (introduction)	5.591(b)(4).
3.815(j)	5.591(b) (introduction).
3.815(j)(1)	5.591(b)(1).
3.815(j)(2)	5.591(b)(2).
3.816	5.592.
3.850(a)	5.791(a).
3.850(b)	5.791(c).
3.850(c)	5.791(b).
3.850(d)	5.791(d).
3.851	No part 5 provision.
3.852(a)	5.792(a).
3.852(b)	5.792(b).
3.852(c)	5.792(d).
3.852(d) (first sentence)	5.792(b).
3.852(d) (second sentence)	5.792(c).
3.853(a), 3.853(b)	No part 5 provision.
3.853(c)	5.798.
3.854	5.793(a).
3.855	5.794.
3.856	5.795.
3.857	5.796.
3.900(a)	5.675(a).
3.900(b)(1)	No part 5 provision.
3.900(b)(2)	5.676(b), 5.676(c), 5.677(b), 5.677(c), 5.678(b)(3).
3.900(c)	5.675(b).
3.900(d)	No part 5 provision.
3.901(a)	5.1 definition of "Fraud," 5.676(a).
3.901(b)	5.676(b)(2).
3.901(c)	5.676(c)(2)(i).
3.901(d)	5.676(b)(1).
3.901(d) (last sentence)	5.676(b)(3)(i).
3.901(e)	5.680(c)(1), 5.680(c)(2).
3.902(a)	5.677(a).
3.902(b)	5.677(b)(2).
3.902(c)	5.677(c)(2).
3.902(d)	5.677(b)(1).
3.902(d) (last sentence)	5.677(b)(3)(i).
3.902(e)	5.677(d).
3.903(a)(1)	5.678(a)(2).
3.903(a)(1)	5.678(a)(2).
3.903(a)(3)	5.678(a)(1).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

[Note to users: The designation ''introduction'' in Appendices A and B refers to regulation text that introduces the paragraphs of a section. For example, ''3.400 (introduction)'' designates the text of 3.400 preceding 3.400(a)–(z) and ''5.268(c)(1) (introduction)'' designates 5.268(c)(1) preceding 5.268(c)(1)(i)–(iv)]

Part 3 provision	Part 5 provision
3.903(a)(4)	5.678(a)(4).
3.903(a)(5)	5.678(a)(5).
3.903(b)(1)	5.678(b)(3)(i), 5.678(b)(3)(ii), 5.678(b)(3)(iv).
3.904(b) (last sentence)	5.677(b)(2).
3.903(b)(2)	5.678(b)(1).
3.903(c)	5.682(a).
3.904(a)	5.676(d).
3.904(b) (last sentence)	5.677(b)(3)(ii).
3.904(b)	5.677(c)(2).
3.904(c) (first sentence)	5.678(b)(3)(iv).
3.904(c) (last sentence)	5.678(c)(2).
3.905(a)	5.679(a), 5.680(a).
3.905(b)	5.679(b), 5.679(c)(2).
3.905(c)	5.679(c)(1).
3.905(d)	5.679(d), 5.679(e).
3.905(e)	5.680(c)(3).
3.950	No part 5 provision.
3.951	5.170(a).
3.951(a)	5.173.
3.951(b) (first sentence)	5.172(a).
3.951(b) (second sentence)	5.172(b).
3.951(b)	5.170(b).
3.952	No part 5 provision.
3.953(a)	5.174(a).
3.953(b)	No part 5 provision.
3.953(c)	5.174(b).
3.954	5.653.
3.955	Reserved.
3.956	Reserved.
3.957	5.170(a), 5.170(b).
3.957 (first sentence)	5.175(a)(1).
3.957 (last sentence)	5.175(a)(2).
3.958	5.751(a)(2).
3.959	5.346(a).
3.960(a)	5.461(d), 5.474(a), 5.758(c).
3.960(b)	5.470(a).
3.960(c)	5.470(c).
3.960(d)	5.470(b), 5.478(c).
3.1000(a) introductory text	5.1 definition of ''Accrued benefits.''
3.1000(a)(1)	5.551(b), 5.551(c).
3.1000(a)(2)	5.551(d).
3.1000(a)(3)	5.551(e).
3.1000(a)(4)	5.551(e).
3.1000(a)(5)	5.551(f).
3.1000(b)	5.784.
3.1000(b)(1)	5.784(b)(1).
3.1000(b)(2)	5.784(a).
3.1000(b)(3)	5.784(b)(2).
3.1000(c)	5.552.
3.1000(c)(1)	5.553.
3.1000(c)(2)	5.551(g).
3.1000(d)(1)	5.551(c), 5.566(d).
3.1000(d)(2)	5.551(a), 5.551(e), 5.566(d).
3.1000(d)(3)	5.551(a), 5.566(d).
3.1000(d)(4)	5.1 definition of ''Evidence in the file on the date of death.''
3.1000(d)(5)	5.1 definition of ''Evidence in the file on the date of death.''
3.1000(e)	5.554.
3.1000(f)	5.551(d), 5.554.
3.1000(g)	5.554.
3.1000(h)	5.554.
3.1001	5.567.
3.1001(b)(1)	No part 5 provision.
3.1002	5.551(f).
3.1003 (introduction)	5.564(a)(1).
3.1003(a)	5.564(a)(1).
3.1003(a)(1)	5.564(a)(1).
3.1003(a)(2)	5.564(b).
3.1003(b)	5.564(a)(1).
3.1003(c)	5.564(c).

APPENDIX A TO PART 5—DISTRIBUTION OF PART 3 PROVISIONS—Continued

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Part 3 provision	Part 5 provision
3.1004	Reserved.
3.1005	Reserved.
3.1006	Reserved.
3.1007	5.568.
3.1008	5.565(d)(2).
3.1009 (introduction)	5.566(a).
3.1009(a)	5.566(d).
3.1009(b)	5.566(e).
3.1600 (first sentence)	5.631(a), 5.631(b).
3.1600(a)	5.638(a).
3.1600(b)(1)	5.643.
3.1600(b)(2)	5.643.
3.1600(b)(3)	5.636.
3.1600(b)(4)	5.643.
3.1600(c)	5.644(a), 5.644(b)(1)–(4).
3.1600(d)	5.631(a).
3.1600(e)	No part 5 provision.
3.1600(f)	5.645(b).
3.1600(g)	5.638(c)(1), 5.639(a), 5.639(c).
3.1601(a)	5.633(a).
3.1601(a)(1)	5.632.
3.1601(a)(2)	5.632.
3.1601(a)(2)(iii) (second and third sentences)	5.649(d).
3.1601(a)(3)	5.645(c).
3.1601(b)	5.633(b).
3.1601(b)(5)	5.636.
3.1602(a)	5.649(b), 5.649(e).
3.1602(b)	5.649(a).
3.1602(c)	5.649(c).
3.1602(d)	5.650.
3.1603	5.636.
3.1604(a)	5.651(a), 5.651(b).
3.1604(a)(1)	5.651(d).
3.1604(a)(2)	5.651(a), 5.651(b).
3.1604(b)(1)	5.651(c)(1).
3.1604(b)(2)	5.651(c)(1).
3.1604(b)(3)	5.651(c)(2).
3.1604(c)	5.651(a), 5.651(b).
3.1604(d)	5.645(a).
3.1604(d)(1)(i)–(iv)	5.645(a).
3.1604(d)(1)(v)	No part 5 provision.
3.1604(d)(2) (first sentence)	No part 5 provision.
3.1604(d)(3)	5.645(a).
3.1604(d)(4)	5.649(a).
3.1605 (introduction)	5.644(a).
3.1605(a)	5.644(b)(5), 5.644(c).
3.1605(a)(3) (last sentence)	5.616.
3.1605(b)	5.644(d).
3.1605(c)	No part 5 provision.
3.1605(d)	5.644(b)(6).
3.1605(e)	No part 5 provision.
3.1606	5.635.
3.1607	5.634(b)(1).
3.1608	5.634(b)(2), 5.634(b)(3).
3.1609	5.652.
3.1610(a)	No part 5 provision.
3.1610(b)	5.636.
3.1611	No part 5 provision.
3.1612	No part 5 provision.
3.2100	5.0.
3.2130	5.134.
3.2600	5.161.

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS

Part 5 Provision	Part 3 Provision	Part 5 Section Title
Subpart A—General Provisions		
5.0(a)	3.2100	Scope of applicability.
5.0(b)	New.	
5.1 definition of ''Accrued benefits''	3.1000(a) introductory text	General definitions.
5.1 definition of ''Active military service''	New.	
5.1 definition of ''Agency of original jurisdiction''.	New.	
5.1 definition of ''Alien''	New.	
5.1 definition of ''Application''	New.	
5.1 definition of ''Armed Forces''	3.1(a).	
5.1 definition of ''Beneficiary''	New.	
5.1 definition of ''Benefit''	New.	
5.1 definition of ''Certified statement''	New.	
5.1 definition of ''Child born of the marriage and child born before the marriage''.	3.54(d)	
5.1 definition of ''Claim''	3.1(p).	
5.1 definition of ''Claim for benefits pending on the date of death''.	3.1000(d)(5).	
5.1 definition of ''Claimant''	New.	
5.1 definition of ''Competent evidence''	3.159(a)(1), 3.159(a)(2).	
5.1 definition of ''Custody of a child''	3.57(d).	
5.1 definition of ''Direct service connection''	New.	
5.1 definition of ''Discharged or released from active military service''.	3.1(h).	
5.1 definition of ''Drugs''	New.	
5.1 definition of ''Effective the date of the last payment''.	New.	
5.1 definition of ''Evidence on file on the date of death''.	3.1000(d)(4).	
5.1 definition of ''Final decision''	New.	
5.1 definition of ''Fraud''	3.1(aa), 3.901(a).	
5.1 definition of ''Insanity''	3.354(a).	
5.1 definition of ''Nonservice-connected''	3.1(*l*).	
5.1 definition of ''Notice''	3.1(q).	
5.1 definition of ''Nursing home''	3.1(z).	
5.1 definition of ''Payee''	New.	
5.1 definition of ''Political subdivision of the U.S.''.	3.1(o).	
5.1 definition of ''Proximately caused''	New.	
5.1 definition of ''Psychosis''	3.384.	
5.1 definition of ''Reserve'' or ''reservist''	3.1(c).	
5.1 definition of ''Reserve component''	3.1(b).	
5.1 definition of ''Secretary concerned''	3.1(g).	
5.1 definition of ''Service-connected''	3.1(k).	
5.1 definition of ''Service treatment records''	New.	
5.1 definition of ''State''	3.1(i).	
5.1 definition of ''Uniformed services''	New.	
5.1 definition of ''VA''	1.9(b)(1).	
5.1 definition of ''Veteran''	3.1(d).	
5.1 definition of Willful misconduct	3.1(n).	
5.2	New	Terms and usage in part 5 regulations.
5.3(a)	New	Standards of proof.
5.3(b)(1)	New.	
5.3(b)(2)	3.102 (third sentences).	
5.3(b)(3)	3.102 (second and seventh sentences).	
5.3(b)(4)	New.	
5.3(b)(5)	3.102 (sixth sentence).	
5.3(b)(6)	New.	
5.3(c), 5.3(d), 5.3(e)	New.	
5.4(a)	3.103(a) (second sentence)	Claims adjudication policies.
5.4(b)	3.102 (first sentence), 3.103(a) (second sentence).	
5.5	3.100	Delegations of authority.
5.6–5.19		Reserved.
Subpart B—Service Requirements for Veterans		
Periods of War and Types of Military Service		
5.20	3.1(e), 3.1(f), 3.2	Dates of periods of war.
5.21(a)	3.6(a), 3.7(a)	Service VA recognizes as active military service.

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.21(b)	3.15.	
5.22(a)	3.6(b)(1)	Service VA recognizes as active duty.
5.22(b)	3.6(b)(7).	
5.22(c)	New.	
5.23(a)	3.7(r)	How VA classifies Reserve and National Guard duty.
5.23(a)(1)	3.6(b)(1).	
5.23(a)(2)	3.6(c)(1).	
5.23(a)(3)	3.6(d)(1), 3.6(d)(2).	
5.23(b)	3.7(m).	
5.23(b)(1)	3.6(b)(1).	
5.23(b)(2)	3.6(c)(3).	
5.23(b)(3)	3.6(d)(4).	
5.23(b)(4)	3.6(d)(4)(i), 3.6(d)(4)(ii).	
5.23(c)	New.	
5.24(a)	3.6(b)(4), 3.6(b)(7), 3.7(f)	How VA classifies duty performed by Armed Services Academy cadets and midshipmen, attendees at the preparatory schools of the Armed Services Academies, and Senior Reserve Officers' Training Corps members.
5.24(b)(1)	3.6(b)(5).	
5.24(b)(2)	3.6(c)(5).	
5.24(c)(1)	3.6(c)(4).	
5.24(c)(2)	3.6(d)(3).	
5.24(c)(3)	3.700(a)(1)(ii).	
5.24(d)	New.	
5.25(a)	3.7(q)	How VA classifies service in the Public Health Service, in the Coast and Geodetic Survey and its successor agencies, and of temporary members of the Coast Guard Reserve.
5.25(a)(1)	3.6(b)(2).	
5.25(a)(2)	3.6(c)(2).	
5.25(a)(3)	3.6(d)(1), 3.6(d)(2).	
5.25(b)	3.6(b)(3).	
5.25(b)(1)	3.7(g).	
5.25(c)	3.6(d)(4)(iii).	
5.25(d)	New.	
5.26	3.7(o)	Circumstances where a person ordered to service, but who did not serve, is considered to have performed active duty.
5.26(a)(3)	3.7(m).	
5.27(a), 5.27(b)	3.7(x)	Individuals and groups designated by the Secretary of Defense as having performed active military service.
5.27(c)	3.7(x), 3.400(z).	
5.28	3.7(c)–(e), 3.7(h)–(l), 3.7(n), 3.7(p), 3.7(s)–(w), 3.7(y).	Other groups designated as having performed active military service.
5.29(a)(1)	3.6(b)(6)	Circumstances under which certain travel periods may be classified as military service.
5.29(a)(2)	3.6(b)(7).	
5.29(a)(3)	New.	
5.29(b)	3.6(c)(6), 3.6(e).	
5.30(a)	3.12(a) (first sentence)	How VA determines if service qualifies for VA benefits.
5.30(b)	New.	
5.30(c)	3.12(a) (second sentence), 3.12(k)(1), 3.14(d).	
5.30(d)	3.12(b).	
5.30(e)	3.12(k)(2), 3.12(k)(3).	
5.30(f)	3.12(d).	
Bars to Benefits		
5.31(a)	New	Statutory bars to VA benefits.
5.31(b)	New.	
5.31(c)	3.7(b), 3.12(c)(1)–(5)	
5.31(d)	New.	
5.31(e)	3.12(j)	
5.31(f)	3.12(i)	
5.32	3.12(c)(6)	Consideration of compelling circumstances when veteran was separated for AWOL.
5.33	3.12(b), 3.354(b)	Insanity as a defense to acts leading to a discharge or dismissal from the service that might be disqualifying for VA benefits.
Military Discharges and Related Matters		
5.34(a)	New	Effect of discharge upgrades by Armed Forces boards for the correction of military records (10 U.S.C. 1552) on eligibility for VA benefits.
5.34(b)	New.	
5.34(c)	3.12(e).	
5.34(d)	3.400(g).	
5.35(a)	New	Effect of discharge upgrades by Armed Forces discharge review boards (10 U.S.C. 1553) on eligibility for VA benefits.
5.35(b)	3.12(f).	
5.35(c), 5.35(d)	3.12(g).	
5.35(e)	3.400(g).	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.36(a)	3.12(h)	Effect of certain special discharge upgrade programs on eligibility for VA benefits.
5.36(b), 5.36(c)	3.12(i).	
5.37(a) (first sentence)	3.12(a)	Effect of extension of service obligation due to change in military status on eligibility for VA benefits.
5.37(a) (second sentence)	New.	
5.37(b)	3.13(a).	
5.37(c)	3.13(b).	
5.37(d)	3.13(c).	
5.38(a)	New	Effect of a voided enlistment on eligibility for VA benefits.
5.38(b)	3.14(a), 3.14(c).	
5.38(c)	3.14(b).	
5.39(a)	3.12a(a)(2), 3.12a(b)	Minimum active duty service requirement for VA benefits.
5.39(b)(1)	3.12a(c)(1).	
5.39(b)(2)	3.12a(c)(2).	
5.39(c)(1)	3.12a(a)(1).	
5.39(c)(2)	3.203(c) (last sentence).	
5.39(d)	3.12a(a)(2), 3.12a(d).	
5.39(e)	3.15.	
5.39(f)	3.12a(e).	
5.40(a)	3.203(a)	Service records as evidence of service and character of discharge that qualify for VA benefits.
5.40(b)	3.203(a)(2).	
5.40(c)	3.203(a)(1), 3.203(a)(3).	
5.40(d)	3.203(c).	
5.41–5.49		Reserved.
Subpart C—Adjudicative Process, General		
VA Benefit Claims		
5.50	3.150	Applications VA Furnishes.
5.51	3.151(a)	Filing a claim for disability benefits.
5.52	3.152	Filing a claim for death benefits.
5.53	3.154	Claims for benefits under 38 U.S.C. 1151 for disability or death due to VA treatment or vocational rehabilitation.
5.54	3.155	Informal claims.
5.55	3.156(a), 3.400 introductory text, 3.400(h)(2), 3.400(q)(2), 3.400(r).	Claims based on New and material evidence.
5.56	3.157	Report of examination, treatment, or hospitalization as a claim.
5.57	3.160	Claims definitions.
5.58–5.79		Reserved.
Rights of Claimants and Beneficiaries		
5.80	3.103(e)	Right to representation.
5.81	3.103(d)	Submission of information, evidence, or argument.
5.82(a) introductory text	3.103(c)(1) (first sentence)	Right to a hearing.
5.82(a)(1)	3.103(c)(1).	
5.82(a)(2)	New.	
5.82(b)	3.103(c)(2).	
5.82(c)	3.103(c)(1).	
5.82(d)(1)	3.103(c)(1).	
5.82(d)(2)	3.103(c)(2).	
5.82(d)(3)	New.	
5.82(e)(1)	3.103(c)(2).	
5.82(e)(2)	3.103(c)(1).	
5.82(e)(3)	New.	
5.82((e)(4)	New.	
5.82(f)(1)	3.105(i)(2).	
5.82(f)(2)	3.105(i)(1).	
5.82(f)(3)	3.105(i)(1).	
5.82(f)(4)	3.105(i)(1).	
5.82(f)(5)	3.105(i)(2).	
5.83(a)	3.103(b)(1), 3.103(b)(2), 3.105(d)–(h)	Right to notice of decisions and proposed adverse actions.
5.83(b)	3.103(a), 3.103(b)(1), 3.103(f).	
5.83(c)	3.103(b)(3).	
5.84	3.103(b)(4)	Restoration of benefits following adverse action.
5.85–5.89		Reserved.
Duties of VA		
5.90 (except (b)(3))	3.159	VA assistance in developing claims.
5.90(b)(3)	3.109(a)(1).	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.91(a)	3.326(b), 3.326(c)	Medical evidence for disability claims.
5.91(b)	3.304(c) (last sentence).	
5.92	3.328	Independent medical opinions.
5.93	New	Service records which are lost, destroyed, or otherwise unavailable.
5.94–5.98		Reserved.
Responsibilities of Claimants and Beneficiaries		
5.99	3.109(b)	Extensions of time limits for providing information or evidence.
5.100	3.110	Time limits for claimant or beneficiary responses.
5.101(a)	3.216	Requirement to provide Social Security numbers.
5.101(b)	3.216.	
5.101(c)	3.500(w).	
5.101(d)	New.	
5.101(e)	3.159(b)(1), 3.216.	
5.101(f)	3.216.	
5.102(a)	3.327(a) (except third sentence)	Reexamination requirements.
5.102(b)	3.327(a) (third sentence).	
5.102(c)(1)	3.327(b)(1) (second sentence).	
5.102(c)(2)(i)	3.327(b)(2).	
5.102(c)(3)	3.327(b)(1) (first sentence).	
5.102(d)	3.327(c).	
5.103(a) (first sentence)	3.326(a) (first and second sentences)	Failure to report for VA examination or reexamination.
5.103(a) (second sentence)	3.327(a) (first sentence).	
5.103(a) (third sentence)	New.	
5.103(b) introductory text	3.655(a) (first sentence).	
5.103(b)(1)	3.655(b).	
5.103(b)(2)	3.655(b).	
5.103(c)	3.655(c)(1) (first sentence).	
5.103(d)(1)	3.655(c)(1) (first and second sentences).	
5.103(d)(2)	3.655(c)(1) (last sentence), 3.655(c)(3).	
5.103(d)(3)	3.655(c)(2).	
5.103(d)(4)	3.655(c)(4).	
5.103(d)(5)	3.655(c)(3).	
5.103(e)	3.330.	
5.103(f) (except last sentence)	3.655(a) (second sentence).	
5.103(f) (last sentence)	New.	
5.104(a)	3.652(a)	Certifying continuing eligibility to receive benefits.
5.104(b)	3.652(a)(1).	
5.104(c)	3.652(a)(1), 3.652(a)(2).	
5.104(d)	3.652(b).	
5.105–5.129		Reserved.
General Evidence Requirements		
5.130(a) (except (a)(3))	3.217(a), 3.217(a) (note)	Submission of statements, evidence, or information affecting entitlement to benefits.
5.130(a)(3).	3.217(b)	
5.130(b).	3.217(b)	
5.130(c).	New	
5.131(a)	3.153	Applications, claims, and exchange of evidence with Social Security Administration—death benefits.
5.131(b)	3.201(a).	
5.131(c)	3.201(b).	
5.132(a)	3.108	Claims, statements, evidence, or information filed or submitted abroad; authentication of documents from foreign countries.
5.132(b)	3.202(a).	
5.132(c)	3.202(b).	
5.132(d)	3.202(a).	
5.132(e)	3.202(c).	
5.133(a)	3.115(a)	Information VA may request from financial institutions.
5.133(b)	New.	
5.133(c)	3.115(b).	
5.134	3.2130	VA acceptance of signature by mark or thumbprint.
5.135	3.200	Statements certified or under oath or affirmation.
5.136	3.158(a)	Abandoned claims.
5.137–5.139		Reserved.
Evidence Requirements for Former Prisoners of War (POWs)		
5.140	3.1(y)	Determining former prisoner of war status.

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.141(a)	3.304(c)	Medical evidence for former prisoner of war disability compensation claims.
5.141(b)	New.	
5.141(c)	3.304(e).	
5.141(d)	3.304(e) (first sentence).	
5.141(e)	3.304(e) (last two sentences).	
5.141(f)	3.326(b).	
5.142–5.149		Reserved.
General Effective Dates for Awards		
5.150(a)	3.400 introductory text, 3.400(a), 3.400(h)(1), 3.400(o)(1) (first sentence), 3.400(q)(2).	General effective dates for awards or increased benefits.
5.150(b)	3.400(o)(1) (second sentence).	
5.150(c)	New.	
5.151	3.1(r)	Date of receipt.
5.152	3.114	Effective dates based on change of law or VA issue.
5.153	3.156(b), 3.400(q)(1)	Effective date of awards based on receipt of evidence prior to end of appeal period or before a final decision.
5.154–5.159		Reserved.
General Rules on Revision of Decisions		
5.160(a)	3.104(a)	Binding effect of VA decisions.
5.160(b)	3.104(b).	
5.161	3.2600	Review of benefit claims decisions.
5.162(a)	3.105 (introduction first sentence)	Revision of agency of original jurisdiction decisions based on clear and unmistakable error.
5.162(b)	New.	
5.162(c)	3.105(a) (first two sentences).	
5.162(e)	New.	
5.162(f)	3.105(a) (third and last sentences).	
5.163	3.105(b)	Revision of decisions based on difference of opinion.
5.164	New	Standard of proof for reducing or discontinuing a benefit payment or for severing service connection based on a beneficiary's act of commission or omission.
5.165	3.156(c)	Keep phrase ''reducing or discontinuing'' in same order in each use. Check and correct tables of contents.
5.166	3.400(h)(1)	Effective dates for revision of decisions based on difference of opinion.
5.167(a)	3.500(b) introductory text	Effective dates for reducing or discontinuing a benefit payment, or for severing service connection, based on commission or omission, or based on administrative error.
5.167(b)	3.500(b)(1).	
5.167(c)	3.500(b)(2).	
5.168		Reserved.
5.169		Reserved.
General Rules on Protection or Reduction of Existing Ratings		
5.170(a)	New	Calculation of 5-year, 10-year, and 20-year protection periods.
5.170(b)	3.951(b), 3.957.	
5.170(c)	New.	
5.170(d)	New.	
5.170(e)	New.	
5.171(a)	3.344(a)	Protection of 5-year stabilized ratings.
5.171(b)	3.344(c).	
5.171(c)(1)	3.344(c).	
5.171(c)(2)	3.344(a).	
5.171(d) introductory text	New.	
5.171(d)	3.344(a).	
5.171(e)	3.344(b).	
5.172(a)	3.951(b) (first sentence)	Protection of continuous 20-year ratings.
5.172(b)	3.951(b) (second sentence).	
5.172(c)	New.	
5.173	3.951(a)	Protection against reduction of disability rating when VA revises the Schedule for Rating Disabilities.
5.174(a)	3.953(a)	Protection of entitlement to benefits established before 1959.
5.174(b)	3.953(c).	
5.175(a)(1)	3.957 (first sentence)	Severance of service connection.
5.175(a)(2)	3.957 (last sentence).	
5.175(b)(1)	3.105(d) (first and second sentences).	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.175(b)(2)	3.105(d) (third and fourth sentences).	
5.176		Reserved.
5.177(a)	3.105 (introduction—last sentence).	Effective dates for reducing or discontinuing benefit payments or for severing service connection.
5.177(b)	3.105 (introduction—second sentence).	
5.177(c)	3.105 (Introduction first sentence), 3.105(d) (fifth through last sentences), 3.500(r).	
5.177(d)	3.105(c), 3.55(r).	
5.177(e)	3.105(e), 3.500(r), 3.501(g)(2).	
5.177(f)	3.105(f), 3.501(e)(1), 3.501(g)(1).	
5.177(g)	3.105(g), 3.500(r).	
5.177(h)	3.105(h) (last sentence).	
5.177(i)	3.105 (introduction first sentence), 3.500(b).	
5.178		Reserved.
5.179		Reserved.
Subpart D—Dependents and Survivors		
General Dependency Provisions		
5.180		Reserved.
5.181(a)	3.213(a) (first sentence)	Evidence needed to establish dependents.
5.181(b)	3.204(a)(1), 3.213(a), 3.213(c).	
5.181(c)	3.204(a)(2), 3.204(b), 3.213(c).	
5.181(d)	3.204(c).	
5.182(a)	3.213(a), 3.277(b), 3.660(a)(1)	Changes in status of dependents.
5.182(b)	3.213(c).	
5.183(a)(1)	3.401(b)(1)(ii), 3.660(c) (second sentence)	Effective date of awards of benefits for a dependent.
5.183(a)(2)	3.401(b)(2).	
5.183(a)(3)	New.	
5.183(b)(1)	3.401(b)(1)(i), 3.660(c) (first sentence).	
5.183(b)(2)	3.401(b)(1)(i), 3.660(c) (first sentence).	
5.183(b)(3)	3.401(b)(1)(i), 3.403(a)(5), 3.660(c) (first sentence).	
5.183(b)(4)	3.401(b)(3).	
5.183(b)(5)	3.401(b)(4).	
5.184(a)	3.500(g)(2)(ii), 3.501(d)(2), 3.660(a)(2) (last sentence).	Effective date of reduction or discontinuance based on changes in dependency status.
5.184(b)		
5.184(c)	New.	
5.184(d)	New.	
	3.213(b) (first sentence).	
5.185–5.190		Reserved.
Marriage, Divorce, and Annulment		
5.191	3.1(j)	Marriages VA recognizes as valid.
5.192(a)	New	Evidence of marriage.
5.192(b)	3.205(b).	
5.192(c) (except (c)(6)(i))	3.205(a).	
5.192(c)(6)(i)	New.	
5.193	3.205(b) (last sentence)	Proof of marriage termination where evidence is in conflict or termination is contested.
5.194(a)	3.206 (first sentence)	Acceptance of divorce decrees.
5.194(b)(1), 5.194(b)(2)	3.206(a) introductory text.	
5.194(b)(3)	New.	
5.194(c)(1)	3.206(b).	
5.194(c)(2)	3.206(c).	
5.195		Reserved.
5.196(a)(1)	New	Void or annulled marriages.
5.196(a)(2)	3.207(a).	
5.196(b)	3.207(b).	
5.197 (introduction)	3.502(d), 3.503(a)(4)	Effective date of reduction or discontinuance of Improved Pension, disability compensation, or dependency and indemnity compensation due to marriage or remarriage.
5.197(a)	3.500(n)(1).	
5.197(b)	3.500(n)(2)(ii).	
5.198		Reserved.
5.199		Reserved.
Surviving Spouse Status		
5.200(a)	3.52 introductory text	Surviving spouse: requirement of valid marriage to veteran.
5.200(b)(1)	3.52(a).	
5.200(b)(2)	3.52(b), 3.205(c).	
5.200(b)(3)	3.52(c).	
5.200(b)(4)	3.52(d).	
5.201(a)	3.50(b) (except (b)(2))	Surviving spouse: requirements for relationship with the veteran.
5.201(b) (introduction)	3.53(a) (first sentence).	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.201(b)(1)	3.54(e).	
5.201(b)(2)(i)	3.53(a) (first sentence).	
5.201(b)(2)(ii)	New.	
5.201(b)(3)	3.53(b) (second sentence).	
5.201(b)(4)	3.53(a) (second sentence).	
5.201(b)(5)	3.53(b) (first sentence).	
5.201(b)(6)	3.53(b) (last sentence).	
5.202		Reserved.
5.203(a)(1)	3.50(b)(2), 3.214	Effect of remarriage on a surviving spouse's benefits.
5.203(a)(2)	3.50(b)(2).	
5.203(b)(1)	3.50(b).	
5.203(b)(2)	3.500(n)(3).	
5.203(b)(3)	3.400(w).	
5.203(c)	3.55(a)(1).	
5.203(d)(1)–(3)	3.55(a)(2).	
5.203(d)(4)	3.55(a)(5), 3.55(a)(8), 3.215.	
5.203(e)(1), except (e)(1)(iii)	3.55(a)(3).	
5.203(e)(1)(iii)	3.55(a)(6).	
5.203(e)(2)	3.55(a)(3).	
5.203(f)	3.55(a)(10)(i).	
5.204		Reserved.
5.205	3.400(v)	Effective date of resumption of benefits to a surviving spouse due to termination of a remarriage.
5.206–5.219		Reserved.
Child Status		
5.220, except 5.220(b)(1) and 5.220(d)	3.57(a)	Status as a child for VA benefit purposes.
5.220(b)(1)	3.57(a)(1)(ii), 3.315(a), 3.356(b) (first sentence).	
5.220(d)	3.503(a)(2).	
5.221	3.210(a), 3.210(b)	Evidence to establish a parent/natural child relationship.
5.222(a), 5.222(c), 5.222(d)	3.57(c) introductory text, 3.210(c) introductory text.	Evidence to establish an adopted child relationship.
5.222(b)	3.210(c)(1) introductory text, 3.210(c)(1)(i).	
5.223(a)	3.210(c)(2)	Child adopted after a veteran's death.
5.223(b) (except (b)(1))	3.210(c)(2).	
5.223(b)(1)	3.57(c)(1)–(3).	
5.224(a)	3.58	Child status despite adoption out of the veteran's family.
5.224(b)	3.210(c)(1) introductory text, 3.210(c)(1)(ii).	
5.225(a)	3.57(e)(1)	Child status based on adoption into a veteran's family under foreign law.
5.225(b)(1)	3.57(e)(2).	
5.225(b)(2)	3.57(e)(4).	
5.225(c)	New.	
5.225(d)	3.57(e)(3).	
5.226(a)	3.57(b), 3.210(d)	Child status based on being a veteran's stepchild.
5.226(b)	3.57(b), 3.210(d).	
5.226(c), 5.226(d)	New.	
5.227(a)	3.356(a)	Child status based on permanent incapacity for self-support.
5.227(b)(1)(i)	3.356(b)(1)	
5.227(b)(1)(ii)	3.356(b)(2) (last sentence).	
5.227(b)(1)(iii)	3.356(b)(4).	
5.227(b)(1)(iv)	3.356(b)(3) (last sentence).	
5.227(b)(2)(i)	3.356(b)(3).	
5.227(b)(2)(ii)	3.356(b) introductory text, 3.356(b) (third sentence).	
5.227(c)(1)	3.356(b)(3).	
5.227(c)(2)(i)	3.356(b) introductory text, 3.356(b) (second sentence).	
5.227(c)(2)(ii)–(iv)	New.	
5.227(d), except for (d)(3)	New.	
5.227(d)(3)	3.356(b)(2) (first sentence).	
5.228(a)	New	Exceptions applicable to termination of child status based on marriage of the child.
5.228(b)	3.55(b).	
5.229 (introduction)	3.204(b)	Proof of age or birth.
5.229(a)	3.209(a).	
5.229(b)	3.209(b), 3.209(g).	
5.229(c)	3.209(c).	
5.229(d)	3.209(d).	
5.229(e)	3.209(e).	
5.229(f)	3.209(f).	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.229(g)	3.209(g).	
Effective Dates of Changes in Child Status		
5.230	3.403(a)(3)	Effective date of award of pension or dependency and indemnity compensation to or for a child born after the veteran's death.
5.231	3.503(a) introductory text, 3.503(a)(1)	Effective date of reduction or discontinuance: child reaches age 18 or 23.
5.232	3.503(a)(10)	Effective date of reduction or discontinuance: terminated adoptions.
5.233	3.503(a)(6)	Effective date of reduction or discontinuance: stepchild no longer a member of the veteran's household.
5.234(a)	New	Effective date of an award, reduction, or discontinuance of benefits based on child status due to permanent incapacity for self-support.
5.234(b)	3.403(a)(1).	
5.234(c)(1)	3.503(a)(3)(i).	
5.234(c)(2)	3.503(a)(3)(ii).	
5.235(a)	New	Effective date of an award of benefits due to termination of a child's marriage.
5.235(b)	3.400(u).	
5.236		Reserved.
5.237		Reserved.
Parent Status		
5.238(a)	3.59(a), 3.59(b) (first sentence)	Status as a veteran's parent.
5.238(b)	New.	
5.238(c)	New.	
5.238(d)(1), 5.238(d)(2)(i)	3.59(b) (second and third sentences).	
5.238(d)(2)(ii), 5.238(e)	New.	
5.239		Reserved.
Subpart E—Claims for Service Connection and Disability Compensation		
Service-Connected and Other Disability Compensation		
5.240(a)	3.4(a), 3.4(b)(1)	Disability compensation.
5.240(b)	3.4(b)(2).	
5.241 (introduction)	New	Service-connected disability.
5.241(a), 5.241(b)	3.1(k), 3.303(a) (first and second sentences).	
5.241(c)	New.	
5.242(a)	3.303(a) (third sentence)	General principles of service connection.
5.242(b)	3.304(b)(3).	
5.243(a)	New	Establishing service connection.
5.243(b)	3.303(d).	
5.243(c)	3.303(b) (first through third sentences).	
5.243(d)	3.303(b) (fifth sentence).	
5.244(a)	3.304(b) (introduction first sentence)	Condition on entry into military service.
5.244(b)(1)	3.304(b)(1) (first sentence).	
5.244(b)(2)	New.	
5.244(c)(1)	3.304(b) (introduction first sentence).	
5.244(c)(2)	New.	
5.244(d)	3.303(c) (first through fifth sentences).	
5.245	3.306(a)	Service connection based on aggravation of preservice injury or disease.
5.245(b)(1)	New.	
5.245(b)(2)	New.	
5.245(b)(3)	3.306(b)(1).	
5.245(b)(4)	3.306(b)(2).	
5.245(c)	3.306(b), 3.306(c).	
5.246	3.310(a)	Secondary service connection—disability that is proximately caused by service-connected disability.
5.247	3.310(b)	Secondary service connection—nonservice-connected disabilities aggravated by service-connected disability.
5.248	3.310(c)	Service connection for cardiovascular disease secondary to service-connected lower extremity amputation.
5.249(a)(1)	3.304(d)	Special service connection rules for combat-related injury or disease.
5.249(a)(2)	New.	
5.249(b)	New.	
5.250(a)	3.304(f) introductory text	Service connection for posttraumatic stress disorder.
5.250(b)	New.	
5.250(c)	3.304(f)(1).	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.250(d)	3.304(f)(2), 3.304(f)(4).	
5.250(e)	3.304(f)(3).	
5.250(f)	3.304(f)(5).	
5.251(a)	3.303(c) (last sentence)	Current disabilities for which VA cannot grant service connection.
5.251(b), 5.251(c), 5.251(d)	New.	
5.251(e)	3.380.	
5.252–5.259		Reserved.
Presumptions Concerning Service Connection for Certain Diseases, Disabilities, and Related Matters		
5.260(a)	New	General rules governing presumptions of service connection.
5.260(b)	3.307(b), 3.307(c) (first sentence).	
5.260(c)(1)	3.307(d)(1).	
5.260(c)(2)	New.	
5.261(a) (introduction)	3.307(a)(3)	Certain chronic diseases VA presumes are service connected.
5.261(a)(1)	3.307(a)(3).	
5.261(a)(2)	New.	
5.261(b)	3.307(a)(1) (first and second sentences).	
5.261(c) (introduction)	3.307(a)(3), 3.307(b).	
5.261(c) (table)	3.307(a)(3), 3.307(b), 3.309(a).	
5.261(d)	3.309(a).	
5.261(e)	New.	
5.262(a)(1)	3.307(a)(6)(iii), 3.307(a)(6)(iv)	Presumption of service connection for diseases associated with exposure to certain herbicide agents.
5.262(a)(2)	3.307(a)(6)(ii).	
5.262(b)	3.307(a)(6)(i).	
5.262(c)	3.307(a)(1) (last sentence).	
5.262(d)	3.307(a)(6)(iii), 3.307(a)(6)(iv).	
5.262(e)	3.307(a)(6)(ii), 3.309(e).	
5.262(e) Note 1	3.309(e) Note 2.	
5.262(e) Note 2	3.309(e) Note 1.	
5.262(e) Note 3	3.309(e) Note 3.	
5.263	3.313	Presumption of service connection for non-Hodgkin's lymphoma based on service in Vietnam.
5.264(a) (introduction)	3.307(a)(1) (last sentence), 3.307(a)(5)	Diseases VA presumes are service connected in a former prisoner of war.
5.264(a)(1)	3.309(c)(1), 3.309(c)(2)(i).	
5.264(a)(2)	3.307(a)(5), 3.309(c)(1), 3.309(c)(2)(ii).	
5.264(b)	3.309(c)(1).	
5.264(c)	3.309(c)(2).	
5.265(a)	3.307(a)(4)	Tropical diseases VA presumes are service connected.
5.265(b)	3.307(a)(1) (first and second sentences).	
5.265(c)	3.307(a)(2).	
5.265(d)	3.309(b).	
5.265(e)	3.307(d)(1) (third and last sentences).	
5.265(f)	3.308(b).	
5.266	3.317	Disability compensation for certain qualifying chronic disabilities.
5.267	3.316(a)	Presumption of service connection for conditions associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite.
5.268(a)	3.309(d)(3)(i)	Presumption of service connection for diseases associated with exposure to ionizing radiation.
5.268(b)	3.309(d)(1), 3.309(d)(2).	
5.268(c) (introduction)	3.309(d)(3)(ii).	
5.268(c)(1) (introduction)	3.309(d)(3)(ii)(A), 3.309(d)(3)(iv) introductory text.	
5.268(c)(1)(i)–(iv)	3.309(d)(3)(iv)(A)–(D).	
5.268(c)(2)	3.309(d)(3)(ii)(B), 3.309(d)(3)(vi).	
5.268(c)(3) (introduction)	3.309(d)(3)(ii)(C), 3.309(d)(3)(vii) introductory text.	
5.268(c)(3)(i)–(iv)	3.309(d)(3)(vii)(A)–(D).	
5.268(c)(4) (introduction)	3.309(d)(3)(ii)(D)(*1*).	
5.268(c)(4)(i)	3.309(d)(3)(ii)(D)(*1*)(*i*).	
5.268(c)(4)(ii)	3.309(d)(3)(ii)(D)(*1*)(*ii*).	
5.268(c)(4) (Note)	3.309(d)(3)(ii)(D)(*3*).	
5.268(c)(5)	3.309(d)(3)(ii)(D)(*2*).	
5.268(c)(6)	3.309(d)(3)(ii)(E).	
5.268(d)	3.309(d)(3)(iii).	
5.268(e)	3.309(d)(3)(v).	
5.268 Note	New.	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.269(a) (introduction first sentence)	3.311(a)(1), 3.311(b)(1)	Direct service connection for diseases associated with exposure to ionizing radiation.
5.269(a) (introduction second and last sentence)	3.311(b)(1)(iii).	
5.269(a)(1)	3.311(b)(1)(i).	
5.269(a)(2)	3.311(b)(1)(ii).	
5.269(a)(3)	3.311(b)(1)(iii).	
5.269(b) (introduction)	3.311(b)(2) introductory text.	
5.269(b)(1)	3.311(b)(2)(i)–(xxiv), 3.311(b)(5).	
5.269(b)(2)	3.311(b)(3).	
5.269(b)(3)	3.311(b)(4).	
5.269(c)(1) (introduction first sentence)	3.311(a)(1) (except last sentence).	
5.269(c)(1) (introduction last sentence)	3.311(a)(2) introductory text.	
5.269(c)(1)(i)–(iii)	3.311(a)(2)(i)–(iii).	
5.269(c)(2)	3.311(a)(1) (last sentence).	
5.269(c)(3)	3.311(a)(4)(ii).	
5.269(c)(4)	3.311(a)(4)(i).	
5.269(d)(1)	3.311(a)(1) (except last sentence).	
5.269(d)(2)	New.	
5.269(e)(1) (introduction first sentence)	3.311(c) introductory text.	
5.269(e)(2)	3.311(a)(3).	
5.269(f)(1)	3.311(c)(1) introductory text, 3.311(c)(1)(i), 3.311(e).	
5.269(f)(2)	3.311(c)(3).	
5.269(f)(3)	3.311(c)(1)(ii).	
5.269(f)(4)	3.311(c)(2), 3.311(d)(1), 3.311(d)(2).	
5.269(f)(5)	3.311(d)(3) (first sentence).	
5.269(f)(6)	3.311(d)(3) (second sentence).	
5.269(g)	3.311(f).	
5.269(h)	3.311(g).	
5.270	3.318	Presumption of service connection for amyotrophic lateral sclerosis.
5.271	3.317(c), 3.317(d), 3.317 Table, 3.317(e)(2)	Presumption of service connection for infectious diseases
5.272–5.279		Reserved.
Rating Service-Connected Disabilities		
5.280(a)	3.321(a), 3.321(b)(1), 3.321(b)(3), 3.321(c)	General rating principles.
5.280(b)(1)	3.321(b)(1).	
5.280(b)(2)	3.321(b)(3).	
5.280(c)	3.321(c).	
5.281	3.324	Multiple 0 percent service-connected disabilities.
5.282(a)	3.383(a)	Special consideration for paired organs and extremities.
5.282(b)	3.383(a)(1)–(5).	
5.282(c)(1)	3.383(b)(1).	
5.282(c)(2)	3.383(b)(1).	
5.282(c)(3)	3.383(c).	
5.282(c)(4)	3.383(d).	
5.283	3.340	Total and permanent total ratings and unemployability.
5.284	3.341	Total disability ratings for disability compensation purposes.
5.285(a)	3.343(a)	Discontinuance of total disability ratings.
5.285(b)	3.343(c).	
5.286–5.299		Reserved.
Additional Disability Compensation Based on a Dependent Parent		
5.300(a)(1)	3.250(a)(1)	Establishing dependency of a parent.
5.300(a)(2)	New.	
5.300(b) (introduction)	3.250(a)(2) (first sentence).	
5.300(b)(1)	3.250(b) introductory text.	
5.300(b)(1)(i)	3.250(b)(1).	
5.300(b)(1)(ii)	3.250(c).	
5.300(b)(2)(i)	3.250(a)(2) (last sentence).	
5.300(b)(2)(ii)	3.250(b)(2).	
5.300(c)	3.250(b)(2).	
5.300(d)	3.660(a)(1).	
5.300(e)	3.250(d).	
5.301		Reserved.
5.302(a)	3.262(a) introductory text	General income rules—parent's dependency.
5.302(b)	3.262(b)(1).	
5.302(c)	3.261(a)(3).	

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Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.302(d)	3.262(k)(2).	
5.302(e)	3.262(k)(3).	
5.303(a)	3.262(a)(2)	Deductions from income—parent's dependency.
5.303(b)	3.261(a)(24), 3.262(i)(1), 3.262(j)(4).	
5.303(c)	3.262(a)(1).	
5.304 (introduction)	3.261 introductory text, 3.262(t) introductory text.	Exclusions from income—parent's dependency.
5.304(a)	3.261(a)(7).	
5.304(b)	3.262(h).	
5.304(c)	3.261(a)(12).	
5.304(d), except (d)(6)	3.261(a)(20).	
5.304(d)(6)	New.	
5.304(e)	3.261(a)(20).	
5.304(f)	3.261(a)(13).	
5.304(g)	3.261(a)(28), 3.262(t)(2).	
5.304(h)	3.261(a)(30), 3.262(k)(4).	
5.304(i)	3.261(a)(31).	
5.304(j)	3.262(a)(2) (last sentence).	
5.304(k)	3.261(a)(22).	
5.304(l)	New.	
5.304(m)	New.	
5.305–5.310		Reserved.
Disability Compensation Effective Dates		
5.311	3.400(b)(2)	Effective dates—award of disability compensation.
5.312(a)	New	Effective dates—increased disability compensation.
5.312(b)	3.400(o)(2).	
5.313(a)	New	Effective dates—discontinuance of compensation for a total disability rating based on individual unemployability.
5.313(b)	3.501(e)(2).	
5.313(c)	3.501(f).	
5.314(a)	New	Effective dates–discontinuance of additional disability compensation based on parental dependency.
5.314(b)	3.660(a)(2).	
5.314(c)	3.500(n)(2)(ii), 3.660(a)(2) (last sentence).	
5.314(d)	3.500(g)(2)(ii), 3.660(a)(2) (last sentence).	
5.315	3.660(d)	Effective dates—additional disability compensation based on decrease in the net worth of a dependent parent.
5.316–5.319		Reserved.
Special Monthly Compensation: General		
5.320 (introduction)	3.352(a) (fifth sentence).	
5.320(a)	3.352(a) (first and fifth through seventh sentences), 3.352(c).	Determining need for regular aid and attendance.
5.320(b)	3.352(a) (second through fourth sentences).	
5.321(a)	3.351(a)(2)	Additional disability compensation for a veteran whose spouse needs regular aid and attendance.
5.321(b)	3.351(c)(1), 3.351(c)(2).	
5.321(c)	3.351(c)(3).	
5.322(a)	New	Special monthly compensation: general information and definitions of disabilities.
5.322(b)	3.350(a)(2)(i).	
5.322(c)	3.350(a)(2)(i), 3.350(a)(2)(i)(*b*).	
5.322(d)	3.350(c)(2).	
5.322(e) (introduction)	New.	
5.322(e)(1)	3.350(d) (introduction except first sentence).	
5.322(e)(2)	3.350(d) (introduction except first sentence).	
5.322(f)	3.350(b)(2) (second sentence).	
5.322(g)	3.350(a)(4).	
Special Monthly Compensation: Specific Statutory Bases		
5.323(a)	3.350(a) (first sentence)	Special monthly compensation under 38 U.S.C. 1114(k).
5.323(b)(1)	3.350(a) (second sentence).	
5.323(b)(2)(i)	3.350(a) (third sentence).	
5.323(b)(2)(ii)	New.	
5.323(b)(3)	3.350(a) (fourth sentence).	
5.323(c)(1)	New.	
5.323(c)(2)	3.350(a)(1)(i) (introduction first sentence).	
5.323(c)(3) (introduction)	3.350(a)(1)(i) (introduction second sentence).	
5.323(c)(3)(i)–(iii)	3.350(a)(1)(i)(a)–(c).	
5.323(c)(3)(iv)	New.	
5.323(c)(4), 5.323(c)(5)	New.	
5.323(c)(6)	3.350(a)(1)(iii).	
5.323(c)(7)	3.350(a)(1)(iv).	

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Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.323(d)(1)	3.350(a)(3)(i).	
5.323(d)(2)	3.350(a)(3)(ii).	
5.323(e)	3.350(a)(5).	
5.323(f)	3.350(a)(6).	
5.324 (introduction)	3.350(b) introductory text	Special monthly compensation under 38 U.S.C. 1114(*l*)
5.324(a)	3.350(b) introductory text.	
5.324(b)	3.350 introductory text.	
5.324(c)	3.350(b) introductory text, 3.350(b)(2) (except second sentence).	
5.324(d)	3.350(b) introductory text.	
5.324(e)	3.350(b) introductory text, 3.350(b)(3), 3.350(b)(4) (second sentence).	
5.325 (introduction)	3.350(f) introductory text	Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(*l*) and (m).
5.325(a)	3.350(f)(1)(i).	
5.325(b)	3.350(f)(1)(iii).	
5.325(c)	3.350(f)(1)(vi).	
5.325(d)	3.350(f)(2)(i).	
5.326 (introduction)	3.350(c)(1) introductory text	Special monthly compensation under 38 U.S.C. 1114(m).
5.326(a)	3.350(c)(1)(i).	
5.326(b)	3.350(c)(1)(ii).	
5.326(c)	3.350(f)(1)(ii).	
5.326(d)	3.350(f)(1)(iv).	
5.326(e)	3.350(c)(1)(iii).	
5.326(f)	3.350(f)(1)(viii).	
5.326(g)	3.350(c)(1)(iv).	
5.326(h)	3.350(f)(2)(ii).	
5.326(i)	3.350(c)(1)(v), 3.350(c)(3).	
5.327 (introduction)	3.350(f) introductory text	Special monthly compensation at the intermediate rate between 38 U.S.C. 1114(m) and (n).
5.327(a)	3.350(f)(1)(x).	
5.327(b)	3.350(f)(1)(v).	
5.327(c)	3.350(f)(1)(vii).	
5.327(d)	3.350(f)(1)(ix).	
5.327(e)	3.350(f)(2)(iii).	
5.328	3.350(d) (introductory text first sentence)	Special monthly compensation under 38 U.S.C. 1114(n).
5.328(a)	3.350(d)(1).	
5.328(b)	3.350(f)(1)(xi).	
5.328(c)	3.350(d)(2).	
5.328(d)	3.350(d)(3).	
5.328(e)	3.350(d)(4).	
5.329	3.350(f) introductory text, 3.350(f)(1)(xii)	Special monthly compensation under 38 U.S.C. 1114(n) and (*o*).
5.330 (introduction)	3.350(e)(1) introductory text	Special monthly compensation under 38 U.S.C. 1114(*o*)
5.330(a)	3.350(e)(1)(i).	
5.330(b)	3.350(e)(1)(iii).	
5.330(c)	3.350(e)(1)(iv).	
5.330(d)	3.350(e)(2).	
5.330(e)	3.350(e)(1)(ii), 3.350(e)(3).	
5.331(a)	3.350(f) introductory text	Special monthly compensation under 38 U.S.C. 1114(p).
5.331(b)(1)	3.350(f)(2)(iv)	
5.331(b)(2)	3.350(f)(2)(v).	
5.331(b)(3)	3.350(f)(2)(vi).	
5.331(c)	3.350(f)(2)(vii).	
5.331(d)(1)	3.350(f)(3).	
5.331(d)(2)	3.350(f)(4)(i).	
5.331(d)(3)	3.350(f)(3).	
5.331(e)(1)	3.350(f)(4) introductory text.	
5.331(e)(2)	3.350(f)(4)(i).	
5.331(e)(3)	3.350(f)(4)(ii).	
5.331(f)	3.350(f)(5).	
5.332(a)	3.350(h)(1), 3.350(h)(2)	Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2).
5.332(b)	3.350(h)(1) (first sentence), 3.350(h)(2) (first sentence), 3.350(h)(3) (first sentence), 3.352(b)(1)(ii).	
5.332(c)(1)	3.350(h)(1) (first sentence), 3.350(h)(2) (first sentence), 3.350(h)(3) (second and last sentences), 3.352(b)(1)(ii).	
5.332(c)(1)(i)	3.350(h)(1) (first sentence), 3.350(h)(2) (first sentence) 3.352(b)(1)(i).	
5.332(c)(1)(ii)	3.352(b)(1)(ii).	
5.332(c)(1)(iii), 5.332(c)(1)(iv)	3.352(b)(1)(iii).	
5.332(c)(1)(v)	3.350(h)(1) (first sentence), 3.350(h)(2) (first sentence).	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.332(c)(2)	3.352(b)(2) (first sentence).	
5.332(c)(3)	3.352(b)(2) (second sentence).	
5.332(c)(4)	3.352(b)(2) (third sentence).	
5.332(c)(5)	3.352(b)(3).	
5.332(c)(6)	3.352(b)(4).	
5.332(c)(7)	New.	
5.333 (introduction)	3.350(i) (introduction)	Special monthly compensation under 38 U.S.C. 1114(s).
5.333(a)	3.350(i)(1).	
5.333(b)	3.350(i)(2).	
5.334	New	Special monthly compensation tables.
Special Monthly Compensation: Effective Dates		
5.335	3.401(a)(1)	Effective dates: special monthly compensation under §§ 5.332 and 5.333.
5.336(a)	3.401(a)(3)	Effective dates: additional compensation for regular aid and attendance payable for a veteran's spouse under § 5.321.
5.336(b)	3.501(b)(3).	
5.337–5.339		Reserved.
Tuberculosis		
5.340	3.370	Pulmonary tuberculosis shown by X-ray in active military service.
5.341	3.371	Presumption of service connection for disease; wartime and service after December 31, 1946.
5.342	3.372	Initial grant following inactivity of tuberculosis.
5.343	3.374	Effect of diagnosis of active tuberculosis.
5.344	3.375	Determination of inactivity (complete arrest) of tuberculosis.
5.345	3.378	Changes from activity in pulmonary tuberculosis pension cases.
5.346(a)	3.959	Tuberculosis and compensation under 38 U.S.C. 1114(q) and 1156.
5.346(b)(1)(i)	3.350(g)(1).	
5.346(b)(1)(ii)	3.401(g).	
5.346(b)(2)	3.350(g)(2).	
5.347	3.343(b)	Continuance of a total disability rating for service-connected tuberculosis.
5.348		Reserved.
5.349		Reserved.
Injury or Death Due to Hospitalization or Treatment		
5.350	3.361	Benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.
5.351	3.400(i)	Effective dates of awards of benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.
5.352	3.362	Effect of Federal Tort Claims Act compromises, settlements, and judgments entered after November 30, 1962, on benefits awarded under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.
5.353	3.363	Effect of Federal Tort Claims Act administrative awards, compromises, settlements, and judgments finalized before December 1, 1962, on benefits awarded under 38 U.S.C. 1151(a).
5.354–5.359		Reserved.
Ratings for Health-care Eligibility Only		
5.360(a)(1)	New	Service connection of dental conditions for treatment purposes.
5.360(a)(2)	3.381(a).	
5.360(b) (introduction)	3.381(b) (first sentence).	
5.360(b)(1)	3.381(d) (first sentence).	

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Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.360(b)(2)	3.381(c).	
5.360(c)(1)	3.381(b) (first sentence).	
5.360(c)(2)	New.	
5.360(c)(3)	3.381(b) (last sentence).	
5.360(d) (introduction)	3.381(d) (last sentence).	
5.360(d)(1)	3.381(e)(1).	
5.360(d)(2)	3.381(e)(2).	
5.360(d)(3)	3.381(e)(3).	
5.360(d)(4)	3.381(e)(4).	
5.360(d)(5)	3.381(f)(3).	
5.360(d)(6)	3.381(f)(4).	
5.360(d)(7)	3.381(g).	
5.360(e) (introduction)	3.381(f) introductory text.	
5.360(e)(1)	3.381(e)(5).	
5.360(e)(2)	3.381(e)(6).	
5.360(e)(3)	3.381(f)(1).	
5.361(a)	3.360(a)	Health care eligibility of a person administratively discharged under other-than-honorable conditions.
5.361(b)	3.360(c).	
5.361(c)	3.360(b).	
5.362	New	Presumption of service incurrence of active psychosis for purposes of hospital, nursing home, domiciliary, and medical care.
5.363	3.359	Determination of service connection for a former member of the Armed Forces of Czechoslovakia or Poland.
5.364		Reserved.
Miscellaneous Service-Connection Regulations		
5.365	3.300	Claims based on the effects of tobacco products.
5.366	3.385	Disability due to impaired hearing.
5.367	3.357	Civil service preference ratings.
5.368(a)	3.315(b)	Basic eligibility.
5.368(b)	3.315(c)	Determinations: home loan and education benefits.
5.369		Reserved.
Subpart F—Nonservice-Connected Disability Pensions and Death Pensions		
Improved Pension Requirements: Veterans, Surviving Spouse, and Surviving Child		
5.370	3.1(w), 3.23(a), 3.23(b), 3.23(d)(4)–(5), 3.24(a), 3.271(a), 3.271(h), 3.351(b), 3.351(f).	Definitions for Improved Pension.
5.371(a)	3.24(a)	Eligibility and entitlement requirements for Improved Pension.
5.371(b)	3.3(a)(3).	
5.371(c)	3.3(b)(4), 3.24(a).	
5.371(d)	3.3(a)(3)(v), 3.3(b)(4)(iii), 3.23(b).	
5.372(a)	New	Wartime service requirements for Improved Pension.
5.372(b)	3.3(a)(3)(i)–(iv), 3.3(b)(4)(i).	
5.372(c)	3.3(b)(4)(ii).	
5.373	3.208	Evidence of age in Improved Pension claims.
5.374–5.379		Reserved.
Improved Disability Pension: Disability Determinations and Effective Dates		
5.380(a)	3.3(a)(3)(vi)(A), 3.323(b), 3.342(a)	Disability requirements for Improved Disability Pension.
5.380(b)	3.3(a)(3)(vi)(B)(*1*)–(*2*).	
5.380(c)(4)	3.342(b)(4).	
5.380(c)(5)	3.321(b)(2).	
5.381		Reserved.
5.382		Reserved.
5.383(a)	3.400 introductory text, 3.400(b)(1) (introductory text), 3.400(b)(1)(ii)(A).	Effective dates of awards of Improved Disability Pension.
5.383(b)	New.	
5.384–5.389		Reserved.
Special Monthly Pension Eligibility for a Veteran and Surviving Spouse		
5.390	3.23(d)(2), 3.351(a)(1), 3.351(a)(5), 3.351(b), 3.351(c).	Special monthly pension for a veteran or surviving spouse based on the need for regular aid and attendance.

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.391(a)	3.23(d)(3), 3.351(d)	Special monthly pension for a veteran or surviving spouse at the housebound rate.
5.391(b)	3.23(d)(3), 3.351(f).	
5.392	3.401(a)(1), 3.402(c)(1)	Effective dates of awards of special monthly pension.
5.393–5.399		Reserved.
Maximum Annual Pension Rates		
5.400 (introduction)	3.23(a) introductory text, 3.24(b)	Maximum annual pension rates for a veteran, surviving spouse, or surviving child.
5.400(a)	3.23(a)(1).	
5.400(b)	3.23(a)(3).	
5.400(c)	3.23(a)(2).	
5.400(d)	3.23(a)(4).	
5.400(e)	3.23(a)(5).	
5.400(f)	3.23(a)(7).	
5.400(g)	3.23(a)(6).	
5.400(h)	3.24(b).	
5.401(a)	3.27(a)	Automatic adjustment of maximum annual pension rates.
5.401(b)	3.23(a), 3.24(b), 3.27(e).	
5.402–5.409		Reserved.
Improved Pension Income, Net Worth, and Dependency		
5.410(a)	3.271(a)	Countable annual income.
5.410(b)(1)	3.23(d)(4).	
5.410(b)(2)	3.23(d)(5).	
5.410(b)(3)	New.	
5.410(c) (introduction)	3.271(a).	
5.410(c)(1)	3.271(a)(1), 3.273(d).	
5.410(c)(2)	3.271(a)(3), 3.273(c).	
5.410(c)(3)	3.271(a)(2), 3.273(d).	
5.410(d)	3.276(a).	
5.410(e)	3.271(b).	
5.410(f) (except (f)(3))	3.271(d).	
5.410(f)(3)	New.	
5.410(g)	New.	
5.411(a)	3.23(d)(4)–(6)	Counting a child's income for Improved Pension payable to a child's parent.
5.411(b)	3.23(d)(6) (second sentence), 3.275(a).	
5.411(c)	3.23(d)(4), 3.23(d)(5), 3.272(m), 3.275(a).	
5.412(a)	3.272(j), 3.275(a)	Income exclusions for calculating countable annual income.
5.412(b) (introduction)	3.272(a).	
5.412(b)(1)	3.272(b).	
5.412(b)(2)	New.	
5.412(b)(3)	3.272(l).	
5.412(c)(1)	3.272(c).	
5.412(c)(2)	New.	
5.412(d)	3.272(d).	
5.412(e)	3.272(e).	
5.412(f)	3.272(f).	
5.412(g)	3.272(n).	
5.412(h)	3.261(a)(38), 3.272(s).	
5.412(i)–(k)	New.	
5.412(l)(1)	3.272(q).	
5.412(l)(2)–(7)	New.	
5.412(l)(8)	3.272(x).	
5.412(m)	New.	
5.413(a)	3.272 (introductory text) (second sentence)	Income deductions for calculating adjusted annual income.
5.413(b) (introduction)	3.272(g) introductory text, (g)(1) introductory text, (g)(2) introductory text.	
5.413(b)(1)	3.272(g)(1)(iii), 3.272(g)(2)(iii), 3.272(g)(3).	
5.413(b)(2)(i)	3.272(g)(1)(i), 3.272(g)(1)(ii).	
5.413(b)(2)(ii)	3.272(g)(2)(i), 3.272(g)(2)(ii).	
5.413(b)(2)(iii)	3.272(g)(3).	
5.413(c)(1)(i)	3.272(h) introductory text, 3.272(h)(1)(ii).	
5.413(c)(1)(ii)	New.	
5.413(c)(1)(iii)	3.272(h)(1)(ii).	
5.413(c)(2)(i)	3.272(h)(2).	
5.413(c)(2)(ii)	3.272(h)(1)(ii).	
5.413(c)(2)(iii)	3.272(h)(1)(ii), 3.272(h)(2)(ii).	
5.413(c)(2)(iv)	3.272(h)(1)(i).	
5.413(c)(3)	3.272(h)(1)(ii).	
5.413(d)	3.272(i).	
5.413(e)	3.271(g).	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.413(f)	3.271(c).	
5.414(a)(1)	3.275(b)	Net worth determinations for Improved Pension.
5.414(a)(2)	3.275(c).	
5.414(a)(2)	3.276(b).	
5.414(b)(1)	3.275(b).	
5.414(b)(2)	3.275(b).	
5.414(b)(3)	3.275(e).	
5.414(b)(4)	3.275(h).	
5.414(b)(5)–(8)	New.	
5.414(c)(1)	3.274(a).	
5.414(c)(2)	3.274(c).	
5.414(c)(3)(i)	3.24(b).	
5.414(c)(3)(ii)	3.274(e).	
5.414(d)(1) (first sentence)	3.274(a), 3.274(c), 3.274(e).	
5.414(d) (except first sentence)	3.275(d).	
5.414(e)	3.274(e).	
5.415	3.660(a)(2), 3.660(d)	Effective dates of changes in Improved Pension benefits based on changes in net worth.
5.416(a)	3.23(d)(1), 3.60	Persons considered as dependents for Improved Pension.
5.416(b)	3.23(d)(1), 3.23(d)(4).	
5.416(c)	3.23(d)(4), (5).	
5.417(a)	3.57(d)(1)	Child custody for purposes of determining dependency for Improved Pension.
5.417(b)	3.57(d)(2).	
5.417(c)	3.57(d)(3).	
5.417(d)	3.57(d)(3).	
5.418		Reserved.
5.419		Reserved.
Improved Pension: Income Reporting Periods, Payments, Effective Dates, and Time Limits		
5.420	New	Reporting periods for Improved Pension.
5.421	3.29(b), 3.273 introductory text, 3.273(a), 3.273(b).	How VA calculates an Improved Pension payment amount.
5.422(a)(1)	3.500(c)	Effective dates of changes to annual Improved Pension payment amounts due to a change in income.
5.422(a)(2)	3.660(a)(2) (second sentence).	
5.422(b)	3.500(c), 3.660(b), 3.660(c).	
5.423(a)	3.271(f)(1)	Improved Pension determinations when expected annual income is uncertain.
5.423(b)	3.271(f)(2).	
5.424(a)–(c)	3.660(b)	Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income.
5.424(d)	New.	
5.425	3.30 introductory text, 3.30(a)–(d), 3.30(f)	Frequency of payment of Improved Pension benefits.
5.426–5.429		Reserved.
Improved Death Pension Marriage Date Requirements and Effective Dates		
5.430 (introduction)	3.54 introductory text	Marriage date requirements for Improved Death Pension.
5.430(a)	3.54(a)(1).	
5.430(b)	3.54(a)(3).	
5.431(a)	New	Effective dates of Improved Death Pension.
5.431(b)	3.400(c).	
5.432	New	Deemed valid marriages and contested claims for Improved Death Pension.
5.433(a)	3.657 introductory text	Effective date of discontinuance of Improved Death Pension payments to a beneficiary no longer recognized as the veteran's surviving spouse.
5.433(b)(1)	3.657(a) introductory text, 3.657(a)(1).	
5.433(b)(2)	3.500(f), 3.657(a) introductory text, 3.657(a)(2).	
5.434	3.500(f), 3.503(a)(9), 3.657(b)	Award or discontinuance of award of Improved Death Pension to a surviving spouse where Improved Death Pension payments to a child are involved.
		Calculating annual Improved Pension amounts for a surviving child.
5.435(a)	3.24(b).	
5.435(b)(1)	3.24(c)(1).	
5.435(b)(2)	3.24(c)(2).	
5.435(b)(3)	3.57(d)(2).	
5.436–5.459		Reserved.

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
Choosing Improved Pension over Other VA Pension Programs		
5.460	3.1(u), 3.1(v), 3.1(x)	Definitions of certain VA pension programs.
5.461		Reserved.
5.462		Reserved.
5.463	3.713(a)	Effective dates of Improved Pension elections.
5.464	3.700(a)(4)	Multiple pension benefits not payable.
5.465–5.469		Reserved.
Continuing Entitlement to Old-Law Pension or Section 306 Pension		
5.470(a)	3.960(b), 3.252(a), 3.252(b)	Reasons for discontinuing or reducing Old-Law Pension or Section 306 Pension.
5.470(b)	3.960(d).	
5.470(c)	3.960(c).	
5.471	3.28	Annual income limits and rates for Old-Law Pension and Section 306 Pension.
5.472(a)	3.262(b)	Rating of income for Old-Law Pension and Section 306 Pension.
5.472(b)(1)	3.252(c).	
5.472(b)(2) (introduction)	New.	
5.472(b)(2)(i), 5.472(b)(2)(ii)	3.262(h).	
5.472(b)(3)	3.260(g).	
5.472(b)(4)	3.252(c), 3.260 introductory text, 3.660(a)(2).	
5.472(c)(1)	3.262(a)(2), 3.262(a)(3).	
5.472(c)(2)	3.262(j)(4).	
5.472(c)(3)	3.261(a)(22), 3.262(a)(1).	
5.472(d)(1),	3.262(k)(1), 3.262(k)(2).	
5.472(d)(2)	3.262(k)(1), 3.262(k)(2).	
5.472(d)(3)	New.	
5.472(d)(4)	3.262(k)(1).	
5.472(d)(5)	3.262(k)(3), 3.262(k)(4).	
5.472(d)(6)	3.262(k)(4).	
5.472(d)(7)	3.262(k)(5).	
5.472(e)	3.261(a)(20).	
5.472(f) introduction)	3.262(t) introductory text.	
5.472(f)(1)	3.261(a)(6), 3.262(c).	
5.472(f)(2)	3.262(r).	
5.472(f)(3)	3.261(a)(12).	
5.472(f)(4)	3.261(a)(13).	
5.472(f)(5)	3.261(a)(31).	
5.472(f)(6)	3.262(t)(2).	
5.472(f)(7)	3.261(a)(20).	
5.472(f)(8)	3.261(a)(7).	
5.472(f)(9)	3.262(a)(2).	
5.472(f)(10)	3.261(a)(26).	
5.472(f)(11)	3.261(a)(22).	
5.472(f)(12)	3.262(e) introductory text, 3.262(e)(1)–(2), 3.262(f)–(g), 3.262(i)(2), 3.262(j)(1)–(3).	
5.472(f)(13)	New.	
5.472(g)(1)	3.262(d), 3.262(f).	
5.472(g)(2)	3.262(f).	
5.472(g)(3)	3.262(k)(1).	
5.472(h)	3.262(d).	
5.473(a)	3.262(b)(2)	Counting a dependent's income for Old-Law Pension and Section 306 Pension.
5.473(b)(1)	New.	
5.473(b)(2)	3.262(b)(2).	
5.473(c)(1)	3.252(e)(2).	
5.473(c)(2)	3.252(e)(3).	
5.473(d)	3.261(a)(4).	
5.474(a)	3.960(a)	Deductible expenses for Section 306 Pension only.
5.474(b)	3.261(b)(1), 3.262(l), 3.262(l)(1)–(3).	
5.474(c)	3.261(b)(3), 3.262(n), 3.262(p).	
5.474(d)	3.261(b)(5), 3.262(k)(6).	
5.475(a)	3.260(f)	Gaining or losing a dependent for Old-Law Pension and Section 306 Pension.
5.475(b) (except (b)(2)(ii))	3.260(f).	
5.475(b)(2)(ii)	3.252(e)(4).	
5.475(c)	3.252(d).	
5.476(a)	3.263(b)	Net worth for Section 306 Pension only.
5.476(b)	3.263(a).	
5.476(c)	3.263(d).	
5.476(d)	New.	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.477(a) (introduction), 5.477(a)(1)	3.501(d)(2), 3.660(a)(2)	Effective dates of reductions or discontinuances of Old-Law Pension and Section 306 Pension.
5.477(a)(2)	3.660(a)(2).	
5.477(a)(3)	3.660(a)(2).	
5.477(b)	New.	
5.478(a)	3.260(b)	Time limit to establish continuing entitlement to Old-Law Pension or Section 306 Pension.
5.478(b)	3.660(b)(1).	
5.478(c)	3.960(d).	
5.479–5.499		Reserved.
Subpart G—Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary		
General Provisions		
5.500(a)	New	Proof of death.
5.500(b)	3.211(a).	
5.500(c) introduction	New.	
5.500(c) (except introduction)	3.211(d).	
5.500(d)	3.211(b).	
5.500(e)	3.211(c).	
5.501(a)	New	Proving death by other means.
5.501(b)	3.211(e) (first sentence).	
5.501(c)	3.211(e) (second sentence).	
5.501(d)	3.211(f), 3.211(g).	
5.502(a)	3.212(a)	Proving death after 7 years of continuous, unexplained absence.
5.502(b)	3.212(b).	
5.502(c)	3.212(b), 3.212(c).	
5.503(a)	New	Establishing the date of death.
5.503(b)	3.212(a).	
5.503(c)	New.	
5.504	3.312	Service-connected cause of death.
5.505–5.509		Reserved.
Dependency and Indemnity Compensation—General		
5.510(a)	3.5(a)	Dependency and indemnity compensation—basic entitlement.
5.510(b), except for (b)(1)(ii)	New.	
5.510(b)(1)(ii)	3.5(b).	
5.510(c)	3.5(d).	
5.510(d)	3.251(a)(1).	
5.511(a)	3.351(a)(3), 3.351(a)(4), 3.351(b), 3.351(c)(3)	Special monthly dependency and indemnity compensation.
5.511(b)	3.351(c)(1), 3.351(c)(2).	
5.511(c)	3.351(e).	
5.512	3.5(c)	Eligibility for death compensation or death pension instead of dependency and indemnity compensation.
5.513–5.519		Reserved.
Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for Surviving Spouses and Children		
5.520(a)	New	Dependency and indemnity compensation—time of marriage requirements for surviving spouses.
5.520(b)	3.22(d).	
5.520(b)(1)(i)	3.54 introductory text.	
5.520(b)(1)(ii)	3.54(c)(2).	
5.520(b)(1)(iii)	3.54(c)(3).	
5.520(b)(1)(iv)	3.54(c)(1).	
5.520(b)(2)	New.	
5.521	3.22(a), 3.22(b), 3.22(c)	Dependency and indemnity compensation benefits for survivors of certain veterans rated totally disabled at time of death.
5.522(a), 5.522(b)	3.22(e)	Dependency and indemnity compensation benefits for survivors of certain veterans rated totally disabled at time of death—offset of wrongful death damages.
5.522(c)(1)	New.	
5.522(c)(2)	3.22(g).	
5.522(c)(3)	New.	
5.522(c)(4)	3.22(f).	
5.522(c)(5)	3.22(g).	
5.522(d)	3.22(g).	
5.523	3.10	Dependency and indemnity compensation rate for a surviving spouse.
5.524(a), except for (a)(1)	3.650(c)(2)	Awards of dependency and indemnity compensation benefits to a child when there is a retroactive award to a schoolchild.
5.524(a)(1)	3.650(c)(1).	
5.524(b), 5.524(c)	3.650(c)(1).	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.525	3.107	Awards of dependency and indemnity compensation when not all dependents apply.
5.526–5.529		Reserved.
Dependency and Indemnity Compensation—Eligibility Requirements and Payment Rules for A Parent		
5.530	New	Eligibility for, and payment of, parent's dependency and indemnity compensation.
5.531(a)	3.251(b), 3.262(a) introductory text.	General income rules for parent's dependency and indemnity compensation.
5.531(b)(1)	3.262(a) introductory text.	
5.531(b)(2)(i)	3.261(a)(7).	
5.531(b)(2)(ii)	3.261(a)(26).	
5.531(b)(2)(iii)	3.262(h).	
5.531(c)	3.262(b)(1).	
5.531(d)(1), 5.531(d)(2)	3.262(k)(1), 3.262(k)(2).	
5.531(d)(3)	New.	
5.531(d)(4)	3.262(k)(1).	
5.531(e)	3.260(b).	
5.532(a)	3.262(a)(2), 3.262(a)(3)	Deductions from income for parent's dependency and indemnity compensation.
5.532(b)	3.262(j)(4).	
5.532(c)	3.261(b)(2), 3.261(b)(4), 3.262(o), 3.262(p).	
5.532(d)	3.261(b)(1), 3.262(l) introductory text, 3.262(l)(4).	
5.532(e)	3.261(a)(22), 3.262(a)(1).	
5.533(a)	3.261(a)(12)	Income not counted for parent's dependency and indemnity compensation.
5.533(b)(1)	3.262(c).	
5.533(b)(2)	3.262(d), 3.262(f).	
5.533(c), 5.533(d)	3.261(a)(20).	
5.533(e)	3.262(f).	
5.533(f)	3.261(a)(13).	
5.533(g) (introduction)	3.262(e) introductory text, 3.262(e)(1), 3.262(e)(2), 3.262(e)(4).	
5.533(g)	3.262(e) introductory text, 3.262(e)(4), 3.262(f)–(g), 3.262(i)(2), 3.262(j)(1)–(2), 3.262(j)(4).	
5.533(h)	3.262(t) introductory text, 3.262(t)(1).	
5.533(i)	3.262(k)(5).	
5.533(j)	3.261(a)(31).	
5.533(k)	3.261(a)(38), 3.262(w).	
5.533(l)–(n)	New.	
5.533(o)	3.262(a)(2) (last sentence).	
5.533(p)	3.261(a)(22).	
5.533(q)	New.	
5.534(a)	3.251(b), 3.260 introductory text	When VA counts a parent's income for parent's dependency and indemnity compensation.
5.534(b)	3.260(c), 3.260(d), 3.260(f).	
5.534(c)	3.260(f).	
5.535	3.660(b) introductory text, 3.660(b)(1)	Adjustment to a parent's dependency and indemnity compensation when income changes.
5.536(a)	3.25	Parent's dependency and indemnity compensation rates.
5.536(b)	3.25, 3.27(b), 3.27(e).	
5.536(c)	3.25(b), 3.251(a)(2).	
5.536(d)	3.251(a)(4).	
5.536(e)	3.251(a)(5).	
5.536(f)(1)	3.25(a), 3.25(c), 3.25(d).	
5.536(f)(2)	3.25(e).	
5.536(g)	3.260(f).	
5.536(h)	3.704(b).	
5.537(b)	3.30 introductory text, 3.30(e)	Payment intervals for parent's dependency and indemnity compensation.
Effective Dates		
5.538(a)	3.400(c)(1)	Effective date of dependency and indemnity compensation award.
5.538(b)	3.400(c)(2).	
5.538(c)	3.400(c)(4)(i).	
5.538(d)	3.400(c)(4)(ii).	
5.538(e)	3.402(a).	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.539(a)	3.657 introductory text	Discontinuance of dependency and indemnity compensation to a person no longer recognized as the veteran's surviving spouse.
5.539(b)(1)	3.657(a) introductory text, 3.657(a)(1).	
5.539(b)(2)	3.500(f), 3.657(a) introductory text, 3.657(a)(2).	
5.540(a)	3.657 introductory text	Effective date and payment adjustment rules for award or discontinuance of dependency and indemnity compensation to a surviving spouse where payments to a child are involved.
5.540(b)	3.657(b)(1).	
5.540(c)(1), 5.540(c)(2)	3.657(b)(2).	
5.540(c)(3)	New.	
5.541	3.502 introductory text, 3.502(b)	Effective date of reduction of a surviving spouse's dependency and indemnity compensation due to recertification of pay grade.
5.542(a)	3.660(b) introductory text, 3.660(b)(1)	Effective date of an award or an increased rate based on decreased income: parents' dependency and indemnity compensation.
5.542(b)	3.660(b)(2).	
5.543(a)	3.660(a)(2) (second sentence)	Effective date of reduction or discontinuance based on increased income: parents' dependency and indemnity compensation.
5.543(b)	3.660(a)(3).	
5.544(a)	3.650(a) introductory text	Dependency and indemnity compensation rate adjustments when an additional survivor files a claim.
5.544(b)(1)	3.650(a)(1).	
5.544(b)(2)	3.650(a)(2).	
5.544(c)	3.650(b).	
5.544(d)	3.650(a) (last paragraph).	
5.545(a)	3.402(c), 3.404	Effective dates of awards and discontinuances of special monthly dependency and indemnity compensation.
5.545(b)(1)	3.502(e)(1), 3.504.	
5.545(b)(2)	New.	
5.545(c)	3.402(c)(2), 3.404.	
5.546–5.550		Reserved.
Accrued Benefits		
5.551(a)	3.667(e), 3.1000(d)(2), 3.1000(d)(3)	Persons entitled to accrued benefits.
5.551(b)	3.1000(a).	
5.551(c)	3.1000(a)(1), 3.1000(d)(1).	
5.551(d)	3.1000(a)(2), 3.1000(f).	
5.551(e)	3.1000(a)(3), 3.1000(a)(4), 3.1000(d)(2).	
5.551(f)	3.1000(a)(5), 3.1002.	
5.551(g)	3.1000(c)(2).	
5.552	3.1000(c)	Claims for accrued benefits.
5.553	3.1000(c)(1)	Notice of incomplete applications for accrued benefits.
5.554	3.803(d), 3.1000(e)–(h)	VA benefits payable as accrued benefits.
5.555	New	Relationship between accrued-benefits claim and claims filed by the deceased beneficiary.
5.556–5.563		Reserved.
Special Provisions		
5.564(a)(1)	3.1003 introductory text, 3.1003(a), 3.1003(b)	Cancelation of checks mailed to a deceased payee; payment of such funds as accrued benefits.
5.564(a)(2), 5.564(a)(3)	New.	
5.564(b)	3.1003(a)(2).	
5.564(c)	3.1003(c).	
5.565(a)–(d)(1)	New	Special rules for payment of VA benefits on deposit in a special deposit account when a payee living in a foreign country dies.
5.565(d)(2)	3.1008.	
5.566(a)	3.1009 introductory text	Special rules for payment of all VA benefits except insurance payments deposited in a personal funds of patients account when an incompetent veteran dies.
5.566(b) and (c)	New.	
5.566(d)	3.1000(d)(1)–(3), 3.1009(a).	
5.566(e)	3.1009(b).	
5.567	3.1001	Special rules for payment of Old-Law Pension when a hospitalized competent veteran dies.
5.568	3.1007	Non-payment of certain benefits upon death of an incompetent veteran.
5.569–5.579		Reserved.
Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors		
Special Benefits for Veterans, Dependents, and Survivors		
5.580(a)	3.802(a)	Medal of Honor pension.
5.580(b)(1), 5.580(b)(2)	3.802(b).	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.580(b)(3)	3.802(c).	
5.580(b)(4)	3.27(d).	
5.580(c), 5.580(d)	3.802(b).	
5.581(a), 5.581(b)	3.801(a)	Awards of VA benefits based on special acts or private laws.
5.581(c)(1)	3.801(c)(2).	
5.581(c)(2)	3.801(d).	
5.581(d)	3.801(b).	
5.581(e)(1)	3.801(e).	
5.581(e)(2)	New.	
5.581(f)	3.801(c)(1).	
5.582	3.803	Naval pension.
5.583	3.804	Special allowance under 38 U.S.C. 1312.
5.584	3.805	Loan guaranty for a surviving spouse: eligibility requirements.
5.585	3.806	Certification for death gratuity.
5.586(a)	New	Certification for dependents' educational assistance.
5.586(b)	3.807(c).	
5.586(c)	3.807(c).	
5.587	3.811	Minimum income annuity and gratuitous annuity.
5.588	3.812	Special allowance payable under section 156 of Public Law 97–377.
5.589	3.27(c); 3.814	Monetary allowance for a Vietnam veteran's child born with spina bifida.
5.590	3.27(c), 3.815	Monetary allowance for a female Vietnam veteran's child with certain birth defects.
5.591 (introduction)	New	Effective dates of awards for a disabled child of a Vietnam veteran.
5.591(a) (introduction)	3.403(b), 3.403(c), 3.814(e) introductory text, 3.815(i) introductory text.	
5.591(a)(1)	3.403(b).	
5.591(a)(2)	3.403(c), 3.815(i) introductory text.	
5.591(a)(3)	3.403(b), 3.403(c), 3.815(i).	
5.591(a)(4)	3.400(g), 3.814(e)(2), 3.815(i)(2).	
5.591(a)(5)	3.400(o)(2), 3.814(e)(1), 3.815(i)(1).	
5.591(b) (introduction)	3.500(a), 3.814(f), 3.815(j).	
5.591(b)(1)	3.814(f)(1), 3.815(j)(1).	
5.591(b)(2)	3.814(f)(2), 3.815(j)(2).	
5.591(b)(3)	3.503(b).	
5.591(b)(4)	3.814(f) introductory text; 3.815(j) introductory text.	
5.591(b)(5)	3.105(g), 3.500(r).	
5.592	3.816	Awards under *Nehmer* Court orders for disability or death caused by a condition presumptively associated with herbicide exposure.
5.593–5.599		Reserved.
Ancillary Benefits for Certain Service-Connected Veterans and Certain Members of the Armed Forces Serving on Active Duty		
5.600–5.602		Reserved.
5.603(a)	New	Financial assistance to purchase a vehicle or adaptive equipment.
5.603(b)(1)	3.808(e).	
5.603(b)(2)	New.	
5.603(c)(1)	3.808(a), 3.808(b).	
5.603(c)(2)(i)–(iv)	3.808(b).	
5.603(c)(2)(v)	New.	
5.603(d)(1)	3.808(c).	
5.603(d)(2)	New.	
5.603(d)(3)	3.808(d).	
5.603(e)	3.808(c).	
5.604	3.809	Specially adapted housing under 38 U.S.C. 2101(a).
5.605	3.809a	Special home adaptation grants under 38 U.S.C. 2101(b).
5.606(a)	New	Clothing allowance.
5.606(b)	3.810(a) introductory text.	
5.606(b)(1)	3.810(a)(1).	
5.606(b)(2)	3.810(a)(2).	
5.606(b)(3)	3.810(a)(2).	
5.606(c)	3.810(a) introductory text.	
5.606(c)(1), 5.606(c)(2)	3.810(a)(1), 3.810(a)(2).	

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Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.606(d)	3.810(b).	
5.606(e)(1)	3.810(c)(1).	
5.606(e)(2)	3.810(c)(2).	
5.606(f)	3.810(d).	
5.607–5.609		Reserved.
Subpart I—Benefits for Certain Filipino Veterans and Survivors		
Philippine Service		
5.610	3.40	Eligibility for VA benefits based on Philippine service.
5.611	3.41	Philippine service: determination of periods of active military service, including, but not limited to, periods of active military service while in prisoner of war status.
Benefits and Effective Dates of Certain Filipino Veterans and Survivors		
5.612	New	Overview of benefits available to a Filipino veteran and his or her survivor.
5.613	3.42	Payment at the full-dollar rate for disability compensation or dependency and indemnity compensation for certain Filipino veterans or their survivors residing in the U.S.
5.614	3.405	Effective dates of benefits at the full-dollar rate for a Filipino veteran and his or her survivor.
5.615(a)	3.251(a)(3)	Parents' dependency and indemnity compensation based on certain Philippine service.
5.615(b)	3.251(a)(1), 3.251(a)(3).	
5.616	3.1605(a)(3) (last sentence)	Hospitalization in the Philippines.
5.617(a)	3.43(a)	Burial benefits at the full-dollar rate for certain Filipino veterans residing in the U.S. on the date of death.
5.617(b)	3.43(b).	
5.617(c)	3.43(c).	
5.618(a)	New	Effective dates of reductions and discontinuances for benefits at the full-dollar rate for a Filipino veteran and his or her survivor.
5.618(b)	3.500(p).	
5.618 (c)	3.505.	
5.619–5.629		Reserved.
Subpart J—Burial Benefits		
Burial Benefits: General.		
5.630	New	Types of VA burial benefits.
5.631(a), 5.631(b)	3.1600 (first sentence), 3.1600(d)	Deceased veterans for whom VA may provide burial benefits.
5.631(c)	New.	
5.632	3.1601(a)(1), 3.1601(a)(2)	Persons who may receive burial benefits.
5.633(a)	3.1601(a)	Claims for burial benefits.
5.633(b)	3.203(c), 3.1601(b).	
5.634(a)	New	Reimbursable burial expenses: general.
5.634(b)(1)	3.1607.	
5.634(b)(2), 5.634(b)(3)	3.1608.	
5.635	3.1606	Reimbursable transportation expenses for a veteran who is buried in a national cemetery or who died while hospitalized by VA.
5.636	3.1600(b)(3), 3.1601(b)(5), 3.1603, 3.1610(b)	Burial of a veteran whose remains are unclaimed.
5.637		Reserved.
Burial Benefits: Allowances & Expenses Paid by VA		
5.638(a)	3.1600(a)	Burial allowance based on service-connected death.
5.638(b)	New.	
5.638(c)(1)	3.1600(g).	
5.638(c)(2)	New.	
5.639(a), 5.639(c)	3.1600(g)	Transportation expenses for burial in a national cemetery.
5.639(b)	New.	
5.640–5.642		Reserved.
5.643	3.1600(b)(1)–(2), 3.1600(b)(4)	Burial allowance based on nonservice-connected death.

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Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.644(a)	3.1600(c), 3.1605 introductory text	Burial allowance for a veteran who died while hospitalized by VA.
5.644(b)(1)–(4)	3.1600(c).	
5.644(b)(5)	3.1605(a).	
5.644(b)(6)	3.1605(d).	
5.644(c)	3.1605(a).	
5.644(d)	3.1605(b).	
5.645(a)	3.1604(d)(1)(i)–(iv), 3.1604(d)(3)	Plot or interment allowance.
5.645(b)	3.1600(f).	
5.645(c)	3.1601(a)(3).	
5.646–5.648		Reserved.
Burial Benefits: Other		
5.649(a)	3.1602(b), 3.1604(d)(4)	Priority of payments when there is more than one claimant.
5.649(b)	3.1602(a).	
5.649(c)	3.1602(c).	
5.649(d)	3.1601(a)(2)(iii) (second and third sentences).	
5.649(e)	3.1602(a).	
5.650	3.1602(d)	Escheat (payment of burial benefits to an estate with no heirs).
5.651(a), (b)	3.1604(a), 3.1604(c), 3.1604(a)(2)	Effect of contributions by government, public, or private organizations.
5.651(c)(1)	3.1604(b)(1), 3.1604(b)(2)	
5.651(c)(2)	3.1604(b)(3)	
5.651(c)(3)	New.	
5.651(d)	3.1604(a)(1).	
5.652	3.1609	Effect of forfeiture on payment of burial benefits.
5.653	3.954	Eligibility based on status before 1958.
5.654–5.659		Reserved.
Subpart K—Matters Affecting the Receipt of Benefits		
Bars to Benefits		
5.660(a)	3.301(a)	In the line of duty.
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(b)(1)	3.1(n)(3), 3.301(a)	Willful misconduct.
5.661(b)(2)	3.301(b).	
5.661(c)(1)	3.301(c)(2), 3.301(d).	
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) introductory text.	
5.662(a)	3.301(d).	
5.662(b)–(d)	New	Alcohol and drug abuse.
5.663	3.11	Homicide as a bar to VA benefits.
5.663(c)–(f)	New.	
5.664–5.674		
Forfeiture and Renouncement of the Right to VA Benefits		
5.675(a)	3.900(a)	General forfeiture provisions.
5.675(b)	3.900(c)	
5.676(a)	3.901(a)	Forfeiture for fraud.
5.676(b)(1)	3.900(b)(2), 3.901(d).	
5.676(b)(2)	3.900(b)(2), 3.901(b).	
5.676(b)(3)(i)	3.900(b)(2), 3.901(d) (last sentence).	
5.676(b)(3)(ii)–(iii), 5.676(b)(4)	New.	
5.676(b)(5)	3.669(a), 3.669(b)(1), 3.900(b)(2).	
5.676(c)(1)	3.669(d)(1), 3.900(b)(2) (last sentence).	
5.676(c)(2)(i)	3.900(b)(2), 3.901(c).	
5.676(c)(2)(ii), 5.676(c)(3)	New.	
5.676(d)	3.904(a).	
5.676(e)	New.	
5.677(a)	3.902(a)	Forfeiture for treasonable acts.
5.677(b)(1)	3.900(b)(2), 3.902(d).	
5.677(b)(2)	3.900(b)(2), 3.902(b), 3.904(b) (last sentence).	
5.677(b)(3)(i)	3.900(b)(2), 3.902(d) (last sentence).	
5.677(b)(3)(ii)	3.900(b)(2), 3.904(b) (last sentence).	
5.677(b)(4)	New.	
5.677(b)(5)	3.669(a), 3.669(b)(2), 3.900(b)(2).	
5.677(c)(1)	3.669(d)(1), 3.900(b)(2) (last sentence).	

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Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.677(c)(2)	3.900(b)(2), 3.902(c), 3.904(b).	
5.677(d)	3.902(e).	
5.677(e)	New.	
5.678(a)(1)	3.903(a)(3)	Forfeiture for subversive activity.
5.678(a)(2)	3.903(a)(1).	
5.678(a)(3)	3.903(a)(2).	
5.678(a)(4)	3.903(a)(4).	
5.678(a)(5)	3.903(a)(5).	
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), 5.678(b)(3)(ii)	3.900(b)(2), 3.903(b)(1).	
5.678(b)(3)(iii)	New.	
5.678(b)(3)(iv)	3.900(b)(2), 3.903(b)(1), 3.904(c) (first sentence).	
5.678(c)(1)	New.	
5.678(c)(2)	3.904(c) (last sentence).	
5.679(a)	3.905(a)	Forfeiture decision procedures.
5.679(b)	3.905(b).	
5.679(c)(1)	3.905(c).	
5.679(c)(2)	3.905(b).	
5.679(d), 5.679(e)	3.905(d).	
5.680(a)	3.905(a)	Revocation of forfeiture.
5.680(b)	New.	
5.680(c)(1), 5.680(c)(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)	Effective dates: forfeiture.
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)	Presidential pardon for offenses causing forfeiture.
5.682(b), 5.682(c)	3.669(d)(1).	
5.682(d)	3.669(d)(2).	
5.683(a), 5.683(b)	3.106(a)	Renouncement of benefits.
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).	
5.684–5.689		Reserved.
Subpart L—Payments and Adjustments to Payments		
General Rate-Setting and Payments		
5.690	3.21	Where to find benefit rates and income limits.
5.691(a)	3.260(g)	Adjustments for fractions of dollars.
5.691(b)	3.29(a), 3.29(c).	
5.691(c)	3.29(b).	
5.692	3.112	Fractions of one cent not paid.
5.693(a)	3.31(a)	Beginning date for certain VA benefit payments.
5.693(b), 5.693(c)(8), 5.693(d)	3.31 introductory text.	
5.693(c)	3.31(b), 3.31(c).	
5.693(c)(1)	3.31(b).	
5.693(c)(2)	New.	
5.693(c)(3)	3.31(c)(1).	
5.693(c)(4)	3.31(c)(3).	
5.693(c)(5)	3.31(c)(4).	
5.693(c)(6)	3.31(c)(5).	
5.693(c)(7)	3.31(c)(3).	
5.693(c)(8)	3.31(c)(2).	
5.693(c)(9)	3.656(a), 3.656(d).	
5.693(c)(10)	New.	
5.693(d)	3.31(c)(2).	
5.693(e)	New.	
5.694	3.500(g)(1)	Deceased beneficiary.
5.695	3.20	Surviving spouse's benefit for the month of the veteran's death.
5.696(a)	3.57(a)(1)(iii), 3.403(a)(4)	Payments to or for a child pursuing a course of instruction at an approved educational institution.
5.696(b)	3.403(a)(4), 3.667(a)(1) and (2).	
5.696(c)	3.403(a)(4), 3.667(a)(3)–(5).	
5.696(d)	3.403(a)(4), 3.667(a)(5).	

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Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.696(e)	3.403(a)(4).	
5.696(f)	3.403(a)(4), 3.667(b).	
5.696(g)	3.403(a)(4), 3.503(a)(5), 3.667(c).	
5.696(h)	3.403(a)(4), 3.667(d).	
5.696(i)	3.403(a)(4), 3.667(f).	
5.697(a) (introduction)	3.32 (introductory text)	Exchange rates for income received or expenses paid in foreign currencies.
5.697(a)(1)	3.32(a)(1).	
5.697(a)(2)	3.32(a)(2).	
5.697(b)	3.32(b).	
5.698–5.704		Reserved.
General Reductions, Discontinuances, and Resumptions		
5.705(a)	3.500 introductory text, 3.500(a), 3.501 introductory text, 3.502 introductory text, 3.500(a) introductory text.	General effective dates for reduction or discontinuance of benefits.
5.705(b)	New.	
5.706(a)	New.	
5.706(b) (introduction)	New.	
5.706(b)(1)	3.261(a)(32)	Payments excluded in calculating income or net worth.
5.706(b)(2)	3.261(a)(41), 3.262(z), 3.263(h), 3.272(v), 3.275(j).	
5.706(b)(3)	3.261(a)(36), 3.262(u), 3.263(f), 3.272(p), 3.275(g).	
5.706(b)(4)	New.	
5.706(b)(5)	3.261(a)(35), 3.262(s), 3.263(e), 3.272(o), 3.275(f).	
5.706(b)(6)	3.261(a)(40), 3.262(y), 3.263(g), 3.272(u), 3.275(i).	
5.706(b)(7)	New.	
5.706(b)(8)	New.	
5.706(b)(9)	New.	
5.706(b)(10)	New.	
5.706(b)(11)	3.261(a)(39),3.262(x) 3.272(t).	
5.706(b)(12)	New.	
5.70(b)(13)	New.	
5.706(b)(14)	New.	
5.706(b)(15)	3.261(a)(33), 3.261(a)(34).	
5.706(b)(16)	New.	
5.706(b)(17)	New.	
5.706(b)(18)	New.	
5.706(b)(19)	New.	
5.706(b)(20)	New.	
5.706(b)(21)	3.261(a)(33), 3.262(q).	
5.706(b)(22)	New.	
5.706(b)(23)	3.261(a)(14); 3.262(e).	
5.706(b)(24)	3.261(a)(42), 3.262(aa), 3.263(i), 3.272(w), 3.275(k).	
5.707(a), 5.707(b)	New	Deductible medical expenses.
5.707(c)	3.261(b)(1), 3.262(l), 3.272(g).	
5.708(a)(1)	3.256(b)(1), 3.277(c)	Eligibility verification reports.
5.708(a)(2)	3.661(b)(2).	
5.708(b) (introduction)	3.256(b)(4), 3.277(c)(3).	
5.708(b) (except introduction)	3.256(b)(3), 3.256(b)(4), 3.277(c)(2).	
5.708(c)	New.	
5.708(d)	3.661(a)(1).	
5.708(e)(1)	3.256(c), 3.277(d).	
5.708(e)(2)	New.	
5.708(e)(3)	3.661(b)(2)(i).	
5.708(f)	3.661(b)(2)(iii).	
5.708(g)	3.661(b)(2)(ii).	
5.709(a)	3.256(a), 3.277(a), 3.277(b), 3.660(a)(1)	Claimant and beneficiary responsibility to report changes.
5.709(b)	3.256(a), 3.277(b)	
5.710(a)	3.651(a)	Adjustment in benefits due to reduction or discontinuance of a benefit to another payee.
5.710(b)	3.651(b)	
5.710(c)	3.651(c)	
5.711(a)	3.656(a)	Payment to dependents due to the disappearance of a veteran for 90 days or more.
5.711(b)	3.656(a).	
5.711(c)	3.656(d).	
5.711(d)(1)	3.501(c), 3.656(b).	
5.711(d)(2)	3.656(c).	

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Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.712	3.158(c), 3.500(t)	Suspension of VA benefits due to the disappearance of a payee.
5.713(a)–(b)(1)	3.653(a).	Restriction on VA benefit payments to an alien located in enemy territory.
5.713(b)(2), 5.713(b)(3)	New.	
5.713(c)	New.	
5.714(a)	New	Restriction on delivery of VA benefit payments to payees located in countries on Treasury Department list.
5.713(b)(2), 5.713(b)(3)	3.653(c)(1).	
5.714(c), 5.714(d)	3.653(c).	
5.714(e)	3.653(c)(1).	
5.714(f)	New.	
5.715(a)	New	Claims for undelivered or discontinued benefits.
5.715(b)(1)	3.653(b)	
5.715(b)(2)	3.653(b), 3.653(c)(3).	
5.715(b)(3)	3.653(b).	
5.715(c)	3.653(b).	
5.715(d)	3.653(b), 3.653(c)(3).	
5.715(e)	3.653(d).	
5.715(f)	New.	
5.716–5.719		Reserved.
Hospital, Domiciliary, and Nursing Home Care Reductions and Resumptions		
5.720(a)	3.551(a), 3.552(b)(3), 3.556(a), 3.556(f)	Adjustments to special monthly compensation based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.
5.720(b)	3.501(b)(1)–(2), 3.552(a)(1), 3.552(b)(1), 3.552(b)(2), 3.552(c).	
5.720(c)(1)	3.501(b)(2), 3.552(b)(2).	
5.720(c)(2)	3.552(d), 3.552(i).	
5.720(c)(3)	3.552(f), 3.552(g).	
5.720(c)(4)	3.552(h).	
5.720(c)(5)	3.552(a)(3) (first sentence).	
5.706(c)(6)	3.552(a)(3) (second sentence).	
5.720(d)	3.552(a)(1), 3.552(a)(2).	
5.720(e)	3.552(b)(3).	
5.720(f)	3.552(k).	
5.721	New	Reduction of Improved Pension while a veteran is receiving domiciliary or nursing home care.
5.722(a)(1)	3.551(e)(1)	Reduction of Improved Pension while a veteran is receiving domiciliary or nursing home care.
5.722(a)(2)	3.551(e)(1).	
5.722(a)(3)	3.501(i)(5)(i), 3.551(e)(1).	
5.722(b)(1)	3.551(a).	
5.722(b)(2), 5.722(b)(3)	New.	
5.722(b)(4)	3.551(e)(6).	
5.722(c)	3.551(e)(3).	
5.722(d)(1)	3.501(i)(5)(ii), 3.551(e)(2).	
5.722(d)(2)	New.	
5.722(e)	3.551(e)(4).	
5.722(f)	3.551(h).	
5.722(g)	3.551(e).	
5.723 (except 5.723(d)	3.501(i)(6), 3.502(f), 3.551(i)	Reduction of Improved Pension while a veteran, surviving spouse, or child is receiving Medicaid-covered care in a nursing facility.
5.723(d)	New.	
5.724(a)	3.501(b)(1), 3.552(b)(1), 3.552(e) (third and fourth sentences).	Reduction or discontinuance of Improved Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.
5.724(b)	3.552(a)(1), 3.552(a)(2).	
5.724(c)	3.501(i)(3), 3.552(b)(3).	
5.724(d)	3.401(a)(2), 3.552(k).	
5.725	New	Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.
5.726(a)(1)	3.551(a), 3.551(c)(1)	Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care.
5.726(a)(2)	3.551(g).	
5.726(a)(3)	3.551(c)(1).	
5.726(a)(4)	3.501(i)(2)(i), 3.551(c)(1).	
5.726(a)(5)	3.551(f).	
5.726(b)(1)	3.551(a).	
5.726(b)(2), 5.726(b)(3)	New.	
5.726(c)	3.551(c)(3).	
5.726(d)(1)	3.501(i)(2)(iii), 3.551(c)(2).	

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
5.726(d)(2)	New.	
5.727(a)(1)	3.551(b)(1)	Reduction of Old-Law Pension while a veteran is receiving hospital, domiciliary, or nursing home care.
5.727(a)(2)	3.551(g).	
5.727(a)(3)	3.551(b)(1).	
5.727(a)(4)(i) (first sentence)	3.501(i)(1), 3.551(b)(1).	
5.727(a)(4)(i) (second sentence)	New.	
5.727(a)(4)(ii)	3.551(b)(3).	
5.727(b)(1)	3.551(a).	
5.727(b)(2), 5.727(b)(3)	New.	
5.727(c)(1)	3.551(b)(2).	
5.727(c)(2)	3.551(b)(3).	
5.728(a)	3.501(b)(1), 3.552(b)(1), 3.552(e), 3.552(j)	Reduction of Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.
5.728(b)	3.552(e).	
5.728(c)	3.552(b)(3).	
5.729(a)	3.556(a)	Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.
5.729(b)	3.556(b), 3.556(d) (third and fourth sentences).	
5.729(c)	3.556(c).	
5.729(d)	3.556(d) (first sentence), 3.556(e).	
5.730(a)	3.556(a)(1)	Resumption of Old-Law Pension and Old-Law Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.
5.730(b)	3.556(b).	
5.730(c)	3.556(e).	
5.730(d)	3.556(d).	
5.731–5.739		Reserved.
Payments to a Beneficiary Who is Eligible for More than One Benefit: General Provisions		
5.740(a), 5.740(b)	3.701(b)	Definitions relating to elections.
5.740(d)	3.750(d)(2).	
5.741(a)	New	Persons who may make an election.
5.741(b)	New.	
5.742(a)	3.701(b), 3.702(d)(1) (second sentence), 3.711 (second sentence).	Finality of elections; cancellation of certain elections.
5.742(b)		
5.742(c)	New.	
5.742(d), 5.742(e)	3.702(d)(1) (second sentence).	
	New.	
5.743(a)	3.400(j)(1)	General effective dates for awarding, reducing, or discontinuing VA benefits because of an election.
5.743(b)	3.500(e) (first sentence), 3.500(i), 3.500(x).	
5.744		Reserved.
Payments from Service Departments and the Effects of Those Payments on VA Benefits		
5.745	3.401(e), 3.750	Entitlement to concurrent receipt of military retired pay and VA disability compensation.
5.745(b)(4)	3.261(a)(15).	
5.746(a)	3.654(a) (first sentence), 3.700(a)(1)(i)	Prohibition against receipt of active military service pay and VA benefits for the same period.
5.746(b)	3.654(a) (second sentence), 3.700(a)(1)(ii).	
5.746(c)	3.501(a), 3.654(b)(1).	
5.746(d)(1)	3.654(b)(2) (first sentence).	
5.746(d)(2)(i)	New.	
5.746(d)(2)(ii)	3.654(b)(2) (third and fourth sentences).	
5.746(d)(3)	New.	
5.746(d)(4)	3.654(b)(2) (second sentence).	
5.746(d)(5)	3.654(b)(2) (last sentence).	
5.746(e)	3.654(c), 3.700(a)(1)(iii).	
5.747(a)(1)	3.700(a)(2)(iii) (first sentence)	Effect of military readjustment pay, disability severance pay, and separation pay on VA benefits.
5.747(a)(2)	3.700(a)(2)(iv).	
5.747(b)	3.700(a)(3).	
5.747(c)(1)	3.700(a)(5)(i) (first sentence).	
5.747(c)(2)	3.700(a)(5)(ii).	
5.747(d)	3.700(a)(2)(iii), 3.700(a)(3), 3.700(a)(5)(i).	
5.748	3.753	Concurrent receipt of VA disability compensation and retired pay by certain officers of the Public Health Service.
5.749		Reserved.

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
Payments from Other Federal Agencies and the Effects of Those Payments on VA Benefits for a Veteran and Survivor		
5.750(a)(1)	3.500(e) (second sentence), 3.658(a), 3.708(a)(1), 3.708(a)(4).	Election between VA benefits and compensation under the Federal Employees' Compensation Act for death or disability due to military service.
5.750(a)(2)		
5.750(b)	3.708(a)(2).	
	3.708(a)(3), 3.500(e) (second sentence).	
5.751(a)(1)	3.500(e) (second sentence), 3.708(b)(1) (first sentence).	Election between VA benefits and compensation under the Federal Employees' Compensation Act for death or disability due to Federal civilian employment.
5.751(a)(2)	3.708(b)(1) (second sentence), 3.958.	
5.751(b)(1) (last sentence)	3.500(e) (third sentence), 3.708(b)(2).	
5.751(c)	3.500(e) (second sentence), 3.708(b)(1) (second and third sentences (excluding intervening cross reference)).	
5.751(d)	3.500(e) (second sentence).	
5.751(e)(1) (last sentence)	3.500(e) (third sentence), 3.708(a)(3), 3.708(b)(1) (last sentence).	
5.752	3.400(f)	Procedures for elections between VA benefits and compensation under the Federal Employees' Compensation Act.
5.753	3.710	Payment of VA benefits and civil service retirement benefits for the same period.
5.754(a)	New	Effect of payment of compensation under the Radiation Exposure Compensation Act of 1990 on payment of certain VA benefits.
5.754(b), 5.754(c)	3.715.	
5.754(d)	3.500(x).	
5.755		Reserved.
Rules Concerning the Receipt of Multiple VA Benefits		
5.756	3.700 introductory text	Prohibition against concurrent receipt of certain VA benefits based on the service of the same veteran.
5.757(a)	3.701(a) (first and second sentences).	Elections between VA disability compensation and VA pension.
5.757(b)	3.701(a) (first and second sentences)	
5.757(c)	3.701(a).	
5.757(d)	3.701(a) (first and third sentences).	
5.757(e)(1)	3.701(a) (first and fourth sentences).	
5.757(e)(2)	New.	
5.757(e)(3)	3.701(a) (fifth sentence).	
5.757(f)	3.701(c).	
5.758(a)	3.711 (first sentence)	Electing Improved Pension instead of Old-Law Pension or Section 306 Pension.
5.758(b)	3.711 (last sentence).	
5.758(c)	3.960(a).	
5.758(d)	3.701(a) (fifth sentence).	
5.759(a)(1)(i)	3.702(a)	Election between death compensation and dependency and indemnity compensation.
5.759(a)(1)(ii)	3.702(d)(1).	
5.759(a)(2)	3.702(a).	
5.759(b)	3.702(c).	
5.760	3.702(d)(2)	Electing Improved Death Pension instead of dependency and indemnity compensation.
5.761	3.658(b), 3.700(b)(1)	Concurrent receipt of disability compensation, pension, or death benefits by a surviving spouse based on the service of more than one veteran.
5.762(a), 5.762(b)	3.700(b)(2)	Payment of multiple benefits to a surviving child based on the service of more than one veteran.
5.762(c)	3.503(a)(7), 3.659, 3.703.	
5.763	3.704(a)	Payment of multiple benefits to more than one child based on the service of the same veteran.
5.764(a)	3.503(a)(8), 3.659(b), 3.703(c), 3.707(a)	Payment of Survivors' and Dependents' Educational Assistance and VA death pension or dependency and indemnity compensation for the same period.
5.764(b)–(d)	3.707.	
5.765	3.700(b)(3)	Payment of compensation to a parent based on the service or death of multiple veterans.
5.766–5.769		Reserved.

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
Subpart M—Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries		
Determining Eligibility for Apportionments		
5.770	3.450 (except 3.450(f), (g))	Apportionment claims.
5.771	3.451	Special apportionments.
5.772(a)	3.452(a)	Veteran's benefits apportionable.
5.772(b)	3.452(b).	
5.772(c)	3.452(c), 3.454(b) (except (b)(2)).	
5.772(d)	3.452(d).	
5.773	3.453	Veterans disability compensation.
5.774 (except 5.774(e)(2))	3.458	Benefits not apportionable.
5.774(e)(2)	3.503(a)(2).	
5.775–5.779		Reserved.
5.780(a)	3.450(a)(1)(ii)	Eligibility for apportionment of pension.
5.780(b)(1)	3.460(b).	
5.780(b)(2)	3.460(c).	
5.781(a)	3.461(a)	Eligibility for apportionment of a surviving spouse's dependency and indemnity compensation.
5.781(b)	3.461(b)(1).	
5.782(a)	3.400(e)(1), 3.400(e) introductory text	Effective date of apportionment grant or increase.
5.782(b)(1).	New.	
5.782(b)(2)	3.400(e)(2).	
5.782(b)(3)	3.665(f).	
5.782(b)(4)	3.500(d)(1).	
5.783(a)	3.500(g)(1), 3.500(n)(1)	Effective date of apportionment reduction or discontinuance.
5.783(b)(1)	3.500(g)(2)(ii), 3.500(n)(2)(ii).	
5.783(b)(2)	New.	
5.783(b)(3), 5.783(b)(4)	3.1000(b)(2).	
5.784(a)	3.1000(b)(1)	Special rules for apportioned benefits on death of beneficiary or apportionee.
5.784(b)(1)	3.1000(b)(3).	
5.784(b)(2)		
5.785–5.789		Reserved.
Incompetency and Payments to Fiduciaries and Minors		
5.790(a)	3.353(a)	Determinations of incompetency and competency.
5.790(b)	3.353(b).	
5.790(c)	3.353(c).	
5.790(d)	3.353(d).	
5.790(e)	3.353(e).	
5.790(f)(1)	3.400(x).	
5.790(f)(2)	3.400(y).	
5.791(a)	3.850(a)	General fiduciary payments.
5.791(b)	3.850(c).	
5.791(c)	3.580(b).	
5.791(d)	3.850(d).	
5.791(e)	3.400(n), 3.500(m).	
5.792(a)	3.852(a)	Institutional awards.
5.792(b)	3.852(b), 3.852(d) (first sentence).	
5.792(c)	3.852(d) (second sentence).	
5.792(d)	3.852(c).	
5.792(e)	3.401(d).	
5.792(f)	3.501(j).	
5.793(a)	3.403(a)(2), 3.854	Limitation on payments for a child.
5.793(b)	3.403(a)(2).	
5.794	3.855	Beneficiary rated or reported incompetent.
5.795	3.856	Change of name of fiduciary.
5.796	3.857	Child's benefits to a fiduciary of an incompetent surviving spouse.
5.797	3.355	Testamentary capacity for VA insurance purposes.
5.798	3.853(c)	Payment of disability compensation previously not paid because an incompetent veteran's estate exceeded $25,000.
5.799–5.809		Reserved.

APPENDIX B TO PART 5—DERIVATION OF PART 5 PROVISIONS—Continued

Part 5 Provision	Part 3 Provision	Part 5 Section Title
Payments to Incarcerated Beneficiaries		
5.810(a)	3.665(b)	Incarcerated beneficiaries—general provisions and definitions.
5.810(b)	New.	
5.810(c)	3.665(a), 3.665(g), 3.666 introductory text.	
5.810(d)	New.	
5.810(e)	3.665(a), 3.666 (introduction)	
5.810(f)	3.665(a), 3.666 introductory text.	
5.811(a)	3.665(a), 3.665(c)	Limitation on disability compensation during incarceration.
5.811(b)	3.665(j)(3)(ii), 3.665(k).	
5.811(c)	3.665(d)(1), 3.665(d)(2), 3.665(j).	
5.812(a)	3.665(a), 3.665(c)	Limitation on dependency and indemnity compensation during incarceration.
5.812(b)	3.665(d)(3).	
5.812(c)	3.665(l).	
5.812(d)	3.665(k).	
5.813(a)	3.666 introductory text	Discontinuance of pension during incarceration.
5.813(b)	3.666(d).	
5.814(a)(1)	3.665(a)	Apportionment when a primary beneficiary is incarcerated.
5.814(a)(2)	3.665(h).	
5.814(b)	3.665(e).	
5.814(c)	3.666(a)(1)–(3).	
5.814(d)	3.666(b)(1), 3.666(b)(2), 3.666(b)(4).	
5.814(e)	3.665(f), 3.666(a)(4), 3.666(b)(3).	
5.815(a)	3.665(i)	Resumption of disability compensation or dependency and indemnity compensation upon a beneficiary's release from incarceration.
5.815(b)	3.665(i)(1), 3.665(i)(3).	
5.815(c)	3.665(i)(2), 3.665(i)(3).	
5.815(d)	3.665(m).	
5.816	3.666(c)	Resumption of pension upon a beneficiary's release from incarceration.
5.817(a)	3.665(n)(1), 3.666(e)(1)	Fugitive felons.
5.817(b)	3.665(n)(2), 3.665(n)(3), 3.666(e)(2), 3.666(e)(3).	
5.818		Reserved.
5.819		Reserved.

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Part III

Department of Justice

Antitrust Division

United States et al. v. US Airways Group, Inc. and AMR Corporation; Proposed Final Judgment and Competitive Impact Statement; Notice

DEPARTMENT OF JUSTICE

Antitrust Division

United States et al. v. US Airways Group, Inc. and AMR Corporation; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States, et al.* v. *US Airways Group, Inc., et al.,* Civil No. 1:13–cv–01236 in the United States District Court for the District of Columbia. On August 13, 2013, the United States and six plaintiff states and the District of Columbia filed a Complaint alleging that the proposed merger of US Airways Group, Inc. (''US Airways'') and AMR Corporation (''American'') would substantially lessen competition for scheduled airline passenger service in the United States and therefore violate Section 7 of the Clayton Act 15 U.S.C. 18. The proposed Final Judgment, filed November 12, 2013, requires US Airways and American to divest (1) 104 air carrier slots at Washington Reagan National Airport along with gates and related facilities, (2) 34 slots at New York LaGuardia Airport along with gates and related facilities, and (3) two gates and related facilities at each of five key airports: Boston Logan, Chicago O'Hare, Dallas Love Field, Los Angeles International and Miami International.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.justice.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the U.S. Department of Justice, Antitrust Division's internet Web site, filed by the United States on the public Court docket and, under certain circumstances, published in the **Federal Register**. Comments should be directed to William Stallings, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, Department of Justice, 450 Fifth Street NW., Suite 8000, Washington, DC 20530, (telephone: 202–514–9323). Comments should not be directed to the Court.

Patricia A. Brink,

Director of Civil Enforcement.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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and

COMMONWEALTH OF VIRGINIA
900 East Main Street
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Plaintiffs,

v.

US AIRWAYS GROUP, INC.
111 W. Rio Salado Parkway
Tempe, AZ 85281
and
AMR CORPORATION
4333 Amon Carter Boulevard
Fort Worth, TX 76155

Defendants.

Case No. 1:13–cv–01236 (CKK)
Judge: Colleen Kollar-Kotelly
Filed: 08/13/2013

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, and the States of Arizona, Florida, Tennessee, Texas, the Commonwealths of Pennsylvania and Virginia, and the District of Columbia (''Plaintiff States''), acting by and through their respective Attorneys General, bring this civil action under federal antitrust law to enjoin the planned merger of two of the nation's five major airlines, US Airways Group, Inc. (''US Airways'') and AMR Corporation (''American''), and to obtain equitable and other relief as appropriate.

I. Introduction

1. Millions of passengers depend on the airline industry to travel quickly, efficiently, and safely between various cities in the United States and throughout the world. Since 1978, the nation has relied on competition among airlines to promote affordability, innovation, and service and quality improvements. In recent years, however, the major airlines have, in tandem, raised fares, imposed new and higher fees, and reduced service. Competition has diminished and consumers have paid a heavy price. This merger—by creating the world's largest airline—would, in the words of US Airways' management, ''finish[ ] industry evolution.'' It would reduce the number of major domestic airlines from five to four, and the number of ''legacy'' airlines—today, Delta, United, American, and US Airways—from four to three. In so doing, it threatens substantial harm to consumers. Because of the size of the airline industry, if this merger were approved, even a small increase in the price of airline tickets, checked bags, or flight change fees would cause hundreds of millions of dollars of harm to American consumers annually.

2. American and US Airways compete directly on thousands of heavily traveled nonstop and connecting routes. Millions of passengers benefit each year from head-to-head competition that this merger would eliminate. With less competition, airlines can cut service and raise prices with less fear of competitive responses from rivals.

3. This merger will leave three very similar legacy airlines—Delta, United, and the new American—that past experience shows increasingly prefer tacit coordination over full-throated competition. By further reducing the number of legacy airlines and aligning the economic incentives of those that remain, the merger of US Airways and American would make it easier for the remaining airlines to cooperate, rather than compete, on price and service. That enhanced cooperation is unlikely to be significantly disrupted by Southwest and JetBlue, which, while offering important competition on the routes they fly, have less extensive domestic and international route networks than the legacy airlines.

4. US Airways' own executives—who would run the new American—have long been ''proponents of consolidation.'' US Airways believes that the industry—before 2005—had ''too many'' competitors, causing an ''irrational business model.'' Since 2005, there has been a wave of consolidation in the industry. US Airways has cheered these successive mergers, with its CEO stating in 2011 that ''fewer airlines'' is a ''good thing.'' US Airways' President

explained this thinking that same year: ''Three successful fare increases—[we are] able to pass along to customers *because of consolidation.''* (emphasis added). Similarly, he boasted at a 2012 industry conference: ''Consolidation has also . . . allowed the industry to do things like ancillary revenues [e.g., checked bag and ticket change fees]. . . . That is a structural permanent change to the industry and one that's impossible to overstate the benefit from it.'' In essence, industry consolidation has left fewer, more-similar airlines, making it easier for the remaining airlines to raise prices, impose new or higher baggage and other ancillary fees, and reduce capacity and service. This merger positions US Airways' management to continue the trend—at the expense of consumers.

5. US Airways intends to do just that. If this merger were approved, US Airways would no longer need to offer low-fare options for certain travelers. For example, US Airways employs ''Advantage Fares,'' an aggressive discounting strategy aimed at undercutting the other legacy airlines' nonstop fares with cheaper connecting service. US Airways' hubs are in cities that generate less lucrative nonstop traffic than the other legacy airlines' hubs. To compensate, US Airways uses its Advantage Fares to attract additional passengers on flights connecting through its hubs.

6. The other legacy airlines take a different approach. If, for example, United offers nonstop service on a route, and Delta and American offer connecting service on that same route, Delta and American typically charge the same price for their connecting service as United charges for its nonstop service. As American executives observed, the legacy airlines ''generally respect the pricing of the non-stop carrier [on a given route],'' even though it means offering connecting service at the same price as nonstop service. But American, Delta, and United frequently *do* charge lower prices for their connecting service on routes where US Airways offers nonstop service. They do so to respond to US Airways' use of Advantage Fares on other routes.

7. If the merger were approved, US Airways' economic rationale for offering Advantage Fares would likely go away. The merged airline's cost of sticking with US Airways' one-stop, low-price strategy would increase. Delta and United would likely undercut the merged firm on a larger number of nonstop routes. At the same time, the revenues generated from Advantage Fares would shrink as American's current nonstop routes would cease to be targets for Advantage Fares. The bottom line is that the merged airline would likely abandon Advantage Fares, eliminating significant competition and causing consumers to pay hundreds of millions of dollars more.

8. Consumers will likely also be harmed by the planned merger because American had a standalone plan to emerge from bankruptcy poised to grow. American planned to expand domestically and internationally, adding service on nearly 115 new routes. To support its plan, American recently made the largest aircraft order in industry history.

9. American's standalone plan would have bucked current industry trends toward capacity reductions and less competition. US Airways called American's growth plan ''industry destabilizing'' and worried that American's plan would cause other carriers to react ''with their own enhanced growth plans. . . .'' The result would be to increase competitive pressures throughout the industry. After the merger, US Airways' current executives—who would manage the merged firm—would be able to abandon American's efforts to expand and instead continue the industry's march toward higher prices and less service. As its CEO candidly stated earlier this year, US Airways views this merger as ''the last major piece needed to fully rationalize the industry.''

10. Passengers to and from the Washington, DC area are likely to be particularly hurt. To serve Ronald Reagan Washington National Airport (''Reagan National''), a carrier must have ''slots,'' which are government-issued rights to take off and land. US Airways currently holds 55% of the slots at Reagan National and the merger would increase the percentage of slots held by the combined firm to 69%. The combined airline would have a monopoly on 63% of the nonstop routes served out of the airport. Competition at Reagan National cannot flourish where one airline increasingly controls an essential ingredient to competition. Without slots, other airlines cannot enter or expand the number of flights that they offer on other routes. As a result, Washington, DC area passengers would likely see higher prices and fewer choices if the merger were approved.

11. Notwithstanding their prior unequivocal statements about the effects of consolidation, the defendants will likely claim that the elimination of American as a standalone competitor will benefit consumers. They will argue that Advantage Fares will continue, existing capacity levels and growth plans will be maintained, and unspecified or unverified ''synergies'' will materialize, creating the possibility of lower fares. The American public has seen this before. Commenting on a commitment to maintain service levels made by two other airlines seeking approval for a merger in 2010, the CEO of US Airways said: ''I'm hopeful they're just saying what they need . . . to get this [transaction] approved.'' By making claims about benefits that are at odds with their prior statements on the likely effects of this merger, that is precisely what the merging parties' executives are doing here—saying what they believe needs to be said to pass antitrust scrutiny.

12. There is no reason to accept the likely anticompetitive consequences of this merger. Both airlines are confident they can and will compete effectively as standalone companies. A revitalized American is fully capable of emerging from bankruptcy proceedings on its own with a competitive cost structure, profitable existing business, and plans for growth. US Airways today is competing vigorously and earning record profits. Executives of both airlines have repeatedly stated that they do not need this merger to succeed.

13. The merger between US Airways and American would likely substantially lessen competition, and tend to create a monopoly, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Therefore, this merger should be permanently enjoined.

II. Jurisdiction, Interstate Commerce, and Venue

14. The United States brings this action, and this Court has subject-matter jurisdiction over this action, under Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain US Airways and American Airlines from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

15. The Plaintiff States bring this action under Section 16 of the Clayton Act, 15 U.S.C. 26, to prevent and restrain US Airways and American Airlines from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. 18. The Plaintiff States, by and through their respective Attorneys General, bring this action as *parens patriae* on behalf of the citizens, general welfare, and economy of each of their states.

16. The defendants are engaged in, and their activities substantially affect, interstate commerce, and commerce in each of the Plaintiff States. US Airways and American Airlines each annually transport millions of passengers across state lines throughout this country, generating billions of dollars in revenue while doing so.

17. Venue is proper under Section 12 of the Clayton Act, 15 U.S.C. § 22. This Court also has personal jurisdiction over each defendant. Both defendants are found and transact business in this judicial district.

III. The Defendants and the Transaction

18. Defendant US Airways Group, Inc., is a Delaware corporation headquartered in Tempe, Arizona. Last year, it flew over fifty million passengers to approximately 200 locations worldwide, taking in more than $13 billion in revenue. US Airways operates hubs in Phoenix, Charlotte, Philadelphia, and Washington, DC

19. US Airways is performing exceptionally well. In 2012, it enjoyed record profits. It is operating at high load factors—the percentage of seats sold on its flights—and has a national and international route network, alliances with international airlines, a strong brand name, modern equipment, and a competitive cost structure. In mid-2012, US Airways' CEO, touting the airline's ''record second quarter results,'' told Dow Jones that the company ''has a great business model that works and we certainly don't need to merge with another airline.''

20. Defendant AMR Corporation is a Delaware corporation headquartered in Fort Worth, Texas. AMR Corporation is the parent company of American Airlines. Last year, American flew over eighty million passengers to approximately 250 locations worldwide, taking in more than $24 billion in revenue. American operates hubs in New York, Los Angeles, Chicago, Dallas, and Miami. The American Airlines brand is ''one of the most recognized . . . in the world.''

21. In November 2011, American filed for bankruptcy reorganization and is currently under the supervision of the Bankruptcy Court for the Southern District of New York. American adopted and implemented a standalone business plan designed ''to restore American to industry leadership, profitability and growth.'' While in bankruptcy, American management ''pursued and successfully implemented'' key provisions of this plan, including revenue and network enhancements, as well as ''restructuring efforts [that] have encompassed labor cost savings, managerial efficiencies, fleet reconfiguration, and other economies . . . .'' That work has paid off. American reported that its revenue growth has ''outpaced'' the industry since entering bankruptcy and in its most recent quarterly results reported a company record-high $5.6 billion in revenues, with $357 million in profits. Under experienced and sophisticated senior management, American's restructuring process has positioned it to produce ''industry leading profitability.'' As recently as January 8, 2013, American's management presented plans to emerge from bankruptcy that would increase the destinations American serves in the United States and the frequency of its flights, and position American to compete independently as a profitable airline with aggressive plans for growth.

22. US Airways sees American the same way. Its CEO observed in December 2011 that ''A[merican] is not going away, they will be stronger post-bankruptcy because they will have less debt and reduced labor costs.'' A US Airways' executive vice president similarly wrote in July 2012 that ''[t]here is no question about AMR's ability to survive on a standalone basis.''

23. US Airways and American agreed to merge on February 13, 2013. US Airways shareholders would own 28 percent of the combined airline, while American shareholders, creditors, labor unions, and employees would own 72 percent. The merged airline would operate under the American brand name, but the new American would be run by US Airways management.

IV. The Relevant Markets

A. Scheduled Air Passenger Service Between Cities

24. Domestic scheduled air passenger service enables consumers to travel quickly and efficiently between various cities in the United States. Air travel offers passengers significant time savings and convenience over other forms of travel. For example, a flight from Washington, DC to Detroit takes just over an hour of flight time. Driving between the two cities takes at least eight hours. A train between the two cities takes more than fifteen hours.

25. Due to time savings and convenience afforded by scheduled air passenger service, few passengers would substitute other modes of transportation (car, bus, or train) for scheduled air passenger service in response to a small but significant industry-wide fare increase. Another way to say this, as described in the *Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines* (2010), and endorsed by courts in this Circuit, is that a hypothetical monopolist of all domestic scheduled air passenger service likely would increase its prices by at least a small but significant and non-transitory amount. Scheduled air passenger service, therefore, constitutes a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

26. A ''city pair'' is comprised of a flight's departure and arrival cities. For example, a flight departing from Washington and arriving in Chicago makes up the Washington-Chicago city pair. Passengers seek to depart from airports close to where they live and work, and arrive at airports close to their intended destinations. Most airline travel is related to business, family events, and vacations. Thus, most passengers book flights with their origins and destinations predetermined. Few passengers who wish to fly from one city to another would likely switch to flights between other cities in response to a small but significant and non-transitory fare increase.

27. Airlines customarily set fares on a city pair basis. For each city pair, the degree and nature of the competition from other airlines generally plays a large role in an airline's pricing decision.

28. Therefore, a hypothetical monopolist of scheduled air passenger service between specific cities likely would increase its prices by at least a small but significant and non-transitory amount. Accordingly, each city pair is a relevant geographic market and section of the country under Section 7 of the Clayton Act.

29. Consumer preferences also play a role in airline pricing and are relevant for the purpose of analyzing the likely effects of the proposed merger. Some passengers prefer nonstop service because it saves travel time; some passengers prefer buying tickets at the last minute; others prefer service at a particular airport within a metropolitan area. For example, most business customers traveling to and from downtown Washington prefer service at Reagan National over other airports in the Washington, DC metropolitan area. Through a variety of fare restrictions and rules, airlines can profitably raise prices for some of these passengers without raising prices for others. Thus, the competitive effects of the proposed merger may vary among passengers depending on their preferences for particular types of service or particular airports.

B. Takeoff and Landing Slots at Reagan National Airport

30. Reagan National is one of only four airports in the country requiring slots for takeoffs and landings. Slots are expensive (often valued at over $2 million per slot), difficult to obtain, and only rarely change hands between airlines. There are no alternatives to

slots for airlines seeking to enter or expand their service at Reagan National.

31. Reagan National is across the Potomac River from Washington, DC, and, due to its proximity to the city and direct service via the Metro, airlines actively seek to serve passengers flying into and out of Reagan National. Airlines do not view service at other airports as adequate substitutes for service offered at Reagan National for certain passengers, and thus they are unlikely to switch away from buying or leasing slots at Reagan National in response to a small but significant increase in the price of slots. Airlines pay significant sums for slots at Reagan National, despite having the option of serving passengers through the region's other airports. A hypothetical monopolist of slots at Reagan National likely would increase its prices by at least a small but significant and non-transitory amount. Thus, slots at Reagan National Airport constitute a line of commerce, section of the country, and relevant market within the meaning of Section 7 of the Clayton Act.

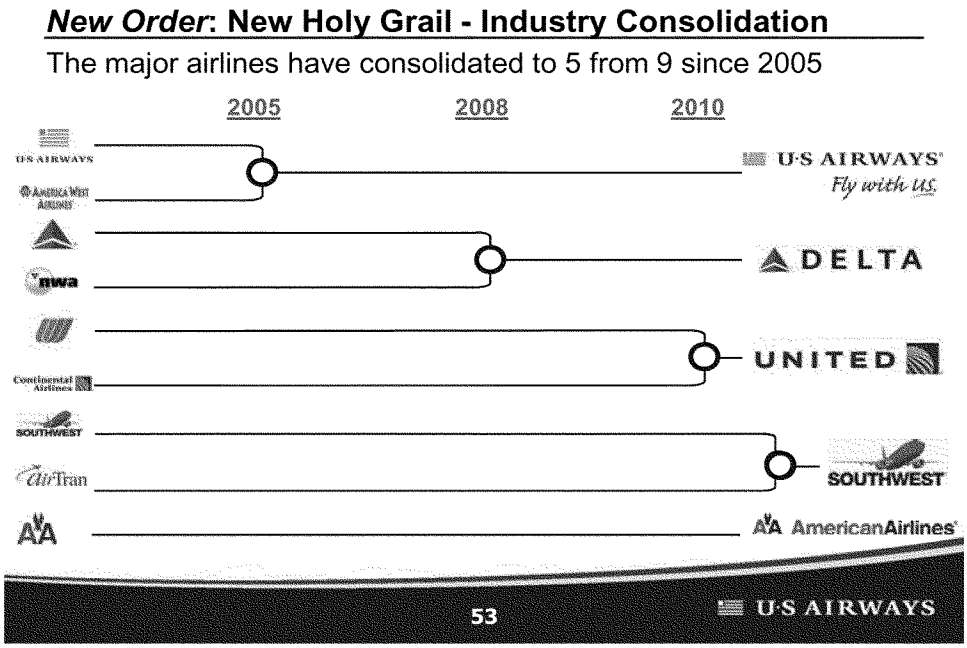
V. The Merger Is Likely to Result in Anticompetitive Effects

A. Industry Background

32. Today, four network or ''legacy'' airlines remain in the United States: American, US Airways, United, and Delta. These four have extensive national and international networks, connections to hundreds of destinations, established brand names, and strong frequent flyer reward programs. In addition, there are non-network airlines, including Southwest Airlines and a handful of smaller firms, which typically do not offer ''hub-and-spoke'' service.

33. Airlines compete in many ways. One is the price of a ticket. Airlines also compete based on: nonstop versus connecting flights; number of destinations served; convenient flight schedules; passenger comfort and seating policies; choices for classes of service; carry-on baggage policies; the degree of personal service at ticket counters and boarding areas; onboard meal and drink service; in-flight entertainment; and the quality and generosity of frequent flyer programs.

34. Since 2005, the U.S. airline industry has undergone significant consolidation. The consolidation ''wave'' started with the 2005 merger between US Airways and America West, creating today's US Airways. In 2008, Delta and Northwest Airlines merged; in 2010, United and Continental merged; and in 2011, Southwest Airlines and AirTran merged. The chart below, in which one of US Airways' executive vice presidents referred to industry consolidation as the ''New Holy Grail,'' demonstrates that since 2005 the number of major airlines has dropped from nine to five.



35. Increasing consolidation among large airlines has hurt passengers. The major airlines have copied each other in raising fares, imposing new fees on travelers, reducing or eliminating service on a number of city pairs, and downgrading amenities. An August 2012 presentation from US Airways observes that consolidation has resulted in ''Fewer and Larger Competitors.'' The structural change to ''fewer and larger competitors'' has allowed ''[t]he industry'' to ''reap the benefits.'' Those benefits to the industry are touted by US Airways in the same presentation as including ''capacity reductions'' and new ''ancillary revenues'' like bag fees.

B. Many Relevant Markets Are Highly Concentrated and the Planned Merger Would Significantly Increase That Concentration

36. In 2005, there were nine major airlines. If this merger were approved, there would be only four. The three remaining legacy airlines and Southwest would account for over 80% of the domestic scheduled passenger service market, with the new American becoming the biggest airline in the world.

37. Market concentration is one useful indicator of the level of competitive vigor in a market, and the likely competitive effects of a merger. The more concentrated a market, and the more a transaction would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in competition. Concentration in relevant markets is typically measured by the Herfindahl-Hirschman Index (''HHI''). Markets in which the HHI exceeds 2,500 points are considered highly concentrated. Post-merger increases in

HHI of more than 200 points are considered to be significant increases in concentration.

38. In more than 1,000 of the city pair markets in which American and US Airways currently compete head-to-head, the post-merger HHI would exceed 2,500 points and the merger would increase the HHI by more than 200 points. For example, on the Charlotte-Dallas city pair, the post-merger HHI will increase by 4,648 to 9,319 (out of 10,000). In these markets, US Airways and American annually serve more than 14 million passengers and collect more than $6 billion in fares. The substantial increases in concentration in these highly concentrated markets demonstrate that in these relevant markets, the merger is presumed, as a matter of law, to be anticompetitive. The relevant markets described in this paragraph are listed in Appendix A.

39. Other city pairs across the country would likely be affected by the loss of competition stemming from this planned merger. In some of these markets, US Airways and American compete head-to-head, often offering consumers discounted fares. If approved, this merger will likely end much of that discounting, significantly harming consumers in the process. Moreover, the loss of competition in these markets would increase the likelihood that the remaining airlines can coordinate to raise price, reduce output, and diminish the quality of their services. In these relevant markets, the merger is likely also to substantially lessen competition.

40. In the market for slots at Reagan National, the merger would result in a highly concentrated market, with a post-merger HHI of 4,959. The merger would also significantly increase concentration by 1,493 points. As a result, the merger should be presumed, as a matter of law, to be anticompetitive.

C. This Merger Would Increase the Likelihood of Coordinated Behavior Among the Remaining Network Airlines Causing Higher Fares, Higher Fees, and More Limited Service

41. The structure of the airline industry is already conducive to coordinated behavior: Few large players dominate the industry; each transaction is small; and most pricing is readily transparent.

42. For example, the legacy airlines closely watch the pricing moves of their competitors. When one airline ''leads'' a price increase, other airlines frequently respond by following with price increases of their own. The initiating carrier will lead the price increase and then see if the other carriers will match the increase. If they do not, the initiating carrier will generally withdraw the increase shortly thereafter.

43. The legacy airlines also use what they call ''cross-market initiatives,'' or ''CMIs,'' to deter aggressive discounting and prevent fare wars. A CMI occurs where two or more airlines compete against each other on multiple routes. If an airline offers discounted fares in one market, an affected competitor often responds with discounts in another market—a CMI—where the discounting airline prefers a higher fare. CMIs often cause an airline to withdraw fare discounts. For example, in the fall of 2009, US Airways lowered fares and relaxed restrictions on flights out of Detroit (a Delta stronghold) to Philadelphia. Delta responded by offering lower fares and relaxed restrictions from Boston to Washington (a US Airways stronghold). US Airways' team lead for pricing observed Delta's move and concluded ''[w]e have more to lose in BOSWAS . . . I think we need to bail on the [Detroit-Philadelphia] changes.''

44. There is also past express coordinated behavior in the industry. For example, all airlines have complete, accurate, and real-time access to every detail of every airline's published fare structure on every route through the airline-owned Airline Tariff Publishing Company (''ATPCO''). US Airways' management has called ATPCO ''a dedicated price-telegraph network for the industry.'' The airlines use ATPCO to monitor and analyze each other's fares and fare changes and implement strategies designed to coordinate pricing. Airlines have previously used ATPCO to engage in coordinated behavior. In 1992, the United States filed a lawsuit to stop several airlines, including both defendants, from using their ATPCO filings as a signaling device to facilitate agreements on fares. That lawsuit resulted in a consent decree, now expired.

45. US Airways also has communicated directly with a competitor when it was upset by that competitor's efforts to compete more aggressively. In 2010, one of US Airways' larger rivals extended a ''triple miles'' promotion that set off a market share battle among legacy carriers. The rival airline was also expanding into new markets and was rumored to be returning planes to its fleet that had been mothballed during the recession. US Airways' CEO complained about these aggressive maneuvers, stating to his senior executives that such actions were ''hurting [the rival airline's] profitability—and unfortunately everyone else's.'' US Airways' senior management debated over email about how best to get the rival airline's attention and bring it back in line with the rest of the industry. In that email thread, US Airways' CEO urged the other executives to ''portray[ ] these guys as idiots to Wall Street and anyone else who'll listen.'' Ultimately, to make sure the message was received, US Airways' CEO forwarded the email chain—and its candid discussion about how aggressive competition would be bad for the industry—directly to the CEO of the rival airline. (The rival's CEO immediately responded that it was an inappropriate communication that he was referring to his general counsel.)

46. Coordination becomes easier as the number of major airlines dwindles and their business models converge. If not stopped, the merger would likely substantially enhance the ability of the industry to coordinate on fares, ancillary fees, and service reductions by creating, in the words of US Airways executives, a ''Level Big 3''of network carriers, each with similar sizes, costs, and structures.

47. Southwest, the only major, non-network airline, and other smaller carriers have networks and business models that differ significantly from the legacy airlines. Traditionally, Southwest and other smaller carriers have been less likely to participate in coordinated pricing or service reductions. For example, Southwest does not charge customers for a first checked bag or ticket change fees. Yet that has not deterred the legacy carriers from continuing, and even increasing, those fees. In November 2011, a senior US Airways executive explained to her boss the reason: ''Our employees know full well that the real competition for us is [American], [Delta], and [United]. Yes we compete with Southwest and JetBlue, but the product is different and the customer base is also different.''

1. The Merger Would Likely Result in the Elimination of US Airways' Advantage Fares

48. On routes where one legacy airline offers nonstop service, the other legacies ''generally respect the pricing of the non-stop carrier,'' as American has put it. Thus, if American offers nonstop service from Washington to Dallas at $800 round-trip, United and Delta will, ''[d]espite having a service disadvantage,'' price their connecting fares at the level of American's nonstop fares. The legacy carriers do this because if one airline, say Delta, were to undercut fares in markets where American offers nonstop service, American would likely do the same in

Delta's nonstop markets. To Delta, the cost of being undercut in its nonstop markets exceeds the benefit it would receive from winning additional passengers in American nonstop markets.

49. US Airways, alone among the legacy carriers, has a different cost-benefit analysis for pricing connecting routes. Although it too is a national network carrier, US Airways has hubs in cities that generate less revenue from passengers flying nonstop than the other legacy airlines' hubs. Because US Airways' hubs generate less revenue from passengers flying nonstop, US Airways must gain more revenue from connecting passengers. It gets that revenue by offering connecting service that is up to 40% cheaper than other airlines' nonstop service. US Airways calls this program ''Advantage Fares.''

50. Millions of consumers have benefitted. Advantage Fares offer consumers, especially those who purchase tickets at the last minute, meaningfully lower fares. The screenshot below from ITA Software, Airfare Matrix (''ITA''), taken on August 12, 2013, for travel departing on August 13 and returning August 14 from Miami to Cincinnati, shows the benefits of US Airways' Advantage Fare program to passengers[1]

All flights	US Airways, Inc.	Multiple Airlines	American Airlines Inc.	United Airlines, Inc.	Delta Air Lines Inc.
Nonstop	--	--	From $740	--	--
1 stop	From $471	From $686	From $751	From $762	From $762

American is the only airline on this route to offer nonstop service, charging $740. Delta and United do not meaningfully compete. Both charge more for their connecting service than American charges for nonstop service. Thus, on this particular route, a passenger who chose Delta or United would pay more for an inferior product. In contrast, US Airways' fares today are significantly lower than American's fares, and offer consumers a real choice. Those consumers who are more price conscious receive the benefit of a substantially lower-fare option. In this case, a customer who purchased a US Airways one-stop ticket would save $269 compared to American's nonstop service.

51. The benefits from Advantage Fares extend to hundreds of other routes, including those where more than one carrier offers nonstop service. The screenshot below from ITA, taken on August 12, 2013, for travel departing on August 13 and returning August 14 from New York to Houston, demonstrates just how dramatic the savings can be:

All flights	US Airways, Inc.	Jetblue Airways Corporation	AirTran Airways, Inc.	Multiple Airlines	United Airlines, Inc.	Delta Air Lines Inc.	American Airlines Inc.
Nonstop	--	From $907	--	--	From $1,445	From $1,457	From $1,477
1 stop	From $575	From $1,618	From $909	From $1,006	From $1,331	From $1,467	From $1,467

US Airways' connecting fare is $870 cheaper than the other legacy carriers' nonstop flights, and beats JetBlue and AirTran's fares by more than $300. Although Southwest does not participate in the standard online travel sites, a cross-check against the Southwest Web site demonstrates that US Airways also beats Southwest's $887 nonstop fare by more than $300.

52. Other airlines have chosen to respond to Advantage Fares with their

[1] ''Multiple Airlines'' refers to an itinerary where a passenger uses different airlines for their departing and returning flights.

own low connecting fares in markets where US Airways has nonstop service. That is, the other legacy airlines undercut US Airways' nonstop fares the same way that US Airways undercuts their nonstop fares. The screenshot below from ITA, taken on August 12, 2013, for travel on August 13 and returning August 14 from Charlotte to Syracuse, shows how the other legacy carriers respond to Advantage Fares to the benefit of consumers:

All flights	Delta Air Lines Inc.	United Airlines, Inc.	Multiple Airlines	US Airways, Inc.	Jetblue Airways Corporation	American Airlines Inc.
Nonstop	--	--	--	From $685	--	--
1 stop	From $375	From $395	From $458	From $696	From $691	From $1,258

Here, US Airways is the only airline to offer nonstop service, charging $685. Delta and United undercut that price by charging $375 and $395, respectively, for connecting service. Once again, consumers benefit by having the option of far less expensive connecting service. A customer who buys a Delta one-stop flight saves $310 over US Airways' nonstop service.

53. There are over 100 routes where other carriers offer nonstop service on which US Airways does not offer Advantage Fares. Consumers in these markets are not given the option of a low-cost connecting alternative and are forced to pay significantly more for service. For example, US Airways does not currently offer Advantage Fares on flights from Cincinnati to Pittsburgh. Without the option of a low connecting fare, consumers see significantly higher prices, as illustrated by a screenshot from ITA, taken on August 12, 2013, for travel on August 13 and returning August 14:

All flights	Delta Air Lines Inc.	Multiple Airlines	US Airways, Inc.	United Airlines, Inc.	American Airlines Inc.
Nonstop	From $892	--	--	--	--
1 stop	From $1,298	From $902	From $911	From $914	From $1,363

54. Advantage Fares have proven highly disruptive to the industry's overall coordinated pricing dynamic. An American executive expressed her frustration in September 2011 with US Airways' Advantage Fares, noting that US Airways was ''still way undercutting us [on flights from Boston and New York to Dallas] and getting significant share.'' One response American considered was to lower its fares on the same route. Another option was ''to take up this battle w/them again,'' in an attempt to force US Airways to limit or abandon its strategy.

55. US Airways' President acknowledged in September 2010 that its Advantage Fare strategy ''would be different if we had a different route network. . . .'' Currently, US Airways' network structure precludes Delta and United from preventing US Airways' aggressive ''one-stop pricing.'' Because US Airways' hubs have relatively less nonstop traffic, the other legacy airlines cannot respond sufficiently to make Advantage Fares unprofitable. But by increasing the size and scope of US Airways' network, the merger makes it likely that US Airways will have to discontinue its Advantage Fares.

56. American's executives agree. American believes that Advantage Fares will be eliminated because of the merger. Internal analysis at American in October 2012 concluded that ''[t]he [Advantage Fares] program would have to be eliminated in a merger with American, as American's large non-stop markets would now be susceptible to reactionary pricing from Delta and United.'' Another American executive observed that same month: ''The industry will force alignment to a single approach—one that aligns with the large legacy carriers as it is revenue maximizing.''

57. US Airways believes that it currently gains ''most of its advantage fare value from AA,'' meaning that Advantage Fares provide substantial value for US Airways on routes where American is the legacy airline offering nonstop service. Post-merger, continuing Advantage Fares would mean that US Airways was taking that value away from itself by undercutting its own nonstop prices. Plainly, this would make no sense. Thus, for US Airways post-merger, the benefits of Advantage Fares would go down, and its costs would go up.

58. By ending Advantage Fares, the merger would eliminate lower fares for millions of consumers. Last year, more than 2.5 million round-trip passengers—including more than 250,000 passengers from the greater Washington, DC area; another 250,000 passengers in the Dallas-Fort Worth area; half a million passengers in the greater New York City area; and 175,000 passengers from Detroit—bought an Advantage Fare ticket. Hundreds of thousands of other passengers flying nonstop on US Airways, particularly from their hubs in Phoenix, Charlotte, and Philadelphia, benefited from responsive fares offered by the legacy airlines.

2. The Merger Would Likely Lead to Increased Industry-Wide ''Capacity Discipline,'' Resulting in Higher Fares and Less Service

59. Legacy airlines have taken advantage of increasing consolidation to exercise ''capacity discipline.'' ''Capacity discipline'' has meant restraining growth or reducing established service. The planned merger would be a further step in that industry-wide effort. In theory, reducing unused capacity can be an efficient decision that allows a firm to reduce its costs, ultimately leading to lower consumer prices. In the airline industry, however, recent experience has shown that capacity discipline has resulted in fewer flights and higher fares.

60. Each significant legacy airline merger in recent years has been followed by substantial reductions in service and capacity. These capacity reductions have not consisted simply of cancellation of empty planes or empty seats; rather, when airlines have cut capacity after a merger, the number of passengers they carry on the affected routes has also decreased.

61. US Airways has recognized that it benefitted from this industry consolidation and the resulting capacity discipline. US Airways has long taken the position that the capacity cuts achieved through capacity discipline ''enabled'' fare increases and that ''pricing power'' results from ''reduced industry capacity.'' US Airways' CEO explained to investors in 2006 that there is an ''inextricable link'' between removing seats and raising fares.

62. In 2005, America West—managed then by many of the same executives who currently manage US Airways—merged with US Airways. America West had hubs in Phoenix and Las Vegas while the former US Airways had hubs in Pittsburgh, Charlotte, and Philadelphia. Following the merger, the combined firm reduced capacity, including significant cuts in Pittsburgh and Las Vegas. In 2010, the Chief Financial Officer for US Airways explained:

> We believe in the hub system. I just think there's too many hubs. If you look across the country, you can probably pick a few that are smaller hubs and maybe duplicative to other hubs that airlines have that they could probably get out of. In our example, we merged with US Airways [and] . . . what we have done over time, which is unfortunate for the cities, but we couldn't hold a hub in Pittsburgh and we couldn't hold a hub in Las Vegas. So over time we have consolidated and condensed our operation back, which is really important, condensed it back to our major hubs.

A post-merger US Airways analysis confirmed that it succeeded in obtaining a ''3% to 4% capacity reduction.''

63. In 2006, on the heels of the America West/US Airways merger, the combined firm submitted an ultimately unsuccessful hostile bid for Delta Air Lines. US Airways' management had concluded that a merged US Airways/Delta could reduce the combined carrier's capacity by 10 percent, which would lead to higher revenues for the combined firm and for the industry. In 2007, following the rejection of the hostile bid, US Airways' CEO explained to investors how the deal would have increased industry profits:

> It's part of what we tried to impress upon people as we were going through our run at Delta, was that * * * it was good for US Airways [and] good for the entire industry. We're going to take out 4% of the industry capacity as we did that. Everyone's 2008 numbers would look a (expletive) of a lot better had that transaction happened * * *

64. In 2008, Delta merged with Northwest Airlines. Despite promises to the contrary, the combined airline reduced capacity, including significant cuts at its former hubs in Cincinnati and Memphis. US Airways' CEO was ''quite happy'' to see the merger and advocated for further consolidation. He explained that an industry structure of ''five different hub and spoke airlines with who knows how many hubs across the United States . . . results in all of us fighting for the same connecting passengers over numerous hubs.'' Left unsaid was that fewer airlines meant less competition and higher fares.

65. In May 2010, United Airlines and Continental Airlines announced their planned merger. The announcement caused speculation about the future of each airline's hubs, including Continental's Cleveland hub. In Congressional testimony, an industry analyst stated that he did not believe the merger would cause reductions in Cleveland. On June 18, 2010, upon seeing the testimony, US Airways' CEO wrote an email to other US Airways executives stating, ''[s]urely these guys [United/Continental] aren't really planning to keep Cleveland open. I'm hopeful they're just saying what they need to (including to [the analyst]) to get this approved.'' United and Continental closed their deal on October 1, 2010. The combined firm has reduced capacity at nearly all of its major hubs (including Cleveland) and at many other airports where the two airlines previously competed. Similarly, Southwest/AirTran has reduced service in a number of its focus cities and on many of AirTran's former routes following its 2011 merger.

66. The defendants are fully aware of these earlier mergers' effects. A 2012 American Airlines analysis concluded that ''following a merger, carriers tend to remove capacity or grow more slowly than the rest of the industry.'' US Airways' management concluded that although industry consolidation has been a success, as its CEO stated publicly in 2010, the industry had yet to hit its ''sweet spot,'' and additional consolidation was needed because the industry remained ''overly fragmented.''

67. A merger with American would allow US Airways to hit the ''sweet spot.'' For consumers, however, it would be anything but sweet. US Airways believes that merging with American ''finishes industry evolution'' by accomplishing US Airways' goal of ''reduc[ing] capacity more efficiently.'' When first considering a combination with American, US Airways projected that the merged firm could reduce capacity by as much as 10 percent. Similarly, American expects that the merger will lead to capacity reductions that would negatively impact ''communities,'' ''people,'' ''customers,'' and ''suppliers.'' Higher fares would be right around the corner.

3. The Planned Merger Would Likely Block American's Standalone Expansion Plans, Thwarting Likely Capacity Increases

68. American does not need this merger to thrive, let alone survive. Before the announcement of this merger, a key component of American's standalone plan for exiting bankruptcy revolved around substantial expansion, including increases in both domestic and international flights. Thus, in 2011, American placed the largest order for new aircraft in the industry's history.

69. US Airways executives feared that American's standalone growth plan would disrupt the industry's capacity discipline ''momentum.'' In a 2012 internal presentation, US Airways executives recognized that while ''[i]ndustry mergers and capacity discipline expand margins,'' American's standalone ''growth plan has potential to disrupt the new dynamic'' and would ''Reverse Industry Capacity Trends.'' Moreover, US Airways believed that if American implemented its growth plans, other airlines would ''react to AMRs plans with their own enhanced growth plans destabilizing industry.'' US Airways believed that American's standalone capacity growth would ''negatively impact'' industry revenues and threaten industry pricing.

70. US Airways thought that a merger with American was a ''lower risk alternative'' than letting American's standalone plan come to fruition because US Airways management could maintain capacity discipline. American's executives have observed that ''the combined network would likely need to be rationalized,'' especially given the merged carrier's numerous hubs, and that it is ''unlikely that [a combined US Airways/American] would pursue growth. * * *''

4. The Merger Would Likely Result in Higher Fees

71. Since 2008, the airline industry has increasingly charged consumers fees for services that were previously included in the price of a ticket. These so-called ancillary fees, including those for checked bags and flight changes, have become very profitable. In 2012 alone, airlines generated over $6 billion in fees for checked bags and flight changes. Even a small increase in these fees would cost consumers millions.

72. Increased consolidation has likely aided the implementation of these fees. The levels of the ancillary fees charged by the legacy carriers have been largely set in lockstep. One airline acts as the ''price leader,'' with others following soon after. Using this process, as a US Airways strategic plan observed, the airlines can raise their fees without suffering ''market share impacts.'' For example, American announced that it would charge for a first checked bag on May 21, 2008. On June 12, 2008, both United and US Airways followed American's lead. Similarly, over a period of just two weeks this spring, all four legacy airlines increased their ticket change fee for domestic travel from $150 to $200.

73. The legacy airlines recognize that the success of any individual attempt to impose a new fee or fee increase depends on whether the other legacies follow suit. When, in July 2009, American matched the other legacy carriers by raising its checked bag fee to $20, but did not join the others in offering a $5 web discount, US Airways was faced with the decision of whether to ''match'' American by either eliminating its own web discount, or raising its price to $25, with a $5 discount. US Airways' CEO gave his view:

> I can't believe I'm saying this, but I think we should stand still on this for now. I recognize that increases the chances of everyone standing still . . . the [dollars] aren't compelling enough for us to stick our necks out first. I do think D[elta] or U[nited] won't let them have an advantage, so it'll get matched—I'm just not sure we should go first. If a couple weeks go by and no one's moved, we can always jump in.

74. Similarly, when US Airways was considering whether to raise its second checked bag fee to $100 to match Delta's fee, a US Airways executive observed: ''Wow—$100 is a lot for second bag. I would think there's big passenger gag reflex associated with that, but if we can get it, we should charge it. Do you think we should wait for [United] or [American] to move first, though?''

75. Conversely, in 2008, when US Airways began charging passengers for soft drinks, the other legacy airlines did not follow its lead, and US Airways backed off. US Airways' CEO explained: ''With US Airways being the only network carrier to charge for drinks, we are at a disadvantage.'' Had US Airways not rescinded this fee, it would have lost passengers to the other legacy airlines.

76. At times, the airlines consider new fees or fee increases, but hold off implementing them while they wait to see if other airlines will move first. For example, on April 18, United announced that it was increasing its ticket change fee from $150 to $200. American decided that ''waiting for [Delta] and then moving to match if [Delta] comes along'' would be its best strategy. Over the next two weeks, US Airways, Delta, and American each fell in line, leading a US Airways executive to observe on May 1: ''A[merican] increased their change fees this morning. The network carriers now have the same $200 domestic . . . change fees.''

77. Post-merger, the new American would likely lead new fee increases. A December 2012 discussion between US Airways executives included the observation that after the merger, ''even as the world's largest airline we'd want to consider raising some of the baggage fees a few dollars in some of the leisure markets.''

78. New checked bag fees on flights from the United States to Europe are a likely target. Both US Airways and American have considered imposing a first checked bag fee on flights to Europe but have refrained from doing so. US Airways seriously considered leading such a price move but was concerned that other airlines would not match: ''We would hope that [other airlines] would follow us right away . . . but there is no guarantee. . . .'' Ultimately, US Airways concluded it was ''too small'' to lead additional checked bag fees for flights to Europe. Post-merger, that would no longer be true. The merged firm would be the world's largest airline, giving it sufficient size to lead industry fee and price increases across the board.

79. Some fee increases are likely to result from US Airways raising American's existing fees. Today, ''US Airways generally charges higher bag fees than AA'' for travel from the United States to international destinations. Post-merger, US Airways would likely raise American's ancillary fees to US Airways' higher fee levels as part of a ''fee harmonization'' process. US Airways' own documents estimate that ''fee harmonization'' would generate an additional $280 million in revenue annually—directly harming consumers by the same amount. A US Airways presentation from earlier this year analyzing the merger identifies American's lower bag fees as a ''value lever'' that US Airways ''will likely manage differently with tangible financial upside.'' The analysis concludes that ''[i]ncreasing AA baggage fees to match US creates significant revenue impact.'' US Airways also plans to institute its fees ($40 on average) for the redemption of frequent flyer tickets on American's existing frequent fliers, who currently are not charged for mileage redemption.

80. The merger would also likely reduce the quality and variety of ancillary services offered by the legacy

airlines—a side effect of consolidation anticipated and embraced by US Airways' CEO. In a 2011 email exchange lamenting the need for US Airways to deploy wireless internet on all of its airplanes, a senior US Airways executive groused:

> [N]ext it will be more legroom. Then industry standard labor contracts. Then better wines. Then the ability to book on Facebook. Penultimately, television commercials. Then, finally, we will pay the NYSE an exorbitant fee to change our ticker symbol [from LCC].

US Airways' CEO responded: ''Easy now. Consolidation will help stop much of the stupid stuff but inflight internet is not one of them.''

81. If the planned merger is enjoined, both American and US Airways will have to compete against two larger legacy rivals, and against each other. The four legacy airlines will not look exactly the same. As the smallest of the legacy airlines, American and US Airways will have greater incentives to grow and compete aggressively through lower ancillary fees, new services, and lower fares.

D. The Merger Would Eliminate Head-to-Head Competition in Hundreds of Relevant Markets and Entrench US Airways' Dominance at Reagan National Airport

82. American and US Airways engage in head-to-head competition with nonstop service on 17 domestic routes representing about $2 billion in annual industry-wide revenues. American and US Airways also compete directly on more than a thousand routes where one or both offer connecting service, representing billions of dollars in annual revenues. The merger's elimination of this head-to-head competition would create strong incentives for the merged airline to reduce capacity and raise fares where they previously competed.

83. The combined firm would control 69% of the slots at Reagan National Airport, almost six times more than its closest competitor. This would eliminate head-to-head competition at the airport between American and US Airways. It would also effectively foreclose entry or expansion by other airlines that might increase competition at Reagan National.

84. The need for slots is a substantial barrier to entry at Reagan National. The FAA has occasionally provided a limited number of slots for new service. In almost all cases, however, a carrier wishing to begin or expand service at Reagan National must buy or lease slots from an airline that already owns them.

85. This merger would thwart any prospect for future entry or expansion at Reagan National. US Airways, which already has 55% of the airport's slots, does not sell or lease them because any slot that goes to another airline will almost certainly be used to compete with US Airways. The merger would only increase US Airways' incentives to hoard its slots. Today, US Airways provides nonstop service to 71 airports from Reagan National, and it faces no nonstop competitors on 55 of those routes. After this merger, the number of US Airways routes with no nonstop competition would increase to 59, leaving, at best, only 21 routes at the entire airport with more than one nonstop competitor. Unsurprisingly, Reagan National is US Airways' second most-profitable airport.

86. Potential entrants would likely not be able to turn to other airlines to obtain slots. When allocating their slots, airlines prioritize their most profitable routes, typically those where they have a frequent, significant pattern of service. If a carrier has a small portfolio of slots, it is likely to allocate almost all of its slots to its most profitable routes. If it has additional slots beyond what is needed to serve those routes, a carrier will then work its way down to other routes or sell or lease those slots to other airlines. Over the last several years, US Airways has purchased nearly all of the slots that might otherwise be available to interested buyers. Thus, before this planned merger, American was the only airline at Reagan National with the practical ability to sell or lease additional slots.

87. In March 2010, American and JetBlue entered into an arrangement in which JetBlue traded slots at New York's JFK International Airport to American in exchange for American trading slots at Reagan National to JetBlue. And until American reached agreement with US Airways to merge, it had been negotiating to sell those slots and ten other Reagan National slots to JetBlue.

88. JetBlue's entry on four routes, particularly Reagan National to Boston, has generated stiff price competition. Fares on the route have dropped dramatically. US Airways estimated that after JetBlue's entry, the last-minute fare for travel between Reagan National and Boston dropped by over $700. The combined firm will have the right to terminate the JetBlue leases and thereby eliminate, or at least diminish, JetBlue as a competitor on some or all of these routes.

89. The merger would also eliminate the potential for future head-to-head competition between US Airways and American on flights at Reagan National. In 2011, US Airways planned to start service from Reagan National to Miami and St. Louis, which would directly compete with American's existing service. US Airways argued to the Department of Transportation that this new competition would ''substantial[ly] benefit[]'' consumers, and so asked DOT to approve the purchase of slots from Delta that would make the service possible. DOT ultimately approved that purchase. When it developed its plan to merge with American, however, US Airways abandoned its plans to enter those markets and deprived consumers of the ''substantial benefits'' it had promised.

90. By acquiring American's slot portfolio, US Airways would eliminate existing and future head-to-head competition, and effectively block other airlines' competitive entry or expansion.

VI. Absence of Countervailing Factors

91. New entry, or expansion by existing competitors, is unlikely to prevent or remedy the merger's likely anticompetitive effects. New entrants into a particular market face significant barriers to success, including difficulty in obtaining access to slots and gate facilities; the effects of corporate discount programs offered by dominant incumbents; loyalty to existing frequent flyer programs; an unknown brand; and the risk of aggressive responses to new entry by the dominant incumbent carrier. In addition, entry is highly unlikely on routes where the origin or destination airport is another airline's hub, because the new entrant would face substantial challenges attracting sufficient local passengers to support service.

92. United and Delta are unlikely to expand in the event of anticompetitive price increases or capacity reductions by the merged airline. Indeed, those carriers are likely to benefit from and participate in such conduct by coordinating with the merged firm.

93. The remaining airlines in the United States, including Southwest and JetBlue, have networks and business models that are significantly different from the legacy airlines. In particular, most do not have hub-and-spoke networks. In many relevant markets, these airlines do not offer any service at all, and in other markets, many passengers view them as a less preferred alternative to the legacy carriers. Therefore, competition from Southwest, JetBlue, or other airlines would not be sufficient to prevent the anticompetitive consequences of the merger.

94. There are not sufficient acquisition-specific and cognizable

efficiencies that would be passed through to U.S. consumers to rebut the presumption that competition and consumers would likely be harmed by this merger.

VII. Violation Alleged

95. The effect of the proposed merger, if approved, likely will be to lessen competition substantially, or tend to create a monopoly, in interstate trade and commerce in the relevant markets, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

96. Unless enjoined, the proposed merger likely would have the following effects in the relevant markets, among others:

(a) Actual and potential competition between US Airways and American Airlines would be eliminated;

(b) competition in general among network airlines would be lessened substantially;

(c) ticket prices and ancillary fees would be higher than they otherwise would;

(d) industry capacity would be lower than it otherwise would;

(e) service would be lessened; and

(f) the availability of slots at Reagan National would be significantly impaired.

VIII. Request for Relief

97. Plaintiffs request:

(a) that US Airways' proposed merger with American Airlines be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. 18;

(b) that Defendants be permanently enjoined from and restrained from carrying out the planned merger of US Airways and American or any other transaction that would combine the two companies;

(c) that Plaintiffs be awarded their costs of this action, including attorneys' fees to Plaintiff States; and

(d) that Plaintiffs be awarded such other relief as the Court may deem just and proper.

Dated this 13th day of August 2013.

Respectfully submitted,

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Appendix A—City Pairs Where the Merger Is Presumptively Illegal

• HHIs in this appendix are calculated based on publicly available airline ticket revenue data from Department of Transportation's Airline Origin and Destination Survey (DB1B) database, available at: *http://www.transtats.bts.gov/DatabaseInfo.asp?DB_ID=125&Link=0*

• Routes are listed only once but include flights at all airports within the metropolitan area and in both directions. For example, the entry

City pair route	Post-merger HHI	Δ HHI
Charlotte, NC (CLT)—Dallas, TX (DFW)	9319	4648

includes flights from Charlotte, North Carolina, to airports in and around Dallas, Texas, including both Dallas-Fort Worth International Airport (DFW) and Love Field (DAL), and it includes flights from both airports to Charlotte.

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Appendix - Introduction

APPENDIX A -- CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

CITY PAIR	Post-Merger HHI	Δ HHI
Charlotte, NC (CLT) - Durango, CO (DRO)	10,000	4,742
Charlotte, NC (CLT) - Dallas, TX (DFW)	9,324	4,653
Charlotte, NC (CLT) - St. Croix, VI (STX)	10,000	4,647
Dallas, TX (DFW) - Philadelphia, PA (PHL)	9,083	4,497
Kahului, HI (OGG) - Tampa, FL (TPA)	9,040	4,478
Kapaa, HI (LIH) - St. Louis, MO (STL)	8,930	4,448
Fresno, CA (FAT) - Tampa, FL (TPA)	8,659	4,259
Dallas, TX (DFW) - Phoenix, AZ (PHX)	8,921	4,205
Miami, FL (MIA) - Monterey, CA (MRY)	9,540	4,079
Indianapolis, IN (IND) - Kahului, HI (OGG)	8,174	4,006
El Paso, TX (ELP) - Fresno, CA (FAT)	8,320	3,866
Columbus, OH (CMH) - Palm Springs, CA (PSP)	7,704	3,703
Miami, FL (MIA) - Santa Barbara, CA (SBA)	8,042	3,634
Kapaa, HI (LIH) - Miami, FL (MIA)	8,439	3,619
El Paso, TX (ELP) - Monterey, CA (MRY)	8,415	3,612
Pittsburgh, PA (PIT) - St. Croix, VI (STX)	10,000	3,600
Dallas, TX (DFW) - Greensboro, NC (GSO)	8,120	3,557
Hilo, HI (KOA) - Miami, FL (MIA)	7,329	3,528
Hilo, HI (KOA) - St. Louis, MO (STL)	7,785	3,418
Kahului, HI (OGG) - St. Louis, MO (STL)	8,888	3,331
Dallas, TX (DFW) - Norfolk-Virginia Beach, VA (ORF)	7,786	3,312
Greensboro, NC (GSO) - St. Croix, VI (STX)	10,000	3,299
Monterey, CA (MRY) - St. Louis, MO (STL)	6,982	3,277
El Paso, TX (ELP) - Kapaa, HI (LIH)	9,185	3,206
Charlotte, NC (CLT) - Palm Springs, CA (PSP)	8,016	3,185
Charlotte, NC (CLT) - Fresno, CA (FAT)	7,903	3,165
Fresno, CA (FAT) - Milwaukee, WI (MKE)	7,185	3,164
Palm Springs, CA (PSP) - St. Louis, MO (STL)	6,753	3,085
Austin, TX (AUS) - Santa Barbara, CA (SBA)	6,499	3,068
Dallas, TX (DFW) - Richmond, VA (RIC)	8,372	3,048
Charleston, WV (CRW) - New York, NY (NYC)	6,407	3,034
Kahului, HI (OGG) - Omaha, NE (OMA)	6,897	3,033
Austin, TX (AUS) - Monterey, CA (MRY)	6,547	3,027
Charlotte, NC (CLT) - Kahului, HI (OGG)	10,000	3,022
Austin, TX (AUS) - Kapaa, HI (LIH)	6,499	3,006
Palm Springs, CA (PSP) - Tampa, FL (TPA)	6,968	2,985
Milwaukee, WI (MKE) - Palm Springs, CA (PSP)	6,319	2,966
Chicago, IL (CHI) - Charlottesville, VA (CHO)	8,865	2,949
Fresno, CA (FAT) - Miami, FL (MIA)	9,061	2,948

CITY PAIR	Post-Merger HHI	Δ HHI
Dallas, TX (DFW) - Monterey, CA (MRY)	7,448	2,938
Pittsburgh, PA (PIT) - Palm Springs, CA (PSP)	6,446	2,932
El Paso, TX (ELP) - Honolulu, HI (HNL)	8,116	2,923
Fresno, CA (FAT) - Indianapolis, IN (IND)	6,099	2,905
Fresno, CA (FAT) - San Antonio, TX (SAT)	6,197	2,895
Dallas, TX (DFW) - Kapaa, HI (LIH)	7,991	2,892
Raleigh-Durham, NC (RDU) - St. Thomas, VI (STT)	6,493	2,845
Phoenix, AZ (PHX) - St. Thomas, VI (STT)	6,178	2,843
Austin, TX (AUS) - Palm Springs, CA (PSP)	6,428	2,839
El Paso, TX (ELP) - Kahului, HI (OGG)	6,861	2,808
Columbus, OH (CMH) - Fresno, CA (FAT)	6,320	2,801
Austin, TX (AUS) - Fresno, CA (FAT)	7,074	2,795
Dallas, TX (DFW) - Fresno, CA (FAT)	8,423	2,774
Kansas City, MO (MCI) - Kahului, HI (OGG)	6,274	2,772
Dallas, TX (DFW) - Ontario, CA (ONT)	8,978	2,770
Des Moines, IA (DSM) - Kahului, HI (OGG)	6,793	2,753
Milwaukee, WI (MKE) - Kahului, HI (OGG)	6,867	2,717
Kapaa, HI (LIH) - Tucson, AZ (TUS)	6,680	2,700
Charlotte, NC (CLT) - Reno, NV (RNO)	6,887	2,672
Dallas, TX (DFW) - Hilo, HI (KOA)	6,671	2,664
Detroit, MI (DTW) - Fresno, CA (FAT)	6,057	2,662
Santa Barbara, CA (SBA) - St. Louis, MO (STL)	5,691	2,656
Columbus, OH (CMH) - St. Croix, VI (STX)	8,177	2,621
Albuquerque, NM (ABQ) - Monterey, CA (MRY)	6,759	2,575
El Paso, TX (ELP) - Hilo, HI (KOA)	9,515	2,574
Atlanta, GA (ATL) - Fresno, CA (FAT)	5,717	2,571
Charlotte, NC (CLT) - Tucson, AZ (TUS)	5,647	2,567
Charlotte, NC (CLT) - Ontario, CA (ONT)	5,750	2,503
Fresno, CA (FAT) - Pittsburgh, PA (PIT)	6,024	2,501
Detroit, MI (DTW) - Palm Springs, CA (PSP)	5,443	2,491
Albuquerque, NM (ABQ) - Kapaa, HI (LIH)	6,473	2,484
Charlotte, NC (CLT) - Grand Junction, CO (GJT)	6,077	2,475
Kansas City, MO (MCI) - Palm Springs, CA (PSP)	5,473	2,455
Albuquerque, NM (ABQ) - Santa Barbara, CA (SBA)	6,410	2,455
Hilo, HI (KOA) - Orlando, FL (MCO)	5,588	2,454
Hartford, CT (BDL) - St. Thomas, VI (STT)	5,373	2,444
Charlottesville, VA (CHO) - St. Louis, MO (STL)	6,691	2,438
Dallas, TX (DFW) - Palm Springs, CA (PSP)	8,959	2,428
Miami, FL (MIA) - Palm Springs, CA (PSP)	7,592	2,423

Appendix Page 1

APPENDIX A -- CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

CITY PAIR	Post-Merger HHI	Δ HHI
Denver, CO (DEN) - St. Thomas, VI (STT)	5,838	2,407
Minneapolis, MN (MSP) - St. Croix, VI (STX)	5,878	2,402
Miami, FL (MIA) - Kahului, HI (OGG)	7,973	2,388
Columbus, OH (CMH) - Kahului, HI (OGG)	7,136	2,383
Philadelphia, PA (PHL) - St. Thomas, VI (STT)	9,203	2,362
Indianapolis, IN (IND) - St. Croix, VI (STX)	8,140	2,349
Dallas, TX (DFW) - Raleigh-Durham, NC (RDU)	7,889	2,341
Palm Springs, CA (PSP) - San Antonio, TX (SAT)	5,514	2,313
Albuquerque, NM (ABQ) - Fresno, CA (FAT)	5,708	2,305
Greensboro, NC (GSO) - Miami, FL (MIA)	5,699	2,278
Charlotte, NC (CLT) - Key West, FL (EYW)	5,573	2,268
Charlotte, NC (CLT) - Orange County, CA (SNA)	5,196	2,265
Albuquerque, NM (ABQ) - Hilo, HI (KOA)	7,026	2,237
Albuquerque, NM (ABQ) - Honolulu, HI (HNL)	5,692	2,227
Monterey, CA (MRY) - Tucson, AZ (TUS)	7,706	2,199
Indianapolis, IN (IND) - Palm Springs, CA (PSP)	5,055	2,198
Dallas, TX (DFW) - Pittsburgh, PA (PIT)	8,393	2,191
Fresno, CA (FAT) - St. Louis, MO (STL)	5,756	2,185
Dallas, TX (DFW) - Westchester County, NY (HPN)	5,037	2,168
Philadelphia, PA (PHL) - Palm Springs, CA (PSP)	6,764	2,137
Atlanta, GA (ATL) - Palm Springs, CA (PSP)	5,169	2,119
Hartford, CT (BDL) - Dallas, TX (DFW)	8,326	2,118
Columbia, SC (CAE) - Dallas, TX (DFW)	7,048	2,113
Raleigh-Durham, NC (RDU) - San Juan, PR (SJU)	4,765	2,109
Philadelphia, PA (PHL) - Tucson, AZ (TUS)	4,757	2,098
Miami, FL (MIA) - Phoenix, AZ (PHX)	4,928	2,090
Phoenix, AZ (PHX) - San Juan, PR (SJU)	4,755	2,075
Chicago, IL (CHI) - Charlotte, NC (CLT)	5,982	2,051
Detroit, MI (DTW) - St. Croix, VI (STX)	8,834	2,039
Chattanooga, TN (CHA) - Chicago, IL (CHI)	6,818	2,039
Charleston, SC (CHS) - Miami, FL (MIA)	5,380	2,037
St. Thomas, VI (STT) - Washington, DC (WAS)	4,617	2,022
Austin, TX (AUS) - Hilo, HI (KOA)	5,363	2,008
Santa Barbara, CA (SBA) - Tucson, AZ (TUS)	7,273	2,004
Boston, MA (BOS) - Key West, FL (EYW)	6,327	1,984
Norfolk-Virginia Beach, VA (ORF) - St. Thomas, VI (STT)	5,239	1,968
Dallas, TX (DFW) - Reno, NV (RNO)	8,668	1,953
San Juan, PR (SJU) - Sacramento, CA (SMF)	4,709	1,950
Boston, MA (BOS) - Palm Springs, CA (PSP)	4,922	1,947

CITY PAIR	Post-Merger HHI	Δ HHI
Kapaa, HI (LIH) - Orlando, FL (MCO)	5,457	1,946
Greensboro, NC (GSO) - St. Thomas, VI (STT)	5,466	1,944
Dallas, TX (DFW) - Savannah, GA (SAV)	7,094	1,936
Hartford, CT (BDL) - Key West, FL (EYW)	4,983	1,931
Dallas, TX (DFW) - Santa Barbara, CA (SBA)	6,048	1,909
Kahului, HI (OGG) - San Antonio, TX (SAT)	5,275	1,901
Las Vegas, NV (LAS) - San Juan, PR (SJU)	4,883	1,885
Nashville, TN (BNA) - St. Thomas, VI (STT)	5,903	1,877
Charlotte, NC (CLT) - Honolulu, HI (HNL)	5,637	1,845
Charleston, SC (CHS) - St. Thomas, VI (STT)	5,230	1,844
Orlando, FL (MCO) - Kahului, HI (OGG)	4,514	1,834
Dallas, TX (DFW) - Sacramento, CA (SMF)	7,494	1,833
Fresno, CA (FAT) - Philadelphia, PA (PHL)	5,844	1,831
Cincinnati, OH (CIN) - St. Croix, VI (STX)	8,601	1,831
Charlotte, NC (CLT) - San Jose, CA (SJC)	5,038	1,815
El Paso, TX (ELP) - Santa Barbara, CA (SBA)	8,179	1,805
Miami, FL (MIA) - Norfolk-Virginia Beach, VA (ORF)	4,355	1,801
Kahului, HI (OGG) - Pittsburgh, PA (PIT)	5,506	1,800
Omaha, NE (OMA) - Palm Springs, CA (PSP)	4,635	1,799
Austin, TX (AUS) - Kahului, HI (OGG)	5,861	1,791
Anchorage, AK (ANC) - El Paso, TX (ELP)	7,220	1,789
Boston, MA (BOS) - Tucson, AZ (TUS)	5,168	1,780
Houston, TX (HOU) - St. Thomas, VI (STT)	7,185	1,771
Dallas, TX (DFW) - Greenville, SC (GSP)	6,372	1,759
Fresno, CA (FAT) - Orlando, FL (MCO)	5,123	1,750
Kahului, HI (OGG) - Tucson, AZ (TUS)	5,099	1,728
Boston, MA (BOS) - Fresno, CA (FAT)	5,173	1,713
Fresno, CA (FAT) - Minneapolis, MN (MSP)	4,959	1,705
Charlottesville, VA (CHO) - Fayetteville, AR (XNA	5,258	1,702
Key West, FL (EYW) - Philadelphia, PA (PHL)	4,530	1,697
Austin, TX (AUS) - Charlotte, NC (CLT)	5,600	1,693
Austin, TX (AUS) - Tucson, AZ (TUS)	5,300	1,687
San Diego, CA (SAN) - San Juan, PR (SJU)	4,198	1,678
Charlottesville, VA (CHO) - Minneapolis, MN (MSP)	4,883	1,669
Fresno, CA (FAT) - Tucson, AZ (TUS)	7,380	1,667
Las Vegas, NV (LAS) - St. Thomas, VI (STT)	7,530	1,665
Charlotte, NC (CLT) - Miami, FL (MIA)	7,087	1,646
San Juan, PR (SJU) - St. Louis, MO (STL)	4,512	1,599
San Antonio, TX (SAT) - Tucson, AZ (TUS)	4,923	1,597

APPENDIX A -- CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

CITY PAIR	Post-Merger HHI	Δ HHI
Dallas, TX (DFW) - Knoxville, TN (TYS)	7,796	1,589
Greensboro, NC (GSO) - San Juan, PR (SJU)	4,835	1,574
Orlando, FL (MCO) - Palm Springs, CA (PSP)	4,336	1,571
Buffalo, NY (BUF) - Fayetteville, AR (XNA)	4,703	1,555
Syracuse, NY (SYR) - Fayetteville, AR (XNA)	4,609	1,545
Miami, FL (MIA) - Philadelphia, PA (PHL)	5,610	1,543
Honolulu, HI (HNL) - San Antonio, TX (SAT)	4,711	1,541
St. Louis, MO (STL) - St. Thomas, VI (STT)	6,580	1,541
Albuquerque, NM (ABQ) - Charlotte, NC (CLT)	4,986	1,540
Honolulu, HI (HNL) - Omaha, NE (OMA)	4,545	1,531
Charlotte, NC (CLT) - San Antonio, TX (SAT)	5,158	1,519
Norfolk-Virginia Beach, VA (ORF) - San Juan, PR (SJU)	5,474	1,517
Miami, FL (MIA) - Reno, NV (RNO)	4,566	1,502
Orlando, FL (MCO) - Monterey, CA (MRY)	5,045	1,492
Dallas, TX (DFW) - San Jose, CA (SJC)	9,421	1,489
Chattanooga, TN (CHA) - Dallas, TX (DFW)	6,641	1,489
Westchester County, NY (HPN) - Phoenix, AZ (PHX)	4,437	1,484
Charlottesville, VA (CHO) - Dallas, TX (DFW)	4,745	1,476
Richmond, VA (RIC) - St. Thomas, VI (STT)	5,002	1,466
Little Rock, AR (LIT) - Syracuse, NY (SYR)	4,209	1,462
Savannah, GA (SAV) - St. Croix, VI (STX)	5,215	1,462
Seattle, WA (SEA) - San Juan, PR (SJU)	3,824	1,462
Charleston, SC (CHS) - Dallas, TX (DFW)	5,316	1,457
Cleveland, OH (CLE) - St. Croix, VI (STX)	7,993	1,449
Chicago, IL (CHI) - Huntsville, AL (HSV)	4,974	1,446
Cleveland, OH (CLE) - St. Thomas, VI (STT)	4,286	1,431
Minneapolis, MN (MSP) - Kahului, HI (OGG)	4,426	1,430
Chicago, IL (CHI) - St. Thomas, VI (STT)	4,985	1,425
Chicago, IL (CHI) - Palm Springs, CA (PSP)	6,637	1,420
New Orleans, LA (MSY) - St. Thomas, VI (STT)	5,276	1,418
Durango, CO (DRO) - Miami, FL (MIA)	5,283	1,417
Dallas, TX (DFW) - Syracuse, NY (SYR)	4,010	1,409
Charlottesville, VA (CHO) - Des Moines, IA (DSM)	5,161	1,397
Denver, CO (DEN) - San Juan, PR (SJU)	3,816	1,381
Honolulu, HI (HNL) - Tucson, AZ (TUS)	4,340	1,380
Philadelphia, PA (PHL) - Fayetteville, AR (XNA)	4,537	1,377
Des Moines, IA (DSM) - Honolulu, HI (HNL)	4,983	1,371
Minneapolis, MN (MSP) - St. Thomas, VI (STT)	4,568	1,370
Des Moines, IA (DSM) - Reno, NV (RNO)	4,282	1,350

CITY PAIR	Post-Merger HHI	Δ HHI
Philadelphia, PA (PHL) - St. Croix, VI (STX)	9,330	1,331
Honolulu, HI (HNL) - Indianapolis, IN (IND)	3,926	1,328
Boston, MA (BOS) - Fayetteville, AR (XNA)	4,474	1,327
Albuquerque, NM (ABQ) - Kahului, HI (OGG)	5,134	1,322
Charlottesville, VA (CHO) - Phoenix, AZ (PHX)	6,867	1,319
Charlotte, NC (CLT) - El Paso, TX (ELP)	5,268	1,317
Des Moines, IA (DSM) - Fresno, CA (FAT)	5,037	1,311
Dallas, TX (DFW) - San Diego, CA (SAN)	6,869	1,310
Dallas, TX (DFW) - Jacksonville, FL (JAX)	7,106	1,304
Dallas, TX (DFW) - San Juan, PR (SJU)	7,234	1,303
Palm Springs, CA (PSP) - Washington, DC (WAS)	4,360	1,300
Des Moines, IA (DSM) - Tucson, AZ (TUS)	4,786	1,292
Fresno, CA (FAT) - Omaha, NE (OMA)	3,874	1,292
St. Louis, MO (STL) - Tucson, AZ (TUS)	4,306	1,273
Nashville, TN (BNA) - San Juan, PR (SJU)	4,957	1,262
Austin, TX (AUS) - Honolulu, HI (HNL)	4,531	1,259
Key West, FL (EYW) - Raleigh-Durham, NC (RDU)	4,746	1,247
Charlottesville, VA (CHO) - Omaha, NE (OMA)	5,087	1,237
Chattanooga, TN (CHA) - San Francisco, CA (SFO)	5,000	1,225
Columbus, OH (CMH) - Honolulu, HI (HNL)	3,984	1,225
Des Moines, IA (DSM) - Palm Springs, CA (PSP)	4,797	1,223
Washington, DC (WAS) - Fayetteville, AR (XNA)	4,214	1,221
Dallas, TX (DFW) - Huntsville, AL (HSV)	8,135	1,218
Miami, FL (MIA) - Louisville, KY (SDF)	3,843	1,217
Philadelphia, PA (PHL) - San Jose, CA (SJC)	3,728	1,215
Boston, MA (BOS) - Kapaa, HI (LIH)	5,009	1,210
Kahului, HI (OGG) - Philadelphia, PA (PHL)	5,157	1,199
St. Thomas, VI (STT) - Tallahassee, FL (TLH)	5,006	1,192
Raleigh-Durham, NC (RDU) - Fayetteville, AR (XNA)	4,878	1,190
Honolulu, HI (HNL) - Milwaukee, WI (MKE)	4,656	1,187
Fresno, CA (FAT) - Kansas City, MO (MCI)	3,980	1,184
Des Moines, IA (DSM) - Ontario, CA (ONT)	4,661	1,179
Indianapolis, IN (IND) - St. Thomas, VI (STT)	4,761	1,179
Boston, MA (BOS) - Santa Barbara, CA (SBA)	5,013	1,174
New York, NY (NYC) - Palm Springs, CA (PSP)	3,955	1,174
Dallas, TX (DFW) - Washington, DC (WAS)	7,095	1,163
Dallas, TX (DFW) - Tallahassee, FL (TLH)	5,582	1,152
Columbus, OH (CMH) - St. Thomas, VI (STT)	4,530	1,146
Westchester County, NY (HPN) - Louisville, KY (SDF)	4,898	1,145

APPENDIX A -- CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

CITY PAIR	Post-Merger HHI	Δ HHI
Cincinnati, OH (CIN) - Dallas, TX (DFW)	6,098	1,143
Charlotte, NC (CLT) - New York, NY (NYC)	5,427	1,141
Hilo, HI (KOA) - Tucson, AZ (TUS)	4,981	1,138
Los Angeles, CA (LAX) - St. Thomas, VI (STT)	7,828	1,136
Dallas, TX (DFW) - Fort Myers, FL (RSW)	7,652	1,136
Dallas, TX (DFW) - Harrisburg, PA (MDT)	3,722	1,134
Tampa, FL (TPA) - Tucson, AZ (TUS)	3,663	1,128
Dallas, TX (DFW) - Lexington, KY (LEX)	7,647	1,128
El Paso, TX (ELP) - Minneapolis, MN (MSP)	5,393	1,121
Detroit, MI (DTW) - Kahului, HI (OGG)	4,623	1,115
Dallas, TX (DFW) - Tucson, AZ (TUS)	8,370	1,111
Orlando, FL (MCO) - Santa Barbara, CA (SBA)	4,729	1,110
Chicago, IL (CHI) - Philadelphia, PA (PHL)	3,773	1,110
Pittsburgh, PA (PIT) - St. Thomas, VI (STT)	6,199	1,105
Chicago, IL (CHI) - Phoenix, AZ (PHX)	3,835	1,105
Boston, MA (BOS) - Reno, NV (RNO)	3,228	1,097
Miami, FL (MIA) - Washington, DC (WAS)	3,354	1,097
Miami, FL (MIA) - Fayetteville, AR (XNA)	5,213	1,089
Tampa, FL (TPA) - Fayetteville, AR (XNA)	4,809	1,089
Chicago, IL (CHI) - Kapaa, HI (LIH)	4,812	1,080
Charlottesville, VA (CHO) - Seattle, WA (SEA)	3,998	1,073
Fort Myers, FL (RSW) - Fayetteville, AR (XNA)	4,835	1,066
Orlando, FL (MCO) - Tucson, AZ (TUS)	3,508	1,059
Dallas, TX (DFW) - Orange County, CA (SNA)	9,283	1,057
Charlottesville, VA (CHO) - San Diego, CA (SAN)	3,649	1,055
New York, NY (NYC) - Fayetteville, AR (XNA)	4,353	1,054
Dallas, TX (DFW) - St. Thomas, VI (STT)	6,531	1,050
Norfolk-Virginia Beach, VA (ORF) - Fayetteville, AR (XNA)	4,322	1,049
Dallas, TX (DFW) - Honolulu, HI (HNL)	6,579	1,049
Orlando, FL (MCO) - Fayetteville, AR (XNA)	4,751	1,047
Fresno, CA (FAT) - New York, NY (NYC)	4,255	1,046
Santa Barbara, CA (SBA) - Salt Lake City, UT (SLC	4,720	1,043
Austin, TX (AUS) - Columbia, SC (CAE)	4,351	1,043
Fresno, CA (FAT) - Washington, DC (WAS)	4,112	1,038
Fresno, CA (FAT) - Houston, TX (HOU)	4,575	1,036
Detroit, MI (DTW) - Tucson, AZ (TUS)	3,293	1,027
Chicago, IL (CHI) - San Juan, PR (SJU)	4,623	1,023
Philadelphia, PA (PHL) - Orange County, CA (SNA)	3,113	1,021
Phoenix, AZ (PHX) - Richmond, VA (RIC)	3,462	1,018

CITY PAIR	Post-Merger HHI	Δ HHI
Cleveland, OH (CLE) - Dallas, TX (DFW)	4,486	1,013
Indianapolis, IN (IND) - Tucson, AZ (TUS)	3,763	1,013
Los Angeles, CA (LAX) - San Juan, PR (SJU)	4,164	1,012
Dallas, TX (DFW) - West Palm Beach (PBI)	8,081	1,010
San Francisco, CA (SFO) - San Juan, PR (SJU)	3,252	1,009
Durango, CO (DRO) - San Antonio, TX (SAT)	5,052	1,007
San Juan, PR (SJU) - Fayetteville, AR (XNA)	4,985	1,000
San Francisco, CA (SFO) - St. Thomas, VI (STT)	4,846	995
Ontario, CA (ONT) - Tampa, FL (TPA)	3,341	992
Charlotte, NC (CLT) - Los Angeles, CA (LAX)	5,485	989
Boston, MA (BOS) - St. Thomas, VI (STT)	4,575	979
Boston, MA (BOS) - Little Rock, AR (LIT)	3,387	969
Key West, FL (EYW) - Phoenix, AZ (PHX)	5,114	968
Westchester County, NY (HPN) - San Diego, CA (SAN)	3,559	965
New York, NY (NYC) - Tucson, AZ (TUS)	3,967	963
Knoxville, TN (TYS) - Fayetteville, AR (XNA)	4,759	958
Harrisburg, PA (MDT) - St. Louis, MO (STL)	3,526	954
Louisville, KY (SDF) - San Juan, PR (SJU)	4,899	951
New York, NY (NYC) - Ontario, CA (ONT)	3,084	950
Boston, MA (BOS) - Ontario, CA (ONT)	3,066	928
Charlotte, NC (CLT) - San Diego, CA (SAN)	5,734	926
Honolulu, HI (HNL) - Philadelphia, PA (PHL)	3,978	925
Pittsburgh, PA (PIT) - Fayetteville, AR (XNA)	4,235	917
Ontario, CA (ONT) - San Antonio, TX (SAT)	4,014	914
Charleston, SC (CHS) - San Juan, PR (SJU)	5,048	912
Dallas, TX (DFW) - Rochester, NY (ROC)	3,776	910
Chicago, IL (CHI) - Fresno, CA (FAT)	4,549	908
Honolulu, HI (HNL) - St. Louis, MO (STL)	4,515	907
Atlanta, GA (ATL) - Grand Junction, CO (GJT)	3,588	893
Nashville, TN (BNA) - New York, NY (NYC)	3,481	892
Kansas City, MO (MCI) - Tucson, AZ (TUS)	3,780	890
St. Louis, MO (STL) - Syracuse, NY (SYR)	3,539	890
Birmingham, AL (BHM) - St. Thomas, VI (STT)	5,001	889
Huntsville, AL (HSV) - Phoenix, AZ (PHX)	3,944	885
Charlottesville, VA (CHO) - Kansas City, MO (MCI)	5,451	883
Dallas, TX (DFW) - Kahului, HI (OGG)	8,258	882
Detroit, MI (DTW) - St. Thomas, VI (STT)	3,512	879
Grand Junction, CO (GJT) - Philadelphia, PA (PHL)	4,499	878
Austin, TX (AUS) - Philadelphia, PA (PHL)	2,915	878

APPENDIX A -- CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

CITY PAIR	Post-Merger HHI	Δ HHI
Chicago, IL (CHI) - Santa Barbara, CA (SBA)	4,819	878
Boston, MA (BOS) - Dallas, TX (DFW)	5,606	877
Charlotte, NC (CLT) - San Juan, PR (SJU)	7,386	875
Philadelphia, PA (PHL) - San Antonio, TX (SAT)	2,927	874
Richmond, VA (RIC) - Fayetteville, AR (XNA)	4,157	873
Honolulu, HI (HNL) - Kansas City, MO (MCI)	3,287	869
Detroit, MI (DTW) - El Paso, TX (ELP)	4,561	864
New York, NY (NYC) - Santa Barbara, CA (SBA)	4,872	863
Westchester County, NY (HPN) - Fayetteville, AR (XNA)	4,657	863
Chicago, IL (CHI) - West Palm Beach (PBI)	6,093	860
Harrisburg, PA (MDT) - Fayetteville, AR (XNA)	4,567	860
Columbus, OH (CMH) - Orange County, CA (SNA)	3,066	855
Chicago, IL (CHI) - El Paso, TX (ELP)	5,120	853
Austin, TX (AUS) - Greensboro, NC (GSO)	4,490	852
Montgomery, AL (MGM) - Fayetteville, AR (XNA)	5,064	848
Montgomery, AL (MGM) - Phoenix, AZ (PHX)	5,152	846
El Paso, TX (ELP) - Philadelphia, PA (PHL)	3,902	843
Austin, TX (AUS) - Orange County, CA (SNA)	3,439	843
Phoenix, AZ (PHX) - Knoxville, TN (TYS)	3,700	838
Westchester County, NY (HPN) - St. Louis, MO (STL)	3,322	838
Miami, FL (MIA) - Ontario, CA (ONT)	3,305	837
Little Rock, AR (LIT) - Philadelphia, PA (PHL)	3,482	832
Dallas, TX (DFW) - Grand Junction, CO (GJT)	7,233	823
Birmingham, AL (BHM) - St. Croix, VI (STX)	10,000	821
Lexington, KY (LEX) - Phoenix, AZ (PHX)	4,181	819
Houston, TX (HOU) - Palm Springs, CA (PSP)	4,929	817
Charlotte, NC (CLT) - Fayetteville, AR (XNA)	5,930	816
Las Vegas, NV (LAS) - Santa Barbara, CA (SBA)	5,004	814
Little Rock, AR (LIT) - Miami, FL (MIA)	3,847	807
Orlando, FL (MCO) - Ontario, CA (ONT)	2,953	805
Fort Myers, FL (RSW) - St. Thomas, VI (STT)	5,127	801
New Orleans, LA (MSY) - San Juan, PR (SJU)	5,674	799
Little Rock, AR (LIT) - Rochester, NY (ROC)	3,500	799
Kapaa, HI (LIH) - Washington, DC (WAS)	4,887	796
Louisville, KY (SDF) - St. Thomas, VI (STT)	4,886	795
Columbus, OH (CMH) - Tucson, AZ (TUS)	3,307	785
Des Moines, IA (DSM) - Phoenix, AZ (PHX)	5,219	784
Charlottesville, VA (CHO) - Denver, CO (DEN)	4,302	784
Boston, MA (BOS) - Gainesville, FL (GNV)	5,346	783

CITY PAIR	Post-Merger HHI	Δ HHI
Charlottesville, VA (CHO) - Los Angeles, CA (LAX)	3,900	782
Charlotte, NC (CLT) - Sacramento, CA (SMF)	3,986	777
Austin, TX (AUS) - Richmond, VA (RIC)	3,835	776
Pittsburgh, PA (PIT) - Tucson, AZ (TUS)	3,255	773
Key West, FL (EYW) - Washington, DC (WAS)	3,876	772
Hartford, CT (BDL) - Fayetteville, AR (XNA)	4,199	772
Tucson, AZ (TUS) - Washington, DC (WAS)	3,981	767
Charlottesville, VA (CHO) - Milwaukee, WI (MKE)	5,375	764
Kahului, HI (OGG) - Washington, DC (WAS)	4,700	761
Dallas, TX (DFW) - Portland, OR (PDX)	4,765	756
Greensboro, NC (GSO) - San Antonio, TX (SAT)	4,719	751
Little Rock, AR (LIT) - Harrisburg, PA (MDT)	4,050	750
Seattle, WA (SEA) - St. Thomas, VI (STT)	4,204	748
San Antonio, TX (SAT) - Orange County, CA (SNA)	3,570	748
Dallas, TX (DFW) - Montgomery, AL (MGM)	8,376	746
Los Angeles, CA (LAX) - St. Louis, MO (STL)	4,736	744
Omaha, NE (OMA) - Tucson, AZ (TUS)	3,272	736
Birmingham, AL (BHM) - Miami, FL (MIA)	3,586	733
Honolulu, HI (HNL) - Pittsburgh, PA (PIT)	4,474	729
El Paso, TX (ELP) - Seattle, WA (SEA)	4,387	728
Honolulu, HI (HNL) - Miami, FL (MIA)	4,481	726
Honolulu, HI (HNL) - Tampa, FL (TPA)	3,403	725
Miami, FL (MIA) - Raleigh-Durham, NC (RDU)	3,319	724
Gainesville, FL (GNV) - San Juan, PR (SJU)	6,576	724
Dallas, TX (DFW) - New York, NY (NYC)	5,162	723
Westchester County, NY (HPN) - Indianapolis, IN (IND)	3,744	723
Des Moines, IA (DSM) - San Jose, CA (SJC)	3,651	718
Chattanooga, TN (CHA) - Phoenix, AZ (PHX)	5,224	718
Columbia, SC (CAE) - Fayetteville, AR (XNA)	5,277	716
Detroit, MI (DTW) - Grand Junction, CO (GJT)	3,495	714
Little Rock, AR (LIT) - New York, NY (NYC)	2,997	712
Chattanooga, TN (CHA) - Los Angeles, CA (LAX)	5,159	711
Buffalo, NY (BUF) - Dallas, TX (DFW)	3,590	708
Chicago, IL (CHI) - Hilo, HI (KOA)	4,809	708
Rochester, NY (ROC) - Fayetteville, AR (XNA)	4,513	705
Detroit, MI (DTW) - Ontario, CA (ONT)	2,905	699
Miami, FL (MIA) - Tucson, AZ (TUS)	4,278	696
Little Rock, AR (LIT) - Raleigh-Durham, NC (RDU)	3,707	693
Raleigh-Durham, NC (RDU) - Washington, DC (WAS)	3,411	692

APPENDIX A -- CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

CITY PAIR	Post-Merger HHI	Δ HHI
San Jose, CA (SJC) - St. Louis, MO (STL)	3,553	689
Pittsburgh, PA (PIT) - Orange County, CA (SNA)	2,862	687
Hartford, CT (BDL) - Phoenix, AZ (PHX)	3,045	687
Chicago, IL (CHI) - Tucson, AZ (TUS)	4,811	686
West Palm Beach (PBI) - San Francisco, CA (SFO)	3,238	684
Durango, CO (DRO) - Tampa, FL (TPA)	5,017	682
Boston, MA (BOS) - Kahului, HI (OGG)	4,044	682
Miami, FL (MIA) - San Diego, CA (SAN)	2,993	682
Richmond, VA (RIC) - St. Louis, MO (STL)	2,976	681
Chicago, IL (CHI) - Syracuse, NY (SYR)	4,598	678
Philadelphia, PA (PHL) - San Diego, CA (SAN)	4,906	676
Columbus, OH (CMH) - New York, NY (NYC)	3,140	674
Nashville, TN (BNA) - St. Croix, VI (STX)	9,444	671
Phoenix, AZ (PHX) - Fort Myers, FL (RSW)	2,711	670
Westchester County, NY (HPN) - Seattle, WA (SEA)	3,511	668
Reno, NV (RNO) - Tampa, FL (TPA)	3,854	663
Columbus, OH (CMH) - Dallas, TX (DFW)	7,592	662
Savannah, GA (SAV) - Fayetteville, AR (XNA)	4,952	659
Little Rock, AR (LIT) - Pittsburgh, PA (PIT)	3,419	659
Columbia, SC (CAE) - Los Angeles, CA (LAX)	3,605	657
New York, NY (NYC) - Reno, NV (RNO)	2,886	656
Orange County, CA (SNA) - Tampa, FL (TPA)	2,872	655
Albuquerque, NM (ABQ) - Philadelphia, PA (PHL)	3,204	655
Westchester County, NY (HPN) - Las Vegas, NV (LAS)	2,975	655
Cleveland, OH (CLE) - San Juan, PR (SJU)	3,338	653
San Juan, PR (SJU) - Tallahassee, FL (TLH)	5,177	651
Cincinnati, OH (CIN) - St. Thomas, VI (STT)	4,816	649
Des Moines, IA (DSM) - Philadelphia, PA (PHL)	3,270	645
Houston, TX (HOU) - Kahului, HI (OGG)	5,285	645
Richmond, VA (RIC) - San Francisco, CA (SFO)	3,125	645
Boston, MA (BOS) - Monterey, CA (MRY)	5,303	644
Atlanta, GA (ATL) - Kahului, HI (OGG)	4,665	643
Dallas, TX (DFW) - Indianapolis, IN (IND)	7,197	643
Detroit, MI (DTW) - Key West, FL (EYW)	5,219	641
Orlando, FL (MCO) - San Jose, CA (SJC)	2,754	640
Gainesville, FL (GNV) - Los Angeles, CA (LAX)	5,109	639
Huntsville, AL (HSV) - Syracuse, NY (SYR)	4,545	636
Columbus, OH (CMH) - San Jose, CA (SJC)	3,066	635
Cincinnati, OH (CIN) - Westchester County, NY (HPN)	4,686	634

CITY PAIR	Post-Merger HHI	Δ HHI
West Palm Beach (PBI) - Phoenix, AZ (PHX)	3,204	633
Boston, MA (BOS) - Lexington, KY (LEX)	4,454	630
Chicago, IL (CHI) - Richmond, VA (RIC)	4,250	628
San Juan, PR (SJU) - Knoxville, TN (TYS)	4,579	628
Jacksonville, FL (JAX) - Fayetteville, AR (XNA)	5,211	624
Pensacola, FL (PNS) - Fayetteville, AR (XNA)	4,492	622
Ontario, CA (ONT) - Philadelphia, PA (PHL)	3,569	620
Chattanooga, TN (CHA) - Denver, CO (DEN)	5,343	614
Kansas City, MO (MCI) - San Juan, PR (SJU)	3,085	612
Orange County, CA (SNA) - St. Louis, MO (STL)	3,356	609
Columbia, SC (CAE) - San Antonio, TX (SAT)	4,511	606
Boston, MA (BOS) - Orange County, CA (SNA)	3,047	606
Indianapolis, IN (IND) - San Juan, PR (SJU)	3,250	605
Charlottesville, VA (CHO) - San Francisco, CA (SF	4,599	605
Ontario, CA (ONT) - Washington, DC (WAS)	2,910	604
Milwaukee, WI (MKE) - Tucson, AZ (TUS)	2,533	602
Westchester County, NY (HPN) - Little Rock, AR (LIT)	4,494	601
Detroit, MI (DTW) - Orange County, CA (SNA)	2,798	601
Hartford, CT (BDL) - Little Rock, AR (LIT)	3,258	599
Westchester County, NY (HPN) - Minneapolis, MN (MSP)	3,448	596
Columbus, OH (CMH) - San Juan, PR (SJU)	3,131	594
Chicago, IL (CHI) - Monterey, CA (MRY)	5,356	591
Key West, FL (EYW) - San Francisco, CA (SFO)	6,164	591
Westchester County, NY (HPN) - Knoxville, TN (TYS)	4,688	589
Chattanooga, TN (CHA) - St. Louis, MO (STL)	5,385	587
Philadelphia, PA (PHL) - Reno, NV (RNO)	3,257	586
Detroit, MI (DTW) - San Juan, PR (SJU)	3,339	583
Chicago, IL (CHI) - Harrisburg, PA (MDT)	4,947	583
Kansas City, MO (MCI) - Knoxville, TN (TYS)	4,543	580
Des Moines, IA (DSM) - West Palm Beach (PBI)	5,020	580
Charlotte, NC (CLT) - St. Thomas, VI (STT)	9,177	579
Boston, MA (BOS) - Louisville, KY (SDF)	3,335	577
Charlotte, NC (CLT) - San Francisco, CA (SFO)	6,566	577
Miami, FL (MIA) - San Jose, CA (SJC)	3,313	577
Chicago, IL (CHI) - Knoxville, TN (TYS)	4,427	575
Lexington, KY (LEX) - Kansas City, MO (MCI)	3,795	570
Nashville, TN (BNA) - Rochester, NY (ROC)	3,840	567
West Palm Beach (PBI) - Fayetteville, AR (XNA)	5,232	566
Hilo, HI (KOA) - New York, NY (NYC)	2,683	565

APPENDIX A -- CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

CITY PAIR	Post-Merger HHI	Δ HHI
Nashville, TN (BNA) - Westchester County, NY (HPN)	4,351	565
St. Thomas, VI (STT) - Knoxville, TN (TYS)	5,261	564
Minneapolis, MN (MSP) - San Juan, PR (SJU)	3,176	564
Jacksonville, FL (JAX) - Phoenix, AZ (PHX)	3,050	564
Minneapolis, MN (MSP) - Ontario, CA (ONT)	2,857	563
Fort Myers, FL (RSW) - San Francisco, CA (SFO)	2,681	563
Pittsburgh, PA (PIT) - San Jose, CA (SJC)	2,903	560
Columbus, OH (CMH) - Westchester County, NY (HPN)	6,310	560
Detroit, MI (DTW) - Reno, NV (RNO)	3,275	558
Charleston, SC (CHS) - Key West, FL (EYW)	5,545	557
San Antonio, TX (SAT) - Savannah, GA (SAV)	4,287	555
Chattanooga, TN (CHA) - Seattle, WA (SEA)	5,329	555
Austin, TX (AUS) - Ontario, CA (ONT)	4,018	552
Los Angeles, CA (LAX) - Richmond, VA (RIC)	2,905	552
Monterey, CA (MRY) - New York, NY (NYC)	5,542	551
San Antonio, TX (SAT) - Knoxville, TN (TYS)	4,405	551
San Antonio, TX (SAT) - San Jose, CA (SJC)	4,077	548
Des Moines, IA (DSM) - Knoxville, TN (TYS)	4,300	548
Westchester County, NY (HPN) - Los Angeles, CA (LAX)	3,258	548
Charlotte, NC (CLT) - Denver, CO (DEN)	5,189	546
Phoenix, AZ (PHX) - Syracuse, NY (SYR)	3,298	544
Richmond, VA (RIC) - Seattle, WA (SEA)	3,084	544
Birmingham, AL (BHM) - San Juan, PR (SJU)	5,331	543
New York, NY (NYC) - Kahului, HI (OGG)	2,993	543
Norfolk-Virginia Beach, VA (ORF) - Phoenix, AZ (PHX)	3,132	541
Chicago, IL (CHI) - San Jose, CA (SJC)	4,892	539
Orlando, FL (MCO) - Orange County, CA (SNA)	2,750	537
Baton Rouge, LA (BTR) - Lexington, KY (LEX)	4,938	535
Dallas, TX (DFW) - Tampa, FL (TPA)	6,378	535
Austin, TX (AUS) - Reno, NV (RNO)	4,193	534
Santa Barbara, CA (SBA) - Washington, DC (WAS)	5,304	533
Gainesville, FL (GNV) - New York, NY (NYC)	4,830	533
Charlotte, NC (CLT) - Kansas City, MO (MCI)	5,296	533
Charlotte, NC (CLT) - Phoenix, AZ (PHX)	6,243	530
Montgomery, AL (MGM) - San Francisco, CA (SFO)	5,057	529
Hilo, HI (KOA) - Washington, DC (WAS)	4,514	529
San Diego, CA (SAN) - Tampa, FL (TPA)	2,600	528
Chicago, IL (CHI) - St. Croix, VI (STX)	9,841	528
Charlottesville, VA (CHO) - Little Rock, AR (LIT)	5,886	527

CITY PAIR	Post-Merger HHI	Δ HHI
Denver, CO (DEN) - Lexington, KY (LEX)	3,415	526
Kapaa, HI (LIH) - Phoenix, AZ (PHX)	4,543	526
San Antonio, TX (SAT) - Sacramento, CA (SMF)	3,274	524
Phoenix, AZ (PHX) - Tallahassee, FL (TLH)	5,470	523
Key West, FL (EYW) - Greensboro, NC (GSO)	5,612	523
Chicago, IL (CHI) - Jacksonville, FL (JAX)	2,959	520
Pittsburgh, PA (PIT) - San Juan, PR (SJU)	4,171	520
Greensboro, NC (GSO) - Fayetteville, AR (XNA)	4,916	519
Boston, MA (BOS) - Des Moines, IA (DSM)	2,605	518
Columbus, OH (CMH) - Fayetteville, AR (XNA)	4,343	517
Charlotte, NC (CLT) - Seattle, WA (SEA)	4,926	517
Dallas, TX (DFW) - Los Angeles, CA (LAX)	5,187	516
Denver, CO (DEN) - Richmond, VA (RIC)	2,855	516
Kapaa, HI (LIH) - New York, NY (NYC)	2,752	514
Phoenix, AZ (PHX) - Fort Walton Beach, FL (VPS)	3,529	512
Omaha, NE (OMA) - San Juan, PR (SJU)	3,521	508
Los Angeles, CA (LAX) - Tallahassee, FL (TLH)	5,315	504
Kansas City, MO (MCI) - Syracuse, NY (SYR)	3,349	504
Miami, FL (MIA) - Sacramento, CA (SMF)	2,774	503
Cincinnati, OH (CIN) - San Juan, PR (SJU)	3,442	502
Greenville, SC (GSP) - Fayetteville, AR (XNA)	5,272	501
Nashville, TN (BNA) - Washington, DC (WAS)	4,076	499
Dallas, TX (DFW) - Salt Lake City, UT (SLC)	4,506	499
Boston, MA (BOS) - Hilo, HI (KOA)	4,509	498
Dallas, TX (DFW) - Las Vegas, NV (LAS)	6,373	498
Des Moines, IA (DSM) - Raleigh-Durham, NC (RDU)	3,832	498
Dallas, TX (DFW) - Fort Walton Beach, FL (VPS)	9,022	496
Charlottesville, VA (CHO) - Las Vegas, NV (LAS)	5,346	495
Des Moines, IA (DSM) - Jacksonville, FL (JAX)	4,522	495
Ontario, CA (ONT) - St. Louis, MO (STL)	3,842	493
Omaha, NE (OMA) - Syracuse, NY (SYR)	3,346	491
San Jose, CA (SJC) - Tampa, FL (TPA)	3,037	490
Orlando, FL (MCO) - Reno, NV (RNO)	3,072	488
Charleston, SC (CHS) - St. Croix, VI (STX)	9,341	488
Raleigh-Durham, NC (RDU) - Seattle, WA (SEA)	2,590	487
Greensboro, NC (GSO) - Los Angeles, CA (LAX)	3,342	484
Los Angeles, CA (LAX) - Raleigh-Durham, NC (RDU)	2,869	481
Denver, CO (DEN) - Montgomery, AL (MGM)	5,661	476
Nashville, TN (BNA) - Charlottesville, VA (CHO)	6,270	476

APPENDIX A -- CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

CITY PAIR	Post-Merger HHI	Δ HHI
Columbus, OH (CMH) - Reno, NV (RNO)	4,533	476
Kahului, HI (OGG) - Phoenix, AZ (PHX)	4,623	475
El Paso, TX (ELP) - Milwaukee, WI (MKE)	3,620	474
Kansas City, MO (MCI) - Philadelphia, PA (PHL)	4,543	474
Harrisburg, PA (MDT) - Phoenix, AZ (PHX)	3,941	474
Cincinnati, OH (CIN) - Rochester, NY (ROC)	3,105	473
Kansas City, MO (MCI) - Orange County, CA (SNA)	2,507	472
Boston, MA (BOS) - Honolulu, HI (HNL)	4,142	472
Little Rock, AR (LIT) - Richmond, VA (RIC)	4,152	471
Chicago, IL (CHI) - Kahului, HI (OGG)	4,738	467
Richmond, VA (RIC) - San Diego, CA (SAN)	3,411	466
Durango, CO (DRO) - Philadelphia, PA (PHL)	5,257	466
Detroit, MI (DTW) - Gulfport, MS (GPT)	4,883	465
Cincinnati, OH (CIN) - Little Rock, AR (LIT)	4,541	461
Key West, FL (EYW) - St. Louis, MO (STL)	4,897	460
Atlanta, GA (ATL) - San Jose, CA (SJC)	3,691	458
Des Moines, IA (DSM) - Montgomery, AL (MGM)	5,393	456
Los Angeles, CA (LAX) - Montgomery, AL (MGM)	5,000	456
San Francisco, CA (SFO) - Tallahassee, FL (TLH)	5,781	455
Detroit, MI (DTW) - San Jose, CA (SJC)	2,931	454
Hartford, CT (BDL) - Los Angeles, CA (LAX)	2,829	451
Little Rock, AR (LIT) - Fort Myers, FL (RSW)	4,582	451
El Paso, TX (ELP) - New York, NY (NYC)	4,710	450
Chattanooga, TN (CHA) - Syracuse, NY (SYR)	5,225	450
Columbus, OH (CMH) - Los Angeles, CA (LAX)	2,829	450
Raleigh-Durham, NC (RDU) - San Francisco, CA (SFO)	2,659	447
Charlotte, NC (CLT) - St. Louis, MO (STL)	6,103	447
Denver, CO (DEN) - Fort Walton Beach, FL (VPS)	3,761	446
Los Angeles, CA (LAX) - West Palm Beach (PBI)	3,421	445
Miami, FL (MIA) - Orange County, CA (SNA)	3,141	442
Rochester, NY (ROC) - Louisville, KY (SDF)	3,431	441
Nashville, TN (BNA) - Syracuse, NY (SYR)	4,010	440
Houston, TX (HOU) - Lexington, KY (LEX)	3,989	440
Westchester County, NY (HPN) - Kansas City, MO (MCI)	3,029	439
New York, NY (NYC) - Raleigh-Durham, NC (RDU)	2,628	439
Indianapolis, IN (IND) - San Jose, CA (SJC)	3,193	437
Omaha, NE (OMA) - West Palm Beach (PBI)	4,576	436
Anchorage, AK (ANC) - Columbus, OH (CMH)	3,993	435
Key West, FL (EYW) - New York, NY (NYC)	3,735	434

CITY PAIR	Post-Merger HHI	Δ HHI
Pittsburgh, PA (PIT) - San Diego, CA (SAN)	2,625	431
El Paso, TX (ELP) - Portland, OR (PDX)	4,077	431
Chicago, IL (CHI) - Mobile, AL (MOB)	4,718	431
Los Angeles, CA (LAX) - Lexington, KY (LEX)	3,480	431
Chattanooga, TN (CHA) - Las Vegas, NV (LAS)	5,739	431
Chicago, IL (CHI) - Reno, NV (RNO)	4,145	430
New York, NY (NYC) - St. Thomas, VI (STT)	4,727	430
Des Moines, IA (DSM) - Syracuse, NY (SYR)	3,540	430
Raleigh-Durham, NC (RDU) - San Antonio, TX (SAT)	2,819	429
Gainesville, FL (GNV) - Philadelphia, PA (PHL)	5,296	428
Norfolk-Virginia Beach, VA (ORF) - San Francisco, CA (SFO	2,619	427
San Francisco, CA (SFO) - Tampa, FL (TPA)	2,503	427
Raleigh-Durham, NC (RDU) - San Diego, CA (SAN)	2,545	426
Indianapolis, IN (IND) - Miami, FL (MIA)	3,367	426
Las Vegas, NV (LAS) - Miami, FL (MIA)	3,416	424
Pittsburgh, PA (PIT) - Reno, NV (RNO)	3,770	423
Indianapolis, IN (IND) - Ontario, CA (ONT)	4,118	421
Dallas, TX (DFW) - Orlando, FL (MCO)	6,437	419
Las Vegas, NV (LAS) - Richmond, VA (RIC)	2,632	418
Mobile, AL (MOB) - Phoenix, AZ (PHX)	3,393	415
Tallahassee, FL (TLH) - Fayetteville, AR (XNA)	5,582	415
Key West, FL (EYW) - Las Vegas, NV (LAS)	5,533	415
Mobile, AL (MOB) - St. Louis, MO (STL)	4,683	415
Ontario, CA (ONT) - Pittsburgh, PA (PIT)	3,463	414
Chattanooga, TN (CHA) - San Diego, CA (SAN)	5,736	413
Des Moines, IA (DSM) - San Diego, CA (SAN)	2,991	413
Montgomery, AL (MGM) - Seattle, WA (SEA)	5,549	412
Houston, TX (HOU) - Hilo, HI (KOA)	5,437	411
Nashville, TN (BNA) - Key West, FL (EYW)	4,663	404
Jacksonville, FL (JAX) - St. Thomas, VI (STT)	3,969	404
Charlotte, NC (CLT) - Omaha, NE (OMA)	4,495	404
Richmond, VA (RIC) - San Antonio, TX (SAT)	3,512	403
West Palm Beach (PBI) - St. Louis, MO (STL)	3,500	403
Boston, MA (BOS) - Huntsville, AL (HSV)	3,855	402
Philadelphia, PA (PHL) - San Juan, PR (SJU)	8,844	400
Columbus, OH (CMH) - Miami, FL (MIA)	3,540	399
Hartford, CT (BDL) - Baton Rouge, LA (BTR)	5,950	398
San Jose, CA (SJC) - Washington, DC (WAS)	2,594	397
Jackson, MS (JAN) - Phoenix, AZ (PHX)	2,850	397

APPENDIX A -- CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

CITY PAIR	Post-Merger HHI	Δ HHI
Las Vegas, NV (LAS) - Harrisburg, PA (MDT)	3,460	396
Austin, TX (AUS) - San Juan, PR (SJU)	2,692	396
Reno, NV (RNO) - Washington, DC (WAS)	2,700	395
Austin, TX (AUS) - Harrisburg, PA (MDT)	3,369	394
Monterey, CA (MRY) - Phoenix, AZ (PHX)	9,083	393
Boston, MA (BOS) - San Antonio, TX (SAT)	3,126	393
Phoenix, AZ (PHX) - Pensacola, FL (PNS)	3,086	392
Columbus, OH (CMH) - Ontario, CA (ONT)	3,863	390
Denver, CO (DEN) - West Palm Beach (PBI)	3,280	390
Baton Rouge, LA (BTR) - San Juan, PR (SJU)	5,023	390
Austin, TX (AUS) - Durango, CO (DRO)	3,946	389
Miami, FL (MIA) - Pittsburgh, PA (PIT)	4,372	389
Austin, TX (AUS) - Charlottesville, VA (CHO)	4,508	386
Baton Rouge, LA (BTR) - Columbus, OH (CMH)	4,922	386
Phoenix, AZ (PHX) - Tampa, FL (TPA)	4,075	385
Cleveland, OH (CLE) - Fayetteville, AR (XNA)	3,346	385
Chattanooga, TN (CHA) - Houston, TX (HOU)	5,565	384
Charlotte, NC (CLT) - Portland, OR (PDX)	3,828	381
Chicago, IL (CHI) - Fort Walton Beach, FL (VPS)	5,381	381
Atlanta, GA (ATL) - Reno, NV (RNO)	3,073	380
Austin, TX (AUS) - Raleigh-Durham, NC (RDU)	2,774	379
Miami, FL (MIA) - Richmond, VA (RIC)	3,155	378
Charlotte, NC (CLT) - Las Vegas, NV (LAS)	5,711	377
El Paso, TX (ELP) - Los Angeles, CA (LAX)	5,469	377
Lexington, KY (LEX) - Syracuse, NY (SYR)	4,516	377
Miami, FL (MIA) - Salt Lake City, UT (SLC)	3,320	375
Memphis, TN (MEM) - San Juan, PR (SJU)	4,175	372
New York, NY (NYC) - Washington, DC (WAS)	3,200	372
Minneapolis, MN (MSP) - Tucson, AZ (TUS)	4,208	372
Detroit, MI (DTW) - Fayetteville, AR (XNA)	5,675	371
Baton Rouge, LA (BTR) - Richmond, VA (RIC)	5,129	371
Des Moines, IA (DSM) - Orange County, CA (SNA)	3,145	371
Dallas, TX (DFW) - Louisville, KY (SDF)	6,997	370
Kahului, HI (OGG) - Salt Lake City, UT (SLC)	3,497	370
Boston, MA (BOS) - Phoenix, AZ (PHX)	3,563	369
Fort Myers, FL (RSW) - San Juan, PR (SJU)	4,369	368
Columbus, OH (CMH) - San Diego, CA (SAN)	2,702	366
Anchorage, AK (ANC) - Tampa, FL (TPA)	3,503	365
Buffalo, NY (BUF) - Little Rock, AR (LIT)	2,779	365

CITY PAIR	Post-Merger HHI	Δ HHI
Reno, NV (RNO) - San Antonio, TX (SAT)	4,524	361
Chattanooga, TN (CHA) - Fayetteville, AR (XNA)	6,035	360
Chicago, IL (CHI) - Tallahassee, FL (TLH)	5,407	358
Austin, TX (AUS) - Los Angeles, CA (LAX)	3,130	357
Austin, TX (AUS) - Sacramento, CA (SMF)	3,323	357
Chattanooga, TN (CHA) - Kansas City, MO (MCI)	5,869	356
Gulfport, MS (GPT) - Minneapolis, MN (MSP)	5,688	353
Houston, TX (HOU) - Kapaa, HI (LIH)	5,668	353
Boston, MA (BOS) - El Paso, TX (ELP)	5,456	352
Atlanta, GA (ATL) - Ontario, CA (ONT)	3,281	352
Columbus, OH (CMH) - Syracuse, NY (SYR)	3,973	352
Kansas City, MO (MCI) - Raleigh-Durham, NC (RDU)	3,046	351
Little Rock, AR (LIT) - West Palm Beach (PBI)	5,040	350
Des Moines, IA (DSM) - Sacramento, CA (SMF)	2,629	350
Seattle, WA (SEA) - Fort Walton Beach, FL (VPS)	3,723	349
Austin, TX (AUS) - Huntsville, AL (HSV)	3,718	349
Des Moines, IA (DSM) - Greenville, SC (GSP)	4,251	348
New York, NY (NYC) - Norfolk-Virginia Beach, VA (ORF)	3,091	346
Gainesville, FL (GNV) - Louisville, KY (SDF)	5,418	346
Chicago, IL (CHI) - Raleigh-Durham, NC (RDU)	3,326	346
Denver, CO (DEN) - Kapaa, HI (LIH)	5,728	345
St. Louis, MO (STL) - Knoxville, TN (TYS)	5,379	345
Rochester, NY (ROC) - St. Louis, MO (STL)	3,063	343
Harrisburg, PA (MDT) - Seattle, WA (SEA)	3,640	342
Charlotte, NC (CLT) - Des Moines, IA (DSM)	4,500	342
Fort Myers, FL (RSW) - San Diego, CA (SAN)	2,930	342
Jacksonville, FL (JAX) - San Francisco, CA (SFO)	2,638	342
Orange County, CA (SNA) - Washington, DC (WAS)	2,798	341
Reno, NV (RNO) - St. Louis, MO (STL)	3,938	340
West Palm Beach (PBI) - Seattle, WA (SEA)	3,470	339
Los Angeles, CA (LAX) - Fort Myers, FL (RSW)	2,683	339
Charlotte, NC (CLT) - Salt Lake City, UT (SLC)	5,011	338
Lexington, KY (LEX) - San Francisco, CA (SFO)	3,416	338
Austin, TX (AUS) - Lexington, KY (LEX)	4,331	337
Des Moines, IA (DSM) - Mobile, AL (MOB)	4,564	336
El Paso, TX (ELP) - Salt Lake City, UT (SLC)	4,641	336
Austin, TX (AUS) - Savannah, GA (SAV)	4,641	334
Houston, TX (HOU) - Norfolk-Virginia Beach, VA (ORF)	2,739	334
Baton Rouge, LA (BTR) - Cincinnati, OH (CIN)	4,797	333

APPENDIX A -- CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

CITY PAIR	Post-Merger HHI	Δ HHI
Key West, FL (EYW) - Richmond, VA (RIC)	5,833	332
San Jose, CA (SJC) - Tucson, AZ (TUS)	5,027	331
Dallas, TX (DFW) - Detroit, MI (DTW)	4,001	330
Little Rock, AR (LIT) - Washington, DC (WAS)	3,013	329
Kansas City, MO (MCI) - Ontario, CA (ONT)	3,922	328
Huntsville, AL (HSV) - Kansas City, MO (MCI)	5,947	328
Boston, MA (BOS) - Grand Junction, CO (GJT)	5,419	328
Omaha, NE (OMA) - Orange County, CA (SNA)	2,541	327
Pensacola, FL (PNS) - San Juan, PR (SJU)	4,740	327
El Paso, TX (ELP) - San Jose, CA (SJC)	5,326	327
Durango, CO (DRO) - Pittsburgh, PA (PIT)	6,192	326
Chicago, IL (CHI) - Rochester, NY (ROC)	5,020	326
Memphis, TN (MEM) - Miami, FL (MIA)	4,462	325
Des Moines, IA (DSM) - Miami, FL (MIA)	3,715	324
Kansas City, MO (MCI) - Mobile, AL (MOB)	3,917	323
Des Moines, IA (DSM) - Gulfport, MS (GPT)	4,617	323
Cleveland, OH (CLE) - Miami, FL (MIA)	3,748	321
Dallas, TX (DFW) - Miami, FL (MIA)	6,662	321
Kansas City, MO (MCI) - Fort Walton Beach, FL (VP	4,599	321
Anchorage, AK (ANC) - Charlotte, NC (CLT)	4,572	321
Pittsburgh, PA (PIT) - San Antonio, TX (SAT)	2,599	321
Los Angeles, CA (LAX) - Knoxville, TN (TYS)	3,201	320
Des Moines, IA (DSM) - Washington, DC (WAS)	3,420	320
Kansas City, MO (MCI) - Harrisburg, PA (MDT)	3,532	319
Baton Rouge, LA (BTR) - Raleigh-Durham, NC (RDU)	4,815	318
Columbus, OH (CMH) - San Francisco, CA (SFO)	2,615	317
Grand Junction, CO (GJT) - Tampa, FL (TPA)	5,003	317
Jacksonville, FL (JAX) - Omaha, NE (OMA)	5,067	317
St. Louis, MO (STL) - Tallahassee, FL (TLH)	5,690	316
Indianapolis, IN (IND) - Los Angeles, CA (LAX)	2,535	316
Greenville, SC (GSP) - Los Angeles, CA (LAX)	3,094	316
Greensboro, NC (GSO) - Phoenix, AZ (PHX)	4,397	315
Hartford, CT (BDL) - New Orleans, LA (MSY)	2,920	315
Los Angeles, CA (LAX) - Norfolk-Virginia Beach, VA (ORF	2,594	314
Chattanooga, TN (CHA) - San Antonio, TX (SAT)	5,910	313
Jacksonville, FL (JAX) - Seattle, WA (SEA)	2,844	313
Hartford, CT (BDL) - San Diego, CA (SAN)	2,509	312
San Antonio, TX (SAT) - San Juan, PR (SJU)	2,667	311
Baton Rouge, LA (BTR) - Washington, DC (WAS)	3,742	311

CITY PAIR	Post-Merger HHI	Δ HHI
Harrisburg, PA (MDT) - San Antonio, TX (SAT)	3,358	311
Nashville, TN (BNA) - Harrisburg, PA (MDT)	3,909	310
Cleveland, OH (CLE) - Westchester County, NY (HPN)	4,704	310
Harrisburg, PA (MDT) - Miami, FL (MIA)	5,288	310
Boston, MA (BOS) - Fort Walton Beach, FL (VPS)	4,955	309
San Juan, PR (SJU) - Salt Lake City, UT (SLC)	4,901	309
Austin, TX (AUS) - Hartford, CT (BDL)	2,809	309
Des Moines, IA (DSM) - Pittsburgh, PA (PIT)	3,185	308
Des Moines, IA (DSM) - Los Angeles, CA (LAX)	2,525	308
Chattanooga, TN (CHA) - Minneapolis, MN (MSP)	6,035	307
Des Moines, IA (DSM) - Richmond, VA (RIC)	3,387	307
Milwaukee, WI (MKE) - San Jose, CA (SJC)	3,322	307
Omaha, NE (OMA) - Tallahassee, FL (TLH)	6,189	307
Columbia, SC (CAE) - Kansas City, MO (MCI)	4,527	306
San Diego, CA (SAN) - Syracuse, NY (SYR)	2,797	306
Los Angeles, CA (LAX) - Pittsburgh, PA (PIT)	2,933	306
Westchester County, NY (HPN) - San Francisco, CA (SFO)	4,195	305
Boston, MA (BOS) - Tallahassee, FL (TLH)	5,024	304
Dallas, TX (DFW) - St. Croix, VI (STX)	10,000	303
Little Rock, AR (LIT) - Orlando, FL (MCO)	4,050	303
Seattle, WA (SEA) - Syracuse, NY (SYR)	2,852	301
Chicago, IL (CHI) - Key West, FL (EYW)	3,494	300
Sacramento, CA (SMF) - St. Louis, MO (STL)	2,582	299
Cincinnati, OH (CIN) - Miami, FL (MIA)	4,935	299
Austin, TX (AUS) - Norfolk-Virginia Beach, VA (ORF)	2,846	299
Seattle, WA (SEA) - Tallahassee, FL (TLH)	6,209	298
Gainesville, FL (GNV) - New Orleans, LA (MSY)	6,300	298
Phoenix, AZ (PHX) - Savannah, GA (SAV)	4,230	297
Huntsville, AL (HSV) - Las Vegas, NV (LAS)	3,885	297
Omaha, NE (OMA) - Raleigh-Durham, NC (RDU)	2,818	297
Miami, FL (MIA) - St. Louis, MO (STL)	3,803	297
Huntsville, AL (HSV) - Seattle, WA (SEA)	3,345	296
Westchester County, NY (HPN) - Memphis, TN (MEM)	4,067	295
Hilo, HI (KOA) - Phoenix, AZ (PHX)	4,454	295
Monterey, CA (MRY) - Washington, DC (WAS)	5,619	295
Austin, TX (AUS) - Pittsburgh, PA (PIT)	2,609	295
Gulfport, MS (GPT) - New York, NY (NYC)	4,484	295
Boston, MA (BOS) - Baton Rouge, LA (BTR)	4,280	293
El Paso, TX (ELP) - Pittsburgh, PA (PIT)	3,986	293

APPENDIX A -- CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

CITY PAIR	Post-Merger HHI	Δ HHI
Little Rock, AR (LIT) - Tampa, FL (TPA)	3,930	293
Key West, FL (EYW) - Louisville, KY (SDF)	6,170	293
Greensboro, NC (GSO) - San Diego, CA (SAN)	4,099	293
San Francisco, CA (SFO) - St. Louis, MO (STL)	2,810	293
San Francisco, CA (SFO) - Fort Walton Beach, FL (	3,454	293
Hartford, CT (BDL) - San Juan, PR (SJU)	5,673	292
Fort Myers, FL (RSW) - San Antonio, TX (SAT)	2,676	291
Fresno, CA (FAT) - Phoenix, AZ (PHX)	9,574	290
Philadelphia, PA (PHL) - Sacramento, CA (SMF)	2,877	290
Chicago, IL (CHI) - Gulfport, MS (GPT)	4,618	289
Memphis, TN (MEM) - Phoenix, AZ (PHX)	4,808	289
Charleston, SC (CHS) - Los Angeles, CA (LAX)	3,071	289
Los Angeles, CA (LAX) - Harrisburg, PA (MDT)	3,884	288
Honolulu, HI (HNL) - Orlando, FL (MCO)	2,888	288
Denver, CO (DEN) - Greensboro, NC (GSO)	3,382	287
St. Louis, MO (STL) - St. Croix, VI (STX)	9,073	287
Harrisburg, PA (MDT) - Louisville, KY (SDF)	3,581	287
Lexington, KY (LEX) - Fayetteville, AR (XNA)	4,320	287
Jackson, MS (JAN) - Minneapolis, MN (MSP)	4,719	287
Hartford, CT (BDL) - Fort Walton Beach, FL (VPS)	5,478	287
Gulfport, MS (GPT) - Phoenix, AZ (PHX)	4,028	286
Montgomery, AL (MGM) - Minneapolis, MN (MSP)	6,343	286
Syracuse, NY (SYR) - Knoxville, TN (TYS)	4,611	286
West Palm Beach (PBI) - San Diego, CA (SAN)	3,433	286
Sacramento, CA (SMF) - Tampa, FL (TPA)	2,501	285
Little Rock, AR (LIT) - Norfolk-Virginia Beach, VA (ORF)	3,660	285
Omaha, NE (OMA) - Pensacola, FL (PNS)	4,733	285
Orlando, FL (MCO) - Phoenix, AZ (PHX)	4,009	283
Dallas, TX (DFW) - Gainesville, FL (GNV)	6,248	283
Indianapolis, IN (IND) - Syracuse, NY (SYR)	3,346	283
New York, NY (NYC) - Tallahassee, FL (TLH)	4,681	282
Jackson, MS (JAN) - New York, NY (NYC)	3,886	282
St. Louis, MO (STL) - Washington, DC (WAS)	3,562	281
Westchester County, NY (HPN) - Lexington, KY (LEX)	4,864	280
Denver, CO (DEN) - Mobile, AL (MOB)	3,366	280
Philadelphia, PA (PHL) - Seattle, WA (SEA)	4,261	280
San Antonio, TX (SAT) - San Francisco, CA (SFO)	3,404	279
Jacksonville, FL (JAX) - Little Rock, AR (LIT)	5,509	278
Des Moines, IA (DSM) - Huntsville, AL (HSV)	5,237	278

CITY PAIR	Post-Merger HHI	Δ HHI
Key West, FL (EYW) - Pittsburgh, PA (PIT)	3,483	277
Houston, TX (HOU) - San Juan, PR (SJU)	4,844	277
Columbus, OH (CMH) - El Paso, TX (ELP)	4,590	276
Louisville, KY (SDF) - Syracuse, NY (SYR)	3,612	275
Greenville, SC (GSP) - Phoenix, AZ (PHX)	2,929	274
Harrisburg, PA (MDT) - San Diego, CA (SAN)	4,131	272
Phoenix, AZ (PHX) - Rochester, NY (ROC)	2,756	272
Kansas City, MO (MCI) - Rochester, NY (ROC)	2,970	271
Baton Rouge, LA (BTR) - Philadelphia, PA (PHL)	3,775	271
El Paso, TX (ELP) - Indianapolis, IN (IND)	4,014	270
Columbus, OH (CMH) - Little Rock, AR (LIT)	3,273	270
Hartford, CT (BDL) - San Francisco, CA (SFO)	2,657	269
St. Thomas, VI (STT) - Tampa, FL (TPA)	4,436	269
Kansas City, MO (MCI) - West Palm Beach (PBI)	3,537	269
Huntsville, AL (HSV) - Minneapolis, MN (MSP)	5,458	268
El Paso, TX (ELP) - Palm Springs, CA (PSP)	6,530	268
Columbus, OH (CMH) - Seattle, WA (SEA)	2,515	267
Lexington, KY (LEX) - New York, NY (NYC)	4,373	267
Houston, TX (HOU) - Tucson, AZ (TUS)	4,456	267
Charlottesville, VA (CHO) - Indianapolis, IN (IND	4,591	266
Nashville, TN (BNA) - Miami, FL (MIA)	4,483	266
Anchorage, AK (ANC) - Indianapolis, IN (IND)	5,094	266
Milwaukee, WI (MKE) - Knoxville, TN (TYS)	4,213	265
Minneapolis, MN (MSP) - West Palm Beach (PBI)	4,823	264
Philadelphia, PA (PHL) - St. Louis, MO (STL)	4,659	264
Gainesville, FL (GNV) - Washington, DC (WAS)	4,883	263
Gulfport, MS (GPT) - Los Angeles, CA (LAX)	3,961	262
Fort Myers, FL (RSW) - Seattle, WA (SEA)	2,839	262
Charlottesville, VA (CHO) - Louisville, KY (SDF)	7,869	261
Cincinnati, OH (CIN) - Phoenix, AZ (PHX)	4,929	261
Dallas, TX (DFW) - San Francisco, CA (SFO)	4,911	261
Austin, TX (AUS) - Fort Myers, FL (RSW)	2,913	261
Phoenix, AZ (PHX) - Pittsburgh, PA (PIT)	4,126	261
Richmond, VA (RIC) - San Juan, PR (SJU)	2,720	261
Mobile, AL (MOB) - San Francisco, CA (SFO)	3,410	261
New Orleans, LA (MSY) - Philadelphia, PA (PHL)	4,232	260
Salt Lake City, UT (SLC) - Tampa, FL (TPA)	2,876	260
Omaha, NE (OMA) - San Diego, CA (SAN)	2,766	260
Columbia, SC (CAE) - Seattle, WA (SEA)	3,457	259

APPENDIX A -- CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

CITY PAIR	Post-Merger HHI	Δ HHI
Austin, TX (AUS) - Chattanooga, TN (CHA)	5,587	258
Kansas City, MO (MCI) - Fort Myers, FL (RSW)	2,777	258
Harrisburg, PA (MDT) - Omaha, NE (OMA)	3,604	257
Fort Walton Beach, FL (VPS) - Fayetteville, AR (X	4,338	257
Boston, MA (BOS) - Pensacola, FL (PNS)	3,307	257
Minneapolis, MN (MSP) - Fort Walton Beach, FL (VP	6,289	256
Omaha, NE (OMA) - Richmond, VA (RIC)	3,508	256
El Paso, TX (ELP) - Tampa, FL (TPA)	3,311	255
Des Moines, IA (DSM) - Rochester, NY (ROC)	3,306	255
Philadelphia, PA (PHL) - Tallahassee, FL (TLH)	5,014	255
Austin, TX (AUS) - Cincinnati, OH (CIN)	3,879	254
Omaha, NE (OMA) - Savannah, GA (SAV)	5,733	254
Cleveland, OH (CLE) - Little Rock, AR (LIT)	2,934	254
Greensboro, NC (GSO) - Omaha, NE (OMA)	3,827	253
Huntsville, AL (HSV) - Indianapolis, IN (IND)	5,972	252
Des Moines, IA (DSM) - El Paso, TX (ELP)	5,590	252
Raleigh-Durham, NC (RDU) - Tallahassee, FL (TLH)	5,133	249
Boston, MA (BOS) - Mobile, AL (MOB)	4,940	249
Grand Junction, CO (GJT) - Miami, FL (MIA)	5,388	249
Austin, TX (AUS) - Knoxville, TN (TYS)	4,141	249
Gainesville, FL (GNV) - Indianapolis, IN (IND)	5,173	248
El Paso, TX (ELP) - San Francisco, CA (SFO)	3,400	248
Jacksonville, FL (JAX) - Los Angeles, CA (LAX)	2,916	248
Greensboro, NC (GSO) - Houston, TX (HOU)	4,051	248
Miami, FL (MIA) - New Orleans, LA (MSY)	4,060	247
Birmingham, AL (BHM) - Key West, FL (EYW)	4,205	247
Hartford, CT (BDL) - Jackson, MS (JAN)	3,698	247
Detroit, MI (DTW) - Jackson, MS (JAN)	4,440	247
Philadelphia, PA (PHL) - Phoenix, AZ (PHX)	5,660	247
Indianapolis, IN (IND) - Reno, NV (RNO)	3,892	246
Charleston, SC (CHS) - Fayetteville, AR (XNA)	5,979	246
Columbia, SC (CAE) - San Francisco, CA (SFO)	3,428	245
Nashville, TN (BNA) - Boston, MA (BOS)	3,105	245
Los Angeles, CA (LAX) - Tampa, FL (TPA)	3,488	245
St. Louis, MO (STL) - Fort Walton Beach, FL (VPS)	5,733	245
El Paso, TX (ELP) - Orlando, FL (MCO)	3,146	244
Atlanta, GA (ATL) - El Paso, TX (ELP)	4,450	244
Minneapolis, MN (MSP) - Knoxville, TN (TYS)	4,920	243
Las Vegas, NV (LAS) - Lexington, KY (LEX)	3,493	243

CITY PAIR	Post-Merger HHI	Δ HHI
Boston, MA (BOS) - Jackson, MS (JAN)	3,999	243
Houston, TX (HOU) - Knoxville, TN (TYS)	4,051	243
Milwaukee, WI (MKE) - Reno, NV (RNO)	3,832	243
Gulfport, MS (GPT) - Kansas City, MO (MCI)	3,887	242
Huntsville, AL (HSV) - New York, NY (NYC)	4,033	242
San Francisco, CA (SFO) - Knoxville, TN (TYS)	3,400	242
Miami, FL (MIA) - Omaha, NE (OMA)	2,831	240
Lexington, KY (LEX) - Rochester, NY (ROC)	4,466	240
Montgomery, AL (MGM) - San Diego, CA (SAN)	5,257	239
Huntsville, AL (HSV) - San Francisco, CA (SFO)	3,449	239
Savannah, GA (SAV) - San Francisco, CA (SFO)	3,791	239
Los Angeles, CA (LAX) - Philadelphia, PA (PHL)	4,082	239
Gainesville, FL (GNV) - Raleigh-Durham, NC (RDU)	5,092	239
Detroit, MI (DTW) - Honolulu, HI (HNL)	4,822	238
Dallas, TX (DFW) - Seattle, WA (SEA)	4,298	237
Boston, MA (BOS) - Miami, FL (MIA)	3,909	237
Milwaukee, WI (MKE) - Ontario, CA (ONT)	4,742	237
Huntsville, AL (HSV) - Los Angeles, CA (LAX)	3,441	237
Minneapolis, MN (MSP) - Syracuse, NY (SYR)	4,097	236
Phoenix, AZ (PHX) - San Antonio, TX (SAT)	4,728	236
Chicago, IL (CHI) - Montgomery, AL (MGM)	6,507	236
Birmingham, AL (BHM) - Des Moines, IA (DSM)	4,292	235
Hartford, CT (BDL) - San Antonio, TX (SAT)	2,916	235
Cincinnati, OH (CIN) - Fayetteville, AR (XNA)	5,927	235
Baton Rouge, LA (BTR) - Greensboro, NC (GSO)	5,054	234
Los Angeles, CA (LAX) - Savannah, GA (SAV)	4,517	234
Pensacola, FL (PNS) - San Diego, CA (SAN)	3,713	234
Hartford, CT (BDL) - Seattle, WA (SEA)	2,772	233
Pensacola, FL (PNS) - San Francisco, CA (SFO)	2,909	233
Austin, TX (AUS) - Grand Junction, CO (GJT)	4,674	233
Hartford, CT (BDL) - Pensacola, FL (PNS)	4,929	233
Omaha, NE (OMA) - Fort Myers, FL (RSW)	3,008	233
Indianapolis, IN (IND) - Knoxville, TN (TYS)	3,945	232
Baton Rouge, LA (BTR) - Pittsburgh, PA (PIT)	4,397	232
Minneapolis, MN (MSP) - Palm Springs, CA (PSP)	3,824	231
Los Angeles, CA (LAX) - Miami, FL (MIA)	3,410	231
Greenville, SC (GSP) - Little Rock, AR (LIT)	4,770	231
Grand Junction, CO (GJT) - Orlando, FL (MCO)	4,457	231
Key West, FL (EYW) - Los Angeles, CA (LAX)	6,973	230

APPENDIX A -- CITY PAIRS WHERE THE MERGER IS PRESUMPTIVELY ILLEGAL

CITY PAIR	Post-Merger HHI	Δ HHI
Charlottesville, VA (CHO) - San Antonio, TX (SAT)	4,463	230
Jacksonville, FL (JAX) - Kansas City, MO (MCI)	3,399	230
Key West, FL (EYW) - Norfolk-Virginia Beach, VA (ORF)	5,747	230
Dallas, TX (DFW) - Durango, CO (DRO)	4,052	230
Key West, FL (EYW) - Minneapolis, MN (MSP)	6,277	229
Miami, FL (MIA) - Knoxville, TN (TYS)	3,304	229
Indianapolis, IN (IND) - Philadelphia, PA (PHL)	6,700	229
St. Croix, VI (STX) - Washington, DC (WAS)	8,150	229
Des Moines, IA (DSM) - Tallahassee, FL (TLH)	6,416	229
Boston, MA (BOS) - Knoxville, TN (TYS)	5,003	228
Los Angeles, CA (LAX) - Syracuse, NY (SYR)	2,935	227
Columbia, SC (CAE) - San Diego, CA (SAN)	4,515	227
Baton Rouge, LA (BTR) - Norfolk-Virginia Beach, VA (ORF	5,156	226
Memphis, TN (MEM) - Syracuse, NY (SYR)	4,421	226
Austin, TX (AUS) - Phoenix, AZ (PHX)	4,891	226
Indianapolis, IN (IND) - Rochester, NY (ROC)	3,666	226
Charleston, SC (CHS) - Seattle, WA (SEA)	3,380	226
San Diego, CA (SAN) - Knoxville, TN (TYS)	3,233	226
Seattle, WA (SEA) - Knoxville, TN (TYS)	3,046	225
Sacramento, CA (SMF) - Washington, DC (WAS)	2,898	225
Denver, CO (DEN) - Tallahassee, FL (TLH)	5,975	225
Los Angeles, CA (LAX) - Fort Walton Beach, FL (VP	3,815	223
Denver, CO (DEN) - Westchester County, NY (HPN)	3,819	223
Phoenix, AZ (PHX) - Raleigh-Durham, NC (RDU)	3,573	223
Hartford, CT (BDL) - Lexington, KY (LEX)	4,745	222
Atlanta, GA (ATL) - Tucson, AZ (TUS)	4,916	222
Monterey, CA (MRY) - Salt Lake City, UT (SLC)	6,650	221
Little Rock, AR (LIT) - San Juan, PR (SJU)	6,569	220
San Diego, CA (SAN) - Tallahassee, FL (TLH)	6,434	219
Key West, FL (EYW) - Memphis, TN (MEM)	6,557	219
Des Moines, IA (DSM) - Westchester County, NY (HPN)	3,464	219
Baton Rouge, LA (BTR) - Phoenix, AZ (PHX)	4,389	219
Baton Rouge, LA (BTR) - New York, NY (NYC)	3,718	218
Jackson, MS (JAN) - Miami, FL (MIA)	4,304	218
Mobile, AL (MOB) - New York, NY (NYC)	4,452	218
Albuquerque, NM (ABQ) - Tampa, FL (TPA)	3,054	218
Boston, MA (BOS) - Gulfport, MS (GPT)	5,213	218
Houston, TX (HOU) - Reno, NV (RNO)	3,525	217
Norfolk-Virginia Beach, VA (ORF) - Seattle, WA (SEA)	3,247	217

CITY PAIR	Post-Merger HHI	Δ HHI
Mobile, AL (MOB) - Minneapolis, MN (MSP)	5,888	217
Denver, CO (DEN) - Norfolk-Virginia Beach, VA (ORF)	2,598	215
Kansas City, MO (MCI) - Tallahassee, FL (TLH)	6,205	215
Des Moines, IA (DSM) - Harrisburg, PA (MDT)	3,556	215
Columbia, SC (CAE) - Houston, TX (HOU)	3,634	214
Gulfport, MS (GPT) - Washington, DC (WAS)	4,647	214
San Francisco, CA (SFO) - Syracuse, NY (SYR)	3,547	214
Jackson, MS (JAN) - Milwaukee, WI (MKE)	5,568	213
New York, NY (NYC) - San Jose, CA (SJC)	3,002	213
Omaha, NE (OMA) - Knoxville, TN (TYS)	3,596	213
Baton Rouge, LA (BTR) - Indianapolis, IN (IND)	4,240	212
Charleston, WV (CRW) - Dallas, TX (DFW)	4,244	212
Des Moines, IA (DSM) - Fort Myers, FL (RSW)	3,859	211
Houston, TX (HOU) - Santa Barbara, CA (SBA)	6,373	211
Pittsburgh, PA (PIT) - St. Louis, MO (STL)	3,179	211
Westchester County, NY (HPN) - Milwaukee, WI (MKE)	3,142	210
Pensacola, FL (PNS) - St. Thomas, VI (STT)	5,346	210
Harrisburg, PA (MDT) - Minneapolis, MN (MSP)	3,659	208
Pittsburgh, PA (PIT) - Seattle, WA (SEA)	2,610	207
Austin, TX (AUS) - Greenville, SC (GSP)	2,984	207
Albuquerque, NM (ABQ) - Boston, MA (BOS)	3,294	207
Las Vegas, NV (LAS) - Syracuse, NY (SYR)	2,755	207
Houston, TX (HOU) - Monterey, CA (MRY)	6,287	206
Jackson, MS (JAN) - San Juan, PR (SJU)	6,244	205
Chattanooga, TN (CHA) - New York, NY (NYC)	5,046	205
Miami, FL (MIA) - Pensacola, FL (PNS)	5,066	204
Indianapolis, IN (IND) - Harrisburg, PA (MDT)	3,462	203
Gulfport, MS (GPT) - Greenville, SC (GSP)	4,923	203
Norfolk-Virginia Beach, VA (ORF) - Tallahassee, FL (TLH)	5,030	203
Phoenix, AZ (PHX) - Washington, DC (WAS)	3,416	202
Chicago, IL (CHI) - Orange County, CA (SNA)	3,726	201
Austin, TX (AUS) - Charleston, SC (CHS)	3,275	201
Baton Rouge, LA (BTR) - Detroit, MI (DTW)	5,080	201

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
UNITED STATES OF AMERICA, *et al.*
Plaintiffs,
v.
US AIRWAYS GROUP, INC.
and
AMR CORPORATION
Defendants.
Case No. 1:13–cv–01236 (CKK)
Judge: Colleen Kollar-Kotelly
Filed: 11/12/2013

Competitive Impact Statement

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), Plaintiffs United States of America (''United States'') files this Competitive Impact Statement relating to the proposed Final Judgment submitted on November 12, 2013, for entry in this civil antitrust matter.

I. Nature and Purpose of the Proceeding

On August 13, 2013, the United States and the States of Arizona, Florida, Tennessee, Texas, the Commonwealths of Pennsylvania and Virginia, and the District of Columbia (''Plaintiff States'') filed a civil antitrust Complaint seeking to enjoin the proposed merger of Defendants US Airways Group, Inc. (''US Airways'') and AMR Corporation (''American'').[2] The Complaint alleges that the likely effect of this merger would be to lessen competition substantially for the sale of scheduled air passenger service in city pair markets throughout the United States, and in the market for takeoff and landing authorizations (''slots'') at Ronald Reagan Washington National Airport (''Reagan National'') in violation of Section 7 of the Clayton Act as amended, 15 U.S.C. 18.

On November 12, 2013, the United States filed a proposed Final Judgment designed to remedy the harm to competition that was likely to result from the proposed merger. The proposed Final Judgment, which is explained more fully below, requires the divestiture of slots, gates, and ground facilities at key airports around the country to permit the entry or expansion of airlines that can provide meaningful competition in numerous markets, eliminate the significant increase in concentration of slots at Reagan National that otherwise would have occurred, and enhance the ability of low-cost carriers to compete with legacy carriers on a system-wide basis.

As set forth in the proposed Final Judgment, the Defendants are required to divest or transfer to purchasers approved by the United States, in consultation with the Plaintiff States:

- 104 air carrier slots[3] at Reagan National and rights and interests in any associated gates or other ground facilities, up to the extent such gates and ground facilities were used by Defendants to support the use of the divested slots;
- 34 slots at New York LaGuardia International Airport (''LaGuardia'') and rights and interests in any associated gates or other ground facilities, up to the extent such gates and ground facilities were used by Defendants to support the use of the divested slots; and
- rights and interests to two airport gates and associated ground facilities at each of the following airports: Chicago O'Hare International Airport (''ORD''), Los Angeles International Airport (''LAX''), Boston Logan International Airport (''BOS''), Miami International Airport (''MIA''), and Dallas Love Field (''DAL'').

The Reagan National and LaGuardia slots will be sold in bundles, under procedures approved by the United States, in consultation with the Plaintiff States.

Trial in this matter is scheduled to begin on November 25, 2013. Plaintiffs and Defendants have filed an Asset Preservation Order and Stipulation providing that: (1) Defendants are bound by the terms of the proposed Final Judgment, (2) the litigation will be stayed pending completion of the procedures called for by the APPA, and (3) the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendants and the Proposed Transaction

US Airways is a Delaware corporation headquartered in Tempe, Arizona. Last year, it flew over fifty million passengers to approximately 200 locations worldwide, taking in more than $13 billion in revenue. US Airways operates hubs in Phoenix, Charlotte, Philadelphia, and Washington, DC.

American is a Delaware corporation headquartered in Fort Worth, Texas. AMR Corporation is the parent company of American Airlines. Last year, American flew over eighty million passengers to approximately 250 locations worldwide, taking in more than $24 billion in revenue. American operates hubs in New York, Los Angeles, Chicago, Dallas, and Miami. In November 2011, American filed for bankruptcy reorganization and is currently under the supervision of the Bankruptcy Court for the Southern District of New York.

US Airways and American agreed to merge on February 13, 2013. US Airways shareholders would own 28 percent of the combined airline, while American shareholders, creditors, labor unions, and employees would own 72 percent. The merged airline would operate under the American brand name, but the new American would be run by US Airways management.

B. The Competitive Effects of the Transaction

1. Relevant Markets

Domestic scheduled air passenger service is a relevant product market within the meaning of Section 7 of the Clayton Act. Because air travel offers passengers significant time savings and convenience over other forms of travel, few passengers would substitute other modes of transportation (car, bus, or train) for scheduled air passenger service in response to a small but significant industry-wide fare increase.

City pairs are relevant geographic markets within the meaning of Section 7 of the Clayton Act. Passengers seek to depart from airports close to where they live and work, and arrive at airports close to their intended destinations. Most airline travel is related to business, family events, and vacations. Thus, most passengers book flights with their origins and destinations predetermined. Few passengers who wish to fly from one city to another would switch to flights between other cities in response to a small but significant and non-transitory fare increase.

Passengers traveling within city pairs have different preferences for factors such as nonstop service, the flexibility to purchase tickets or change plans at the last minute and, in cities served by more than one airport, the ability to fly in to or out of the airport most convenient to their home or intended destination. Through a variety of fare restrictions and rules, airlines can profitably raise prices for some of these passengers without raising prices for others. Thus, the competitive effects of

[2] Michigan joined the group of Plaintiff States on September 5, 2013; Texas withdrew from the lawsuit on October 1, 2013 after reaching a settlement with the Defendants. References to Plaintiff States include Michigan and exclude Texas.

[3] Slots at Reagan National are designated as either ''air carrier,'' which may be operated with any size aircraft, or ''commuter,'' which must be operated using aircraft with 76 seats or less.

the proposed merger may vary among passengers depending on their preferences for particular types of service or particular airports.

Slots at Reagan National Airport also constitute a relevant market within the meaning of Section 7 of the Clayton Act. Reagan National is across the Potomac River from Washington, DC, and, due to its proximity to the city and direct service via the Metro, airlines actively seek to serve passengers flying into and out of Reagan National. To serve Reagan National, a carrier must have ''slots,'' which are government-issued rights to take off and land. Reagan National is one of only four airports in the country requiring federally-issued slots. Slots at Reagan National are highly valued, difficult to obtain, and only rarely change hands between airlines. There are no alternatives to slots for airlines seeking to enter or expand their service at Reagan National.

2. Competitive Effects

As alleged in the Complaint, this merger would combine two of the four major ''legacy'' carriers, leaving ''New American,'' Delta, and United as the remaining major national network carriers.[4] Those three carriers would have extensive national and international networks, connections to hundreds of destinations, established brand names, and strong frequent flyer reward programs. In contrast to the legacy carriers, other carriers (hereinafter referred to as ''low-cost carriers'' or ''LCCs''), such as Southwest Airlines (''Southwest''), JetBlue Airways (''JetBlue''), Virgin America, Frontier Airlines, and Spirit Airlines, have less extensive networks and tend to focus more heavily on lower fares and other value propositions. Southwest carries the most domestic passengers of any airline, however, its route network is limited compared to the four current legacy carriers, especially to significant business-oriented markets. Although the LCCs serve fewer destinations than the legacy airlines, they generally offer important competition on the routes that they do serve.

This merger would leave three very similar legacy airlines—Delta, United, and the New American. By further reducing the number of legacy airlines and aligning the economic incentives of those that remain, the merger would make it easier for the remaining legacy airlines to cooperate, rather than compete, on price and service. Absent the merger, US Airways and American, as independent competitors, would have unique incentives to disrupt coordination that already occurs to some degree among the legacy carriers. US Airways' network structure provides the incentive to offer its ''Advantage Fares'' program, an aggressive discounting strategy aimed at undercutting the other airlines' nonstop fares with cheaper connecting service. American, having completed a successful reorganization in bankruptcy, would have the incentive, and indeed, it has announced the intention to undertake significant growth at the expense of its competitors. The merger would diminish these important competitive constraints.

The merger would also entrench the merged airline as the dominant carrier at Washington Reagan National Airport, where it would control 69 percent of the take-off and landing slots. The merger would eliminate head-to-head competition between American and US Airways on the routes they both serve from the airport and would effectively foreclose entry or expansion by other airlines that might increase competition at Reagan National.

Finally, the merger would eliminate head-to-head competition between US Airways and American on numerous non-stop and connecting routes.

3. Entry and Expansion

New entry, or expansion by existing competitors, would be unlikely to prevent or remedy the merger's likely anticompetitive effects absent the proposed divestitures. Operational barriers limit entry and expansion at a number of important airports. Four of the busiest airports in the United States—including Reagan National and LaGuardia—are subject to slot limitations governed by the FAA. The lack of availability of slots is a substantial barrier to entry at those airports, especially for low-cost carriers. Slots at these airports are concentrated in the hands of large legacy airlines that have little incentive to sell or lease slots to those carriers most likely to compete aggressively against them. As a result, slots are expensive, difficult to obtain, and change hands only rarely.

Access to gates can also be a substantial barrier to entry or expansion at some airports. At several large airports, a significant portion of the available gates are leased to established airlines under long-term exclusive-use leases. In such cases, a carrier seeking to enter or expand would have to sublease gates from incumbent airlines.

In addition to operational constraints, new entrants and those seeking to expand must overcome the effects of corporate discount programs offered by dominant incumbents; loyalty to existing frequent flyer programs; a less well-known brand; and the risk of aggressive responses to new entry by the dominant incumbent carrier. However, especially in large cities, low-cost carriers have demonstrated some ability to overcome those disadvantages with the help of lower costs, when they are able to obtain access to the necessary airport facilities.

III. Explanation of the Proposed Final Judgment

The Complaint alleges several ways that the elimination of US Airways and American as independent competitors will result in harm to consumers. As things stand today, each carrier places important competitive constraints on the other large network carriers. US Airways undercuts the nonstop fares of legacy carriers through its Advantage Fares program. American had planned to fly more planes. The Complaint alleges that the merger will diminish New American's incentives to maintain these strategies and increase its incentives to coordinate with the other legacy carriers rather than compete. The Complaint also alleges harm resulting from increased slot concentration at DCA.

The proposed remedy seeks to address both the harm resulting from increased slot concentration at DCA and the broader harms alleged in the Complaint by requiring the divestiture of an unprecedented quantity of valuable facilities at seven of the most important airports in the United States. The access to key airports made possible by the divestitures will create network opportunities for the purchasing carriers that would otherwise have been out of reach for the foreseeable future. Those opportunities will provide increased incentives for those carriers to invest in new capacity and expand into additional markets.

The proposed remedy will not create a new independent competitor, nor does it purport to replicate American's capacity expansion plans or create Advantage Fares where they might otherwise be eliminated. Instead, it promises to impede the industry's evolution toward a tighter oligopoly by requiring the divestiture of critical facilities to carriers that will likely use them to fly more people to more places at more competitive fares. In this way, the proposed remedy will deliver benefits to consumers that could not be obtained by enjoining the merger.

The divestiture of 104 air carrier slots at Reagan National and 34 slots at

[4] Two carriers—Hawaiian Airlines and Alaska Air—are technically ''legacy'' carriers, as they have operated interstate service since prior to deregulation and rely on hub-and-spoke networks, but each operates in a narrow geographic region.

LaGuardia will not only address the localized competitive concerns at those airports, but will deliver substantial additional benefits. American and US Airways currently compete head-to-head on two routes from Reagan National (Raleigh-Durham and Nashville) and one route from LaGuardia (Charlotte). In addition, JetBlue and Southwest offer service on a limited number of routes at these airports through use of slots leased from American on terms that could be renegotiated or cancelled by the New American.[5] Through the remedy, Southwest and JetBlue will have the opportunity to obtain permanent access to the slots they are currently leasing from American, and those LCCs and others will have the opportunity to acquire more slots at DCA and at LGA as well. This will allow them to provide greatly expanded service on numerous routes, including new nonstop and connecting service to points throughout the country.

Similarly, gate divestitures at O'Hare (ORD), Los Angeles (LAX), Boston (BOS), Dallas Love Field (DAL), and Miami (MIA) would expand the presence of potentially disruptive competitors at these strategically important airports located throughout the country.[6] ORD and LAX, two of American's major hubs, are among the most highly congested airports in the country, and competitors have historically had difficulties obtaining access to gates and other facilities at those airports to be able to enter or expand service. The divestitures will give competing carriers an expanded foothold at these important airports in the center of the country and the west coast, respectively. Likewise, there is limited ability to enter or expand at BOS; the divestitures will provide relief there. Although access issues at Miami are not as acute as at the other airports, the proposed Final Judgment also ensures that a carrier seeking to enter or expand at Miami will have access to two of the gates and associated ground facilities currently leased by US Airways.

The proposed Final Judgment also includes divestitures at Dallas Love Field, an airport near American's largest hub at Dallas-Fort Worth International Airport (''DFW''). Gates at DFW are readily available, but Love Field, which is much closer to downtown Dallas, is highly gate-constrained. Although today operations at Love Field are severely restricted under current law,[7] those restrictions are due to expire in October 2014, at which point Love Field will have a distinct advantage versus DFW, particularly in serving business customers. The divestitures will position a low-cost carrier to provide vigorous competition to the New American's nonstop and connecting service out of DFW.

Past antitrust enforcement demonstrates that providing LCCs with access to constrained airports results in dramatic consumer benefits. In 2010, in response to the United States' concerns regarding competitive effects of the proposed United/Continental merger, United and Continental transferred 36 slots, three gates and other facilities at Newark to Southwest. Southwest used those assets to establish service on six nonstop routes from Newark, resulting in substantially lower fares to consumers. For example, average fares for travel between Newark and St. Louis dropped 27% and fares for travel between Newark and Houston dropped 15%. In addition, Southwest established connecting service to approximately 60 additional cities throughout the United States.

The proposed remedy will require the divestiture of almost four times as many slots as were divested at the time of the United/Continental merger, plus gates and additional facilities at key airports throughout the country. In total, the divestitures will significantly strengthen the purchasing carriers, provide the incentive and ability for those carriers to invest in new capacity, and position them to provide more meaningful competition system-wide.

A. The Divestiture of Slots at Reagan National

Section IV.F of the Proposed Final Judgment requires that the New American permanently divest 104 air carrier slots at Reagan National, two of which shall be slots currently held by US Airways and the remainder from American, including 16 slots American currently leases to JetBlue in exchange for slots at John F. Kennedy International Airport. New American will offer to make the slot exchange with JetBlue permanent. The remaining 88 slots (plus any of the 16 traded slots that JetBlue declines) will be divided into bundles, taking into account specific slot times to ensure commercially viable and competitive patterns of service for the recipients of the divested slots. New American will divest these slot bundles to at least two different carriers approved by the United States in its sole discretion, in consultation with the Plaintiff States.

In addition, New American will either sublease or transfer to the purchaser of any Reagan National slots, gates and other ground facilities (*e.g.,* ticket counters, hold-rooms, leased jet bridges, and operations space), up to the extent such gates and facilities were used by Defendants to support the use of the divested slots, on the same terms and conditions pursuant to which the New American currently leases those facilities.

Following the divestiture of the Reagan National slots, if requested by the purchasers, Defendants shall lease back the slots for no consideration for a period not to exceed 180 calendar days, or as may be extended at the request of the purchaser, with the approval of the United States, in consultation with the Plaintiff States. The value of this rent-free lease back will naturally be reflected in the purchase price of the slots. A transfer of this magnitude will naturally entail a transition period for both the acquirers and the Defendants. The lease-back provisions are designed to allow purchasers sufficient time to institute new service while incentivizing them to establish that service reasonably quickly.

B. The Divestiture of Slots and Facilities at LaGuardia

Section IV.G of the Proposed Final Judgment requires that New American permanently divest 34 air carrier slots at LGA. New American will offer to divest to Southwest on commercially reasonable terms the 10 slots Southwest currently leases from American. The United States will identify the remaining 24 slots to be divested taking into account specific slot times to ensure commercially viable and competitive patterns of service for the recipients of the divested slots. The 24 slots (in addition to any of the 10 leased slots that Southwest declines) will be divided into bundles and divested to carriers approved by the United States in its sole discretion, in consultation with the Plaintiff States.

In addition, New American will either sublease or transfer to the purchaser of any LaGuardia slots gates and other ground facilities (*e.g.,* ticket counters, hold-rooms, leased jet bridges, and

[5] JetBlue and American currently engage in an exchange in which JetBlue trades 24 slots at New York's JFK International Airport to American in exchange for American trading 16 slots at Reagan National to JetBlue. Southwest currently leases ten slots from American at LaGuardia.

[6] We estimate that each gate can support between eight and ten round trips per day and thus, two gates at each of these key airports will provide for commercially viable and competitive patterns of service for the recipients of the divested gates.

[7] Under legislation known as the Wright Amendment, airlines operating out of Love Field may not operate nonstop service on aircraft with more than 56 seats to any points beyond Texas, New Mexico, Oklahoma, Kansas, Arkansas, Louisiana, Mississippi, Missouri or Alabama.

operations space), up to the extent such gates and facilities were used by Defendants to support the use of the divested slots, on the same terms and conditions pursuant to which the New American currently leases those facilities. With respect to gates, New American will make reasonable best efforts to facilitate any gate moves necessary to ensure that the purchasing carrier can operate contiguous gates.

Following the divestiture of the LaGuardia slots, if requested by the purchasers, Defendants shall lease back the slots for no consideration for a period not to exceed 180 calendar days, or as may be extended at the request of the purchaser, with the approval of the United States, in consultation with the Plaintiff States. The value of this rent-free lease back will naturally be reflected in the purchase price of the slots. A transfer of this magnitude will naturally entail a transition period for both the acquirers and the Defendants. The lease-back provisions are designed to allow purchasers sufficient time to institute new service while incentivizing them to establish that service reasonably quickly.

C. The Divestiture of Gates at Other Key Airports

Section IV.H of the Proposed Final Judgment requires that New American will transfer, consistent with the practices of the relevant airport authority, to another carrier or carriers approved by DOJ in its sole discretion, in consultation with the Plaintiff States, all rights and interests in two gates, to be identified and approved by DOJ in its sole discretion, in consultation with the Plaintiff States, and provide reasonable access to ground facilities (e.g., ticket counters, baggage handling facilities, office space, loading bridges) at each of: ORD, LAX, BOS, MIA, DAL on commercial terms and conditions identical to those pursuant to which the gates and facilities are leased to New American. New American will make reasonable best efforts to facilitate any gate moves necessary to ensure that the transferee can operate contiguous gates.

D. Divestiture Trustee

In the event the Defendants do not accomplish the divestitures as prescribed by the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a Divestiture Trustee selected by the United States, in consultation with the Plaintiff States, to complete the divestitures. If a Divestiture Trustee is appointed, the proposed Final Judgment provides that the Defendants will pay all costs and expenses of the Divestiture Trustee. After his or her appointment becomes effective, the Divestiture Trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture.

E. Monitoring Trustee

Section VII of the proposed Final Judgment permits the United States, in consultation with the Plaintiff States, to appoint a Monitoring Trustee, subject to approval by the Court. If a Monitoring Trustee is appointed, the proposed Final Judgment provides that the Defendants will pay all costs and expenses of the Monitoring Trustee. After his or her appointment becomes effective, the Monitoring Trustee will file reports with the Court and the United States every ninety days or more frequently as needed setting forth the Defendants' efforts to comply with the terms of the Final Judgment.

F. Prohibition on Reacquisition

Section XII of the proposed Final Judgment prohibits the merged company from reacquiring an ownership interest in the divested slots or gates during the term of the Final Judgment. The proposed Final Judgment will not prevent New American from engaging in short-term trades or exchanges involving the divested slots at Reagan National or LGA for scheduling purposes.

G. Future Transactions

The proposed Final Judgment requires Defendants to provide advance notification of any future slot acquisition at Reagan National by the merged company, regardless of whether the transaction meets the reporting thresholds set forth in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the ''HSR Act''). The proposed Final Judgment further provides for waiting periods and opportunities for the United States to obtain additional information analogous to the provisions of the HSR Act.

H. Stipulation and Order Provisions

Defendants have entered into the Stipulation and Order attached as an exhibit to the Explanation of Consent Decree Procedures, which was filed simultaneously with the Court, to ensure that, pending the divestitures, the Divestiture Assets are maintained. The Stipulation and Order ensures that the Divestiture Assets are preserved and maintained in a condition that allows the divestitures to be effective.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet Web site and, under certain circumstances, published in the **Federal Register**.

Written comments should be submitted to: William H. Stallings, Chief, Transportation, Energy & Agriculture Section Antitrust Division, United States Department of Justice, 450 Fifth Street NW., Suite 8000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains

jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against the proposed merger. However, the proposed Final Judgment avoids the time, expense, and uncertainty of a full trial on the merits. Moreover, the United States is satisfied that the divestiture of assets described in the proposed Final Judgment is an appropriate remedy. The proposed relief will facilitate entry and expansion by low-cost carriers at key slot-constrained and gate-constrained airports, thereby enhancing the ability of the purchasing carrier(s) to provide meaningful competition to New American and other legacy carriers.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.'').[8]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.''* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[9] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.''' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; see also *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court

[8] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[9] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest''').

believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[10]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: November 12, 2013

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*
Plaintiffs,
v.
US AIRWAYS GROUP, INC.
and
AMR CORPORATION
Defendants.

Case No. 1:13–cv–01236 (CKK)
Judge: Colleen Kollar-Kotelly
Filed: 11/12/2013

Proposed Final Judgment

Whereas, Plaintiffs United States of America (''United States'') and the States of Arizona, Florida, Tennessee and Michigan, the Commonwealths of Pennsylvania and Virginia, and the District of Columbia (''Plaintiff States'') filed their Complaint against Defendants US Airways Group, Inc. (''US Airways'') and AMR Corporation (''American'') on August 13, 2013, as amended on September 5, 2013;

And whereas, the United States and the Plaintiff States and Defendants, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And whereas, Defendants agree to be bound by the provisions of the Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the Defendants to assure that competition is not substantially lessened;

And whereas, the Final Judgment requires Defendants to make certain divestitures for the purposes of remedying the loss of competition alleged in the Complaint;

And whereas, Defendants have represented to the United States and the Plaintiff States that the divestitures required below can and will be made, and that the Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions below;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *ordered, adjudged, and decreed:*

I. Jursidiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief can be granted against Defendants US Airways and American under Section 7 of the Clayton Act as amended (15 U.S.C. 18).

II. Definitions

As used in the Final Judgment:

A. ''Acquirer'' or ''Acquirers'' means the entity or entities, approved by the United States in its sole discretion in consultation with the Plaintiff States, to which Defendants may divest all or specified parts of the Divestiture Assets.

B. ''American'' means Defendant AMR Corporation, its parents, successors and assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing. As used in this definition, the terms ''parent,'' ''subsidiary,'' ''affiliate,'' and ''joint venture'' refer to any person or entity in which American holds, directly or indirectly, a majority (greater than 50 percent) or total ownership or control or which holds, directly or indirectly a majority (greater than 50 percent) or total ownership or control in American.

C. ''Associated Ground Facilities'' means the facilities owned or operated by Defendants and reasonably necessary for Acquirer(s) to operate the Divested Assets at the relevant airport, including, but not limited to, ticket counters, hold-rooms, leased jet bridges, and operations space.

D. ''DCA Gates and Facilities'' means all rights and interests held by Defendants in the gates at Washington Reagan National Airport (''DCA'') described in Exhibit A and in the Associated Ground Facilities, up to the extent such gates and Associated Ground Facilities were used by Defendants to support the use of the DCA Slots.

E. ''DCA Slots'' means all rights and interests held by Defendants in the 104 slots at DCA listed in Exhibit A, consisting of two air carrier slots held by US Airways at DCA and 102 air carrier slots held by American at DCA, including the JetBlue Slots.

F. ''Divestiture Assets'' means (1) the DCA Slots, (2) the DCA Gates and Facilities, (3) the LGA Slots, (4) the LGA Gates and Facilities, and (5) the Key Airport Gates and Facilities.

[10] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

G. ''JetBlue Slots'' means all rights and interests held by Defendants in the 16 slots at DCA currently leased by American to JetBlue Airways, Inc., listed in Exhibit A.

H. ''Key Airport'' means each of the following airports: (1) Boston Logan International Airport; (2) Chicago O'Hare International Airport; (3) Dallas Love Field; (4) Los Angeles International Airport; and (5) Miami International Airport.

I. ''Key Airport Gates and Facilities'' means all rights and interests held by Defendants in two gates at each Key Airport as described in Exhibit C. The term ''Key Airport Gates and Facilities'' includes Associated Ground Facilities, up to the extent such facilities were used by Defendants to support the gates described in Exhibit C.

J. ''LGA Gates and Facilities'' means all rights and interests held by Defendants in the gates at New York LaGuardia Airport (''LGA'') described in Exhibit B and Associated Ground Facilities up to the extent of such gates and Associated Ground Facilities were used by Defendants to support the use of the LGA Slots.

K. ''LGA Slots'' means the 34 slots at New York LaGuardia Airport (''LGA'') listed in Exhibit B, consisting of the Southwest Slots and 24 additional slots held by American or US Airways.

L. ''Slot Bundles'' means groupings of DCA Slots and LGA Slots, as determined by the United States in its sole discretion in consultation with the Plaintiff States.

M. ''Southwest Slots'' means the 10 slots at LGA currently leased by American to Southwest Airlines, Inc. listed in Exhibit B.

N. ''Transaction'' means the transaction referred to in the Agreement and Plan of Merger among AMR Corporation, AMR Merger Sub, Inc., and US Airways Group, Inc., dated as of February 13, 2013.

O. ''US Airways'' means Defendant US Airways Group, Inc., its parents, successors and assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing. For purposes of this definition, the terms ''parent,'' ''subsidiary,'' ''affiliate,'' and ''joint venture'' refer to any person or entity in which US Airways holds, directly or indirectly, a majority (greater than 50 percent) or total ownership or control or which holds, directly or indirectly, a majority (greater than 50 percent) or total ownership or control in US Airways.

III. Applicability

A. This Final Judgment applies to Defendants and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Section IV and V of this Final Judgment, a Defendant directly or indirectly sells or otherwise disposes of any of the Divestiture Assets, it shall require the purchaser of the Divestiture Assets to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer(s) of the assets divested pursuant to this Final Judgment.

IV. Divestitures

A. Subject to any necessary approval of the Federal Aviation Administration, Defendants are ordered and directed to divest the DCA Slots and LGA Slots to Acquirers in a manner consistent with this Final Judgment within ninety (90) calendar days after the later of (1) completion of the Transaction or (2) the United States providing Defendants a list of the Acquirers and Slot Bundles.

B. Subject to any necessary approval of the relevant airport operator, Defendants are ordered and directed to transfer the DCA Gates and Facilities as necessary to Acquirers of the DCA Slots within ninety (90) days after completion of the divestiture of the DCA Slots.

C. Subject to any necessary approval of the relevant airport operator, Defendants are ordered and directed to transfer the LGA Gates and Facilities as necessary to Acquirer(s) of the LGA Slots within ninety (90) days after completion of the divestiture of the LGA Slots.

D. Subject to any necessary approval of the relevant airport operator, Defendants are ordered and directed to divest the Key Airport Gates and Facilities to Acquirer(s) in a manner consistent with this Final Judgment within 180 calendar days after the later of (1) completion of the Transaction or (2) the United States providing Defendants a list of the Acquirers.

E. All proceeds from the transfer of the DCA Slots and the LGA Slots are for the account of Defendants. Defendants agree to use their best efforts to divest the Divestiture Assets as expeditiously as possible. The United States in its sole discretion, may agree to one or more extensions of each of the time periods specified in Sections IV.A.—IV.D., not to exceed sixty (60) calendar days in total for each such time period, and shall extend any time period by the number of days during which there is pending any objection under Section VI of this Final Judgment. The United States shall notify the Court of any extensions of the time periods.

F. The Court orders the divestiture of the DCA Slots and DCA Gates and Facilities to proceed as follows:

1. Defendants shall offer to divest the 16 JetBlue Slots to JetBlue Airways, Inc., by making permanent the current agreement between JetBlue and American to exchange the JetBlue Slots for slots at John F. Kennedy International Airport;

2. Defendants shall divest in Slot Bundles to at least two Acquirers the other 88 DCA slots listed in Exhibit A, together with any of the JetBlue Slots not sold to JetBlue pursuant to paragraph IV.F.1. above;

3. Defendants shall either (a) sublease to Acquirers of the DCA Slots, the DCA Gates and Facilities on the same terms and conditions pursuant to which the Defendants currently lease the DCA Gates and Facilities or, (b) with the consent of the United States, pursuant to an agreement with the airport operator, relinquish the DCA Gates and Facilities to the airport operator to enable the Acquirer to lease them from the airport operator on terms and conditions determined by the airport operator, and shall make best efforts to obtain any consent or approval from the relevant airport operator for the divestitures required by this paragraph;

4. Following the divestiture of the DCA Slots, if requested by an Acquirer, Defendants shall lease the DCA Slots from the Acquirer for no consideration for a period not to exceed 180 calendar days. Defendants shall continue to operate the DCA Slots during this lease-back period at a level sufficient to prevent the DCA Slots from reverting to the Federal Aviation Administration pursuant to 14 CFR 93.227. The lease-back period may be extended at the sole discretion of the Acquirer(s), with the approval of the United States, in consultation with the Plaintiff States.

G. The Court orders the divestiture of the LGA Slots and LGA Gates and Facilities to proceed as follows:

1. Defendants shall offer to divest the ten Southwest Slots to Southwest Airlines, Inc.;

2. Defendants shall divest in Slot Bundles to Acquirer(s) the other 24 LGA slots listed in Exhibit B, together with any of the Southwest Slots not sold to Southwest pursuant to Paragraph IV.G.1. above;

3. Defendants shall either (a) sublease to the Acquirer(s) of the LGA Slots, the LGA Gates and Facilities on the same terms and conditions pursuant to which the Defendants currently lease the LGA

Gates and Facilities or, (b) with the consent of the United States, pursuant to an agreement with the airport operator, relinquish the LGA Gates and Facilities to the airport operator to enable the Acquirer to lease them from the airport operator on terms and conditions determined by the airport operator, and shall make best efforts to obtain any consent or approval from the relevant airport operator for the divestitures required by this paragraph;

4. Defendants shall make reasonable best efforts to facilitate any re-locations necessary to ensure that the Acquirer(s) can operate from contiguous gates at LGA to the extent such relocation does not unduly disrupt Defendants' operations.

5. Following the divestiture of the LGA Slots, if requested by the Acquirer(s), Defendants shall lease the LGA Slots from the Acquirer for no consideration for a period not to exceed 180 calendar days. Defendants shall continue to operate the LGA Slots during this lease-back period at a level sufficient to prevent the LGA Slots from reverting to the Federal Aviation Administration pursuant to 71 FR 77,854 (Dec. 27, 2006), as extended by 78 FR 28, 279 (Oct. 24, 2013). The lease-back period may be extended at the sole discretion of the Acquirer(s), with the approval of the United States, in consultation with the Plaintiff States.

H. The Court orders the divestiture of the Key Airport Gates and Facilities, to proceed as follows:

1. Defendants shall either (a) lease to the Acquirers the Key Airport Gates and Facilities on the same terms and conditions pursuant to which the Defendants currently lease the Key Airport Gates and Facilities, or (b) with the consent of the United States, pursuant to an agreement with the airport operator, relinquish the Key Airport Gates and Facilities to the airport operator to enable the Acquirer to lease them from the airport operator on terms and conditions determined by the airport operator;

2. Defendants shall make best efforts to obtain any consent or approval from the relevant airport operator for the transfer(s) required by this Section;

3. With respect to the Divestiture Assets at Boston Logan International Airport, Defendants shall make reasonable best efforts to facilitate any re-locations necessary to ensure that the Acquirer(s) can operate from contiguous gates at the Key Airport, to the extent such relocation does not unduly disrupt Defendants' operations.

I. In accomplishing the divestiture ordered by this Final Judgment, Defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Assets to Acquirer(s). Defendants shall inform any such person contacted regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privileges or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

J. As part of their obligations under paragraph IV.I. above, Defendants shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to: (i) Personnel; (ii) the physical facilities of the Divestiture Assets to make reasonable inspections; (iii) all environmental, zoning, and other permit documents and information; and (iv) all financial, operational, or other documents and information customarily provided as part of a due diligence process.

K. Defendants shall warrant to the Acquirer(s) that each asset will be operational on the date of transfer.

L. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

M. Defendants shall warrant to the Acquirer(s) that there are no material defects in any environmental, zoning or other permits obtained or controlled by Defendants pertaining to the operation of the Divestiture Assets, and that following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

N. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV or V shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, in consultation with the Plaintiff States, that the Divestiture Assets can and will be used by the Acquirer(s) as part of a viable, ongoing business, engaged in providing scheduled air passenger service in the United States. Divestiture of the Divestiture Assets may be made to Acquirers, provided that in each instance it is demonstrated to the sole satisfaction of the United States, in consultation with the Plaintiff States, that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestiture, whether pursuant to Section IV or Section V of this Final Judgment, shall be:

1. made to an Acquirer(s) that, in the United States' sole judgment, in consultation with the Plaintiff States, has the intent and capability (including the necessary managerial, operational, technical and financial capability) to compete effectively in the business of providing scheduled airline passenger service; and

2. accomplished so as to satisfy the United States in its sole discretion, in consultation with the Plaintiff States, that none of the terms of any agreement between an Acquirer(s) and Defendants gives Defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer(s) to effectively compete.

V. Appointment of Trustee To Effect Divestiture

A. If Defendants have not divested the Divestiture Assets within the time periods specified in Sections IV.A.—IV.D., Defendants shall notify the United States and the Plaintiff States of that fact in writing. Upon application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States, in consultation with the Plaintiff States, and approved by the Court to divest the Divestiture Assets in a manner consistent with this Final Judgment.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the Divestiture Assets, including any arrangements related to Associated Ground Facilities. The Divestiture Trustee shall have the power and authority to accomplish the divestiture to an Acquirer(s) acceptable to the United States in its sole discretion, in consultation with the Plaintiff States, at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Section IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate.

C. Subject to Section V.E. of this Final Judgment, the Divestiture Trustee may hire at the reasonable cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture

Trustee, reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture.

D. Defendants shall not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States, the Plaintiff States and the Divestiture Trustee within ten (10) calendar days after the Divestiture Trustee has provided the notice required under Section VI.A.

E. The Divestiture Trustee shall serve at the cost and expense of Defendants, pursuant to a written agreement with Defendants on such terms and conditions as the United States approves, in consultation with the Plaintiff States, and shall account for all monies derived from the sale of the assets sold by the Divestiture Trustee and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for its services and those of any professionals and agents retained by the Divestiture Trustee, all remaining money shall be paid to Defendants and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the Divestiture Trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

F. Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any consultants, accountants, attorneys, and other persons retained by the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendants shall develop financial and other information relevant to such business as the Divestiture Trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture.

G. After its appointment, the Divestiture Trustee shall file monthly reports with the United States, the Plaintiff States, and the Court setting forth the Divestiture Trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee or Defendants deem confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

H. If the Divestiture Trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth (1) the Divestiture Trustee's efforts to accomplish the required divestiture, (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished, and (3) the Divestiture Trustee's recommendations. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. The Divestiture Trustee shall at the same time furnish such report to the Defendants and to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestitures

A. Within two (2) business days following execution of a definitive divestiture agreement, Defendants or the Divestiture Trustee, whichever is then responsible for effecting the divestitures required herein, shall notify the United States and the Plaintiff States, of any proposed divestitures required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestitures and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States, in its sole discretion, in consultation with the Plaintiff States, may request from Defendants, the proposed Acquirer(s), any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestitures, the proposed Acquirer(s), and any other potential Acquirer(s). Defendants and the Divestiture Trustee shall furnish any additional information requested to the United States within fifteen (15) calendar days of receipt of the request, unless the parties otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice, or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer(s), any third party, and the trustee, whichever is later, the United States, in consultation with the Plaintiff States, shall provide written notice to Defendants and/or the Divestiture Trustee, stating whether it objects to the proposed divestitures. If the United States provides written notice that it does not object, the divestitures may be consummated, subject only to the Defendants' limited right to object to the sale under Section V.D. of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V.D., a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Monitoring Trustee

A. Upon the filing of this Final Judgment, the United States may, in its sole discretion, in consultation with the Plaintiff States, appoint a Monitoring Trustee, subject to approval by the Court.

B. The Monitoring Trustee shall have the power and authority to monitor Defendants' compliance with the terms of this Final Judgment, and shall have such powers as this Court deems appropriate. The Monitoring Trustee shall be required to investigate and report on the Defendants' compliance with this Final Judgment and the Defendants' progress toward effectuating the purposes of this Final Judgment.

C. Subject to Section VII.E of this Final Judgment, the Monitoring Trustee may hire at the cost and expense of Defendants, any consultants, accountants, attorneys, or other persons, who shall be solely accountable to the

Monitoring Trustee, reasonably necessary in the Monitoring Trustee's judgment.

D. Defendants shall not object to actions taken by the Monitoring Trustee in fulfillment of the Monitoring Trustee's responsibilities under this Final Judgment or any other Order of this Court on any ground other than the Monitoring Trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States, the Plaintiff States, and the Monitoring Trustee within ten (10) calendar days after the action taken by the Monitoring Trustee giving rise to the Defendants' objection.

E. The Monitoring Trustee shall serve at the cost and expense of Defendants, pursuant to a written agreement with Defendants on such terms and conditions as the United States, in consultation with the Plaintiff States, approves. The compensation of the Monitoring Trustee and any consultants, accountants, attorneys, and other persons retained by the Monitoring Trustee shall be on reasonable and customary terms commensurate with the individuals' experience and responsibilities. The Monitoring Trustee shall, within three (3) business days of hiring any consultants, accountants, attorneys, or other persons, provide written notice of such hiring and the rate of compensation to Defendants.

F. The Monitoring Trustee shall have no responsibility or obligation for the operation of Defendants' businesses.

G. Defendants shall use their best efforts to assist the Monitoring Trustee in monitoring Defendants' compliance with their individual obligations under this Final Judgment. The Monitoring Trustee and any consultants, accountants, attorneys, and other persons retained by the Monitoring Trustee shall have full and complete access to the personnel, books, records, and facilities relating to compliance with this Final Judgment, subject to reasonable protection for trade secret or confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the Monitoring Trustee's accomplishment of its other responsibilities. The Monitoring Trustee shall, within three (3) business days of hiring any consultants, accountants, attorneys, or other persons, provide written notice of such hiring and the rate of compensation to Defendants.

H. After its appointment, the Monitoring Trustee shall file reports every ninety (90) days, or more frequently as needed, with the United States, the Plaintiff States, the Defendants and the Court setting forth the Defendants' efforts to comply with their individual obligations under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court.

I. The Monitoring Trustee shall serve until the completion of the divestitures required by Sections IV and V of this Final Judgment, including any lease back period pursuant to Section IV.F.5. or IV.G.5.

VIII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment. For purposes of this Section VIII, subleasing shall not be regarded as financing.

IX. Asset Preservation

Until the divestiture required by this Final Judgment has been accomplished, Defendants shall take all steps necessary to comply with the Asset Preservation Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

X. Affidavits

A. Within twenty (20) calendar days of entry of the Court entering the Asset Preservation Order and Stipulation in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, Defendants shall deliver to the United States and the Plaintiff States an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the first twenty (20) calendar days or, thereafter, the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the Court entering the Asset Preservation Order and Stipulation in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section IX of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

XI. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Asset Preservation Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) Access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters

contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then the United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XII. No Reacquisition

Defendants shall not reacquire any interest in any part of the Divestiture Assets divested under this Final Judgment during the term of this Final Judgment. Nothing in this Final Judgment shall prevent Defendants from engaging in trades, exchanges, or swaps involving Divestiture Assets with an Acquirer, provided such arrangements do not increase Defendants' percentage of slots operated or held or gates operated or held at the airport in question, except that, consistent with industry practice, Defendants may temporarily operate slots for periods of no more than two consecutive months at the request of the Acquirer. Nothing in this Section XII shall prevent Defendants from acquiring additional slots, gates or facilities, other than the Divestiture Assets, at DCA, LGA or the Key Airports subject to the notification requirement in Section XIII.A. Nothing in this Section shall prevent Defendants from cooperating in gate or facility re-locations in the ordinary course of the airport operator's business, including re-locating to the Divestiture Assets, provided the Acquirer of those gates is offered alternative gates and Associated Ground Facilities from the airport operator.

XIII. Notification of Future Transactions

A. Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the ''HSR Act''), Defendants shall not acquire any interest in any slot at DCA that was in use at the completion of the Transaction without providing notice to the United States at least thirty (30) calendar days prior to the acquisition, provided however that this reporting requirement shall not apply to transactions that do not result in an increase in Defendants' percentage of slots operated or held at DCA. Defendants shall maintain a record of any non-reportable transactions and shall provide such record to the United States promptly upon request.

B. Any notification provided pursuant to Section XIII.A. above shall be provided in the same format as required by the HSR Act, and shall include the names of the principal representatives of the parties to the transaction who negotiated the agreement and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification the United States makes a written request for additional information regarding the transaction, Defendants shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in a similar manner as applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder.

C. All references to the HSR Act in this Final Judgment refer to the HSR Act as it exists at the time of the transaction or agreement and incorporate any subsequent amendments to the HSR Act.

XIV. Bankruptcy

For purposes of Section 365 of the Bankruptcy Reform Act of 1978, as amended, and codified as 11 U.S.C. 101 et seq. (the ''Bankruptcy Code'') or any analogous provision under any law of any foreign or domestic, federal, state, provincial, local, municipal or other governmental jurisdiction relating to bankruptcy, insolvency or reorganization (''Foreign Bankruptcy Law''), (a) no sublease or other agreement related to the Divesture Assets will be deemed to be an executory contract, and (b) if for any reason a sublease or other agreement related to the Divesture Assets is deemed to be an executory contract, the Defendants shall take all necessary steps to ensure that the Acquirer(s) shall be protected in the continued enjoyment of its right under any such agreement including, acceptance of such agreement or any underlying lease or other agreement in proceedings under the Bankruptcy Code or any analogous provision of Foreign Bankruptcy Law.

XV. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to ensure and enforce compliance, and to punish violations of its provisions.

XVI. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XVII. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

The Honorable Colleen Kollar-Kotelly,
United States District Judge

EXHIBIT A
DCA SLOTS

JetBlue Slots (currently held by American)					
1284	1040	1018	1012	1025	1200
1034	1334	1013	1058	1172	1221
1014	1217	1097	1174		
Additional American Air Carrier Slots					
1090	1144	1570	1321	1425	1445
1521	1585	1092	1159	1274	1296
1493	1496	1044	1051	1667	1233
1322	1341	1616	1138	1139	1271
1430	1464	1547	1272	1351	1481
1506	1525	1611	1381	1420	1480
1641	1662	1104	1342	1543	1666
1208	1286	1299	1345	1388	1422
1620	1117	1121	1167	1312	1460
1473	1624	1625	1628	1364	1411
1561	1646	1074	1100	1202	1380
1405	1499	1276	1292	1353	1396
1634	1441	1475	1492	1503	1559
1587	1623	1008	1606	1575	1642
1122	1216				
US Airways Air Carrier Slots					
1070	1066				
DCA Gates					
Up to five (5) gates from among Gates 24, 26, 28, 30 and 32, if necessary.					

EXHIBIT B
LGA SLOTS

Southwest Slots (currently held by American)					
3351	2101	3335	3422	3665	3314
2215	3045	2120	3312		
American LGA Slots					
3189	3068	2139	2147	3236	2222
2096	2075	3784	2033	3841	2008
3594	3671	3380	3258	3282	3080
2032	2230	3013	2166	2111	3826
LGA Gates					
Up to two contiguous gates on Concourse C currently leased by American at LGA.					

Exhibit C—Key Airport Gates

Boston Logan International Airport

Two gates that Defendants currently lease or two gates that Defendants would be entitled to occupy following any relocation of gates and facilities at the direction of Massport.

Chicago O'Hare International Airport

Gates L1 and L2. Defendants, at their own expense, will reconfigure Gate L2A, L2B, and L2C, as follows: Gate L2A will be restored to a mainline gate by (a) removing the gate at L2B, (b) moving the gate podium that currently serves Gate L2C south, creating one additional bay for gate L2A, and restriping the tarmac. Defendants will retain their interest in Gate L2C.

Dallas Love Field

Gates currently leased by American at Dallas Love Field, or which American will be entitled to occupy following completion of construction of the Love Field Modernization Program.

Los Angeles International Airport

Gates 31A and 31B in Terminal 3.

Miami International Airport

Two gates currently leased by US Airways in Terminal J.

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Part IV

Department of Education

Notice of Waivers Granted under the Elementary and Secondary Education Act of 1965, as Amended; Notice

DEPARTMENT OF EDUCATION

Notice of Waivers Granted Under the Elementary and Secondary Education Act of 1965, as Amended

SUMMARY: In this notice, we announce the waivers that the U.S. Department of Education (Department) granted during calendar year 2010 under the waiver authority in section 9401 of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

SUPPLEMENTARY INFORMATION:

In 2010, the Department granted a total of 238 waivers under the waiver authority in section 9401 of the ESEA. We granted:

(a) eleven waivers extending the period in which funds were available for obligation for the Reading First program, and seventy-two waivers extending the period in which Title I, Part A funds reserved under ESEA section 1003(a) (one waiver) or awarded under ESEA section 1003(g) (seventy-one waivers) were available for obligation for school improvement activities;

(b) thirty-one waivers of the regulatory definition of ''persistently lowest-achieving schools'' either allowing the State educational agency (SEA) to expand the pool of secondary schools from which it selects its persistently lowest-achieving schools or allowing it to apply a ''minimum n'' size below which the SEA would not identify a school as persistently lowest-achieving;

(c) two waivers allowing the SEA, with respect to a local educational agency (LEA) that receives School Improvement Grant (SIG) program funds for ''Partnership Zone'' schools, as defined by the State, to implement certain State regulatory provisions;

(d) nine waivers of the requirement that an SEA carry over 25 percent of SIG funds if not all of its Tier 1 schools are served with those funds;

(e) one waiver allowing high school students to take any one of a number of subject-specific mathematics assessments rather than the State's statewide mathematics assessment;

(f) twelve waivers allowing delayed release of assessment results or waiving the requirement to provide parents notice of public school choice options at least 14 days before the start of the school year (14-day notice);

(g) three waivers of certain requirements related to how adequate yearly progress (AYP) determinations are made;

(h) two Title I, Part A within-district allocation waivers;

(i) one waiver allowing an SEA to use Title I funds reserved for academic achievement rewards for eligible Title I schools to reward qualified Title I-eligible, but non-participating, schools;

(j) three waivers of various statutory and regulatory requirements due to the impact of the H1N1 flu virus;

(k) one waiver of the Title III requirement to make annual measurable achievement objective (AMAO) determinations;

(l) one waiver to allow the continued use of the ''two percent transition flexibility'' for calculating AYP for the students with disabilities subgroup;

(m) one waiver of the paraprofessional qualifications requirement in Title I schools;

(n) two waivers of the Consolidated Grant restrictions;

(o) twenty-nine waivers allowing SEAs or LEAs to approve schools or LEAs identified as in need of improvement as supplemental educational services (SES) providers;

(p) four new waivers and seventeen continuations of existing waivers allowing LEAs both to provide SES to eligible students attending schools in the first year of school improvement that receive funding under Title I, Part A of the ESEA (Title I schools) and to count the costs of doing so toward meeting the LEA's ''20 percent obligation''; and

(q) thirty-six waivers allowing LEAs or schools to exclude their Title I, Part A allocation received under the American Recovery and Reinvestment Act of 2009 (ARRA) when calculating their 20 percent obligation for public school choice and SES, their professional development set-asides, and the per-pupil amount for SES, and to waive the carryover limitation more than once every three years.

Waiver Data

I. Extensions of the Obligation Period

A. Waivers for the Reading First Program

1. Waiver Applicant: Arizona Department of Education

- Provision waived: Tydings Amendment, section 421(b) of the General Education Provisions Act (GEPA).
- Date waiver granted: May 26, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of fiscal year (FY) 2008 Reading First funds.

2. Waiver Applicant: California Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: June 24, 2010.
- Description of waiver: Extended until March 31, 2010, the period of availability of FY 2007 Reading First funds.

3. Waiver Applicant: California Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: October 27, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of FY 2008 Reading First funds.

4. Waiver Applicant: Idaho Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: June 14, 2010.
- Description of waiver: Extended until September 30, 2010, the period of availability of FY 2007 Reading First funds.

5. Waiver Applicant: Indiana Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 20, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of FY 2008 Reading First funds.

6. Waiver Applicant: Louisiana Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 30, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of FY 2007 Reading First funds.

7. Waiver Applicant: Louisiana Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 16, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of FY 2008 Reading First funds.

8. Waiver Applicant: Maine Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: May 26, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of FY 2008 Reading First funds.

9. Waiver Applicant: Maryland Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: March 26, 2010.
- Description of waiver: Extended until September 30, 2010, the period of availability of FY 2007 Reading First funds.

10. Waiver Applicant: Ohio Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: June 30, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of FY 2008 Reading First funds.

11. Waiver Applicant: Texas Education Agency

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 16, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of FY 2008 Reading First funds.

B. Waivers for School Improvement Requirements

1. Waiver Applicant: Alabama Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 30, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of fiscal year (FY) 2008 SIG funds awarded under section 1003(g) of the ESEA, with the condition that Alabama submit to the Department any comments it received regarding this waiver request within five days of the closing of the comment period.

Note: This condition was satisfied and officially removed on January 26, 2011.

2. Waiver Applicant: Alabama Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 21, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

3. Waiver Applicant: Alabama Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: August 18, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 Title I, Part A funds reserved for school improvement activities under section 1003(a) of the ESEA.

4. Waiver Applicant: Alaska Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: October 27, 2010.
- Description of waiver: Extended until September 30, 2012, the period of availability of FY 2008 SIG funds awarded under section 1003(g) of the ESEA.

5. Waiver Applicant: Alaska Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 15, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

6. Waiver Applicant: Arizona Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 9, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

7. Waiver Applicant: Arkansas Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: October 27, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of FY 2008 SIG funds awarded under section 1003(g) of the ESEA.

8. Waiver Applicant: Arkansas Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 13, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

9. Waiver Applicant: Department of the Interior/Bureau of Indian Education (BIE)

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: August 3, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

10. Waiver Applicant: California Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: June 25, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

11. Waiver Applicant: Colorado Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 30, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of FY 2008 SIG funds awarded under section 1003(g) of the ESEA, with the condition that Colorado submit to the Department any comments it received regarding this waiver request within five days of the closing of the comment period.

Note: This condition was satisfied and officially removed on January 19, 2011.

12. Waiver Applicant: Colorado Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 15, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

13. Waiver Applicant: Connecticut Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 15, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

14. Waiver Applicant: DC Office of the State Superintendent of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: October 27, 2010.
- Description of waiver: Extended until September 30, 2012, the period of availability of FY 2008 SIG funds

awarded under section 1003(g) of the ESEA.

15. Waiver applicant: DC Office of the State Superintendent of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 2, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

16. Waiver Applicant: Delaware Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: June 25, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

17. Waiver Applicant: Florida Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: July 6, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

18. Waiver Applicant: Georgia Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 7, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

19. Waiver Applicant: Hawaii Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 25, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

20. Waiver Applicant: Idaho Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: August 18, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

21. Waiver Applicant: Illinois Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 30, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of FY 2008 SIG funds awarded under section 1003(g) of the ESEA, with the condition that Illinois submit to the Department any comments it received regarding this waiver request within five days of the closing of the comment period.

Note: This condition was satisfied and officially removed on January 26, 2011.

22. Waiver Applicant: Illinois Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: August 11, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

23. Waiver Applicant: Indiana Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: March 29, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

24. Waiver Applicant: Iowa Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 7, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

25. Waiver Applicant: Kansas Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: June 16, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

26. Waiver Applicant: Kentucky Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 21, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

27. Waiver Applicant: Louisiana Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: July 6, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

28. Waiver Applicant: Maine Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: July 16, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

29. Waiver Applicant: Maryland Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 30, 2010.
- Description of waiver: Extended until September 30, 2012, the period of availability of FY 2008 SIG funds awarded under section 1003(g) of the ESEA, with the condition that Maryland submit to the Department any comments it received regarding this waiver request within five days of the closing of the comment period.

Note: This condition was satisfied and officially removed on January 26, 2011.

30. Waiver Applicant: Maryland Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: March 29, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

31. Waiver Applicant: Massachusetts Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 30, 2010.
- Description of waiver: Extended until December 31, 2010, the period of availability of FY 2008 SIG funds awarded under section 1003(g) of the

ESEA, with the condition that Massachusetts submit to the Department any comments it received regarding this waiver request within five days of the closing of the comment period.

Note: This condition was satisfied and officially removed on January 18, 2011.

32. Waiver Applicant: Massachusetts Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: July 16, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

33. Waiver Applicant: Michigan Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: October 27, 2010.
- Description of waiver: Extended until September 30, 2012, the period of availability of FY 2008 SIG funds awarded under section 1003(g) of the ESEA.

34. Waiver Applicant: Michigan Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: July 8, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

35. Waiver Applicant: Minnesota Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 30, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of FY 2008 SIG funds awarded for the SIG program under section 1003(g) of the ESEA, with the condition that Minnesota submit to the Department any comments it received regarding this waiver request within five days of the closing of the comment period.

Note: This condition was satisfied and officially removed on January 26, 2011.

36. Waiver Applicant: Minnesota Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: March 10, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

37. Waiver Applicant: Mississippi Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: August 18, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

38. Waiver Applicant: Missouri Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 15, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

39. Waiver Applicant: Montana Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: July 22, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

40. Waiver Applicant: Nebraska Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: July 16, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

41. Waiver Applicant: Nevada Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 15, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

42. Waiver Applicant: New Hampshire Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: August 2, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

43. Waiver Applicant: New Jersey Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 30, 2010.
- Description of waiver: Extended until September 30, 2012, the period of availability of FY 2008 SIG funds awarded for the SIG program under section 1003(g) of the ESEA, with the condition that New Jersey submit to the Department any comments it received regarding this waiver request within five days of the closing of the comment period.

Note: This condition was satisfied and officially removed on January 26, 2011.

44. Waiver Applicant: New Jersey Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: March 29, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

45. Waiver Applicant: New Mexico Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 9, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

46. Waiver Applicant: New York State Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: May 10, 2010.
- Description of waiver: Extended until March 31, 2011, the period of availability of FY 2008 SIG funds awarded under section 1003(g) of the ESEA.

47. Waiver Applicant: New York State Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: May 3, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

48. Waiver Applicant: North Carolina Department of Public Instruction

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 30, 2010.
- Description of waiver: Extended until September 30, 2012, the period of availability of FY 2008 SIG funds awarded for the SIG program under section 1003(g) of the ESEA, with the condition that North Carolina submit to the Department any comments it received regarding this waiver request within five days of the closing of the comment period.

Note: This condition was satisfied and officially removed on January 26, 2011.

49. Waiver Applicant: North Carolina Department of Public Instruction

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 9, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

50. Waiver Applicant: North Dakota Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: July 6, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

51. Waiver Applicant: Ohio Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 30, 2010.
- Description of waiver: Extended until September 30, 2012, the period of availability of FY 2008 SIG funds awarded for the SIG program under section 1003(g) of the ESEA, with the condition that Ohio submit to the Department any comments it received regarding this waiver request within five days of the closing of the comment period.

Note: This condition was satisfied and officially removed on January 26, 2011.

52. Waiver Applicant: Ohio Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: March 29, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

53. Waiver Applicant: Oklahoma Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: November 4, 2010.
- Description of waiver: Extended until September 30, 2012, the period of availability of FY 2008 SIG funds awarded under section 1003(g) of the ESEA.

54. Waiver Applicant: Oklahoma Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 21, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

55. Waiver Applicant: Oregon Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: November 4, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of FY 2008 SIG funds awarded under section 1003(g) of the ESEA.

56. Waiver Applicant: Oregon Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: July 8, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

57. Waiver Applicant: Pennsylvania Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: June 10, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

58. Waiver Applicant: Puerto Rico Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 30, 2010.
- Description of waiver: Extended until September 30, 2011, the period of availability of FY 2008 SIG funds awarded under section 1003(g) of the ESEA, with the condition that Puerto Rico submit to the Department any comments it received regarding this waiver request within five days of the closing of the comment period.

Note: This condition was satisfied and officially removed on January 26, 2011.

59. Waiver Applicant: Puerto Rico Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 29, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

60. Waiver Applicant: Rhode Island Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: July 6, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

61. Waiver Applicant: South Carolina Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 15, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

62. Waiver Applicant: South Dakota Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: April 15, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

63. Waiver Applicant: Tennessee Department of Education

- Provision waived: Tydings Amendment, section 421(b) of GEPA.
- Date waiver granted: September 22, 2010.
- Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

64. Waiver Applicant: Texas Education Agency

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: October 27, 2010.
• Description of waiver: Extended until September 30, 2012, the period of availability of FY 2008 SIG funds awarded under section 1003(g) of the ESEA.

65. Waiver Applicant: Texas Education Agency

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: April 2, 2010.
• Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

66. Waiver Applicant: Utah Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: April 15, 2010.
• Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

67. Waiver Applicant: Vermont Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: May 3, 2010.
• Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

68. Waiver Applicant: Virginia Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: April 15, 2010.
• Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

69. Waiver Applicant: Washington Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: March 29, 2010.
• Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

70. Waiver Applicant: Wisconsin Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: June 17, 2010.
• Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

71. Waiver Applicant: West Virginia Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: March 10, 2010.
• Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

72. Waiver Applicant: Wyoming Department of Education

• Provision waived: Tydings Amendment, section 421(b) of GEPA.
• Date waiver granted: August 11, 2010.
• Description of waiver: Extended until September 30, 2013, the period of availability of FY 2009 SIG funds awarded under section 1003(g) of the ESEA.

II. Definition of Persistently Lowest-Achieving Schools

1. Waiver Applicant: Alabama Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.
• Date waiver granted: April 21, 2010.
• Description of waiver: Allowed Alabama to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 40 students enrolled for a full academic year, as that term was defined in Alabama's Accountability Workbook.

2. Waiver Applicant: Alabama Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.
• Date waiver granted: April 21, 2010.
• Description of waiver: Allowed Alabama to include certain secondary schools in the pool from which it identifies its persistently lowest-achieving schools. The inclusion covered any Alabama secondary school that—

(A) Participated in Title I;

(B) Was not identified in Tier I; and

(C)(i) Had not made AYP for at least two consecutive years; or

(ii) Was in the lowest quintile of performance based on proficiency rates on Alabama's assessments in reading/language arts and mathematics combined.

3. Waiver Applicant: Alaska Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.
• Date waiver granted: April 15, 2010.
• Description of waiver: Allowed Alaska to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 25 students enrolled for a full academic year, as that term was defined in Alaska's Accountability Workbook.

4. Waiver Applicant: Alaska Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.
• Date waiver granted: April 14, 2010.
• Description of waiver: Allowed Alaska to include certain secondary schools in the pool from which it identifies its persistently lowest-achieving schools. The inclusion covered any Alaska secondary school that—

(A) Participated in Title I;

(B) Was not identified in Tier I; and

(C)(i) Had not made AYP for at least two consecutive years; or

(ii) Was in the lowest quintile of performance based on proficiency rates on Alaska's assessments in reading/language arts and mathematics combined.

5. Waiver Applicant: California Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: May 24, 2010.

• Description of waiver: Allowed California to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 100 students enrolled for a full academic year, as that term was defined in California's Accountability Workbook.

6. Waiver Applicant: California Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.

• Date waiver granted: May 24, 2010.

Description of waiver: Allowed California to include certain secondary schools in the pool from which it identifies its persistently lowest-achieving schools. The inclusion covered any California secondary school that—

(A) Participated in Title I;

(B) Was not identified in Tier I; and

(C)(i) Had not made AYP for at least two consecutive years; or

(ii) Was in the lowest quintile of performance based on proficiency rates on the California's assessments in reading/language arts and mathematics combined.

7. Waiver Applicant: Colorado Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: May 10, 2010.

• Description of waiver: Allowed Colorado to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 20 students enrolled for a full academic year, as that term was defined in Colorado's Accountability Workbook.

8. Waiver Applicant: Colorado Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.

• Date waiver granted: May 10, 2010.

• Description of waiver: Allowed Colorado to include certain secondary schools in the pool from which it identifies its persistently lowest-achieving schools. The inclusion covered any Colorado secondary school that—

(A) Participated in Title I;

(B) Was not identified in Tier I; and

(C)(i) Had not made AYP for at least two consecutive years; or

(ii) Was in the lowest quintile of performance based on proficiency rates on Colorado's assessments in reading/language arts and mathematics combined.

9. Waiver Applicant: Delaware Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: June 24, 2010.

• Description of waiver: Allowed Delaware to exclude certain schools from the pool from which it identifies its persistently lowest-achieving schools. This exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 30 students enrolled for a full academic year, as that term was defined in Delaware's Accountability Workbook.

10. Waiver Applicant: Illinois Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR. 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.

• Date waiver granted: August 13, 2010.

• Description of waiver: Allowed Illinois to include certain secondary schools in the pool from which it identifies its persistently lowest-achieving schools. The inclusion covered any Illinois secondary school that—

(A) Participated in Title I;

(B) Was not identified in Tier I; and

(C)(i) Had not made AYP for at least two consecutive years; or

(ii) Was in the lowest quintile of performance based on proficiency rates on Illinois' assessments in reading/language arts and mathematics combined.

11. Waiver Applicant: Kansas Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: March 31, 2010.

• Description of waiver: Allowed Kansas to exclude certain schools from the pool from which it identifies its persistently lowest-achieving schools. This exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 30 students enrolled for a full academic year, as that term was defined in Kansas' Accountability Workbook.

12. Waiver Applicant: Kansas Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.

• Date waiver granted: March 31, 2010.

• Description of waiver: Allows Kansas to include certain secondary schools in the pool of secondary schools from which it identifies its persistently lowest-achieving schools. This inclusion covered any Kansas secondary school that—

(A) Participated in Title I;

(B) Was not identified in Tier I; and

(C)(i) Had not made AYP for at least two consecutive years; or

(ii) Was in the lowest quintile of performance based on proficiency rates on Kansas' assessments in reading/language arts and mathematics combined.

13. Waiver Applicant: Massachusetts Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: April 27, 2010.

• Description of waiver: Allowed Massachusetts to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 20 students enrolled for a full academic year, as that term was defined in Massachusetts' Accountability Workbook.

14. Waiver Applicant: Massachusetts Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.

• Date waiver granted: April 27, 2010.

• Description of waiver: Allowed Massachusetts to include certain secondary schools in the pool from which it identifies its persistently lowest-achieving schools. The inclusion covered any Massachusetts secondary school that—

(A) Participated in Title I;

(B) Was not identified in Tier I; and

(C)(i) Had not made AYP for at least two consecutive years; or

(ii) Was in the lowest quintile of performance based on proficiency rates on Massachusetts' assessments in reading/language arts and mathematics combined.

15. Waiver Applicant: Maryland Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: April 9, 2010.

• Description of waiver: Allowed Maryland to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 30 for schools with one grade assessed and fewer than 60 for schools with at least two grades assessed enrolled for a full academic year as that term was defined in Maryland's Accountability Workbook.

16. Waiver Applicant: Maryland Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.

• Date waiver granted: April 9, 2010.

• Description of waiver: Allowed Maryland to include certain secondary schools in the pool from which it identifies its persistently lowest-achieving schools. The inclusion covered any Maryland secondary school that—

(A) Participated in Title I;

(B) Was not identified in Tier I; and

(C)(i) Had not made AYP for at least two consecutive years; or

(ii) Was in the lowest quintile of performance based on proficiency rates on Maryland's assessments in reading/language arts and mathematics combined.

17. Waiver Applicant: Michigan Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: July 2, 2010.

• Description of waiver: Allowed Michigan to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 30 students enrolled for a full academic year, as that term was defined in Michigan's Accountability Workbook.

18. Waiver Applicant: Michigan Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.

• Date waiver granted: July 2, 2010.

• Description of waiver: Allowed Michigan to include certain secondary schools in the pool from which it identifies its persistently lowest-achieving schools. The inclusion covered any Michigan secondary school that—

(A) Participated in Title I;

(B) Was not identified in Tier I; and

(C)(i) Had not made AYP for at least two consecutive years; or

(ii) Was in the lowest quintile of performance based on proficiency rates on Michigan's assessments in reading/language arts and mathematics combined.

19. Waiver Applicant: Missouri Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: March 31, 2010.

• Description of waiver: Allowed Missouri to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 30 students enrolled for a full academic year, as that term was defined in Missouri's Accountability Workbook.

20. Waiver Applicant: Missouri Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.

• Date waiver granted: March 31, 2010.

• Description of waiver: Allowed Missouri to include certain secondary schools in the pool from which it identifies its persistently lowest-achieving schools. The inclusion covered any Missouri secondary school that—

(A) Participated in Title I;

(B) Was not identified in Tier I; and

(C)(i) Had not made AYP for at least two consecutive years; or

(ii) Was in the lowest quintile of performance based on proficiency rates on Missouri's assessments in reading/language arts and mathematics combined.

21. Waiver Applicant: Nebraska Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: March 31, 2010.

• Description of waiver: Allowed Nebraska to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all

students'' group in the grades assessed consisted of fewer than 30 students enrolled for a full academic year, as that term was defined in Nebraska's Accountability Workbook.

22. Waiver Applicant: Nebraska Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.

• Date waiver granted: March 31, 2010.

• Description of waiver: Allowed Nebraska to include certain secondary schools in the pool from which it identifies its persistently lowest-achieving schools. The inclusion covered any Nebraska high school with a graduation rate lower than 75 percent.

23. Waiver Applicant: New Mexico Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: April 9, 2010.

• Description of waiver: Allowed New Mexico to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 25 students enrolled for a full academic year, as that term was defined in New Mexico's Accountability Workbook.

24. Waiver Applicant: Oklahoma Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: April 21, 2010.

• Description of waiver: Allowed Oklahoma to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 30 students enrolled for a full academic year, as that term was defined in Oklahoma's Accountability Workbook.

25. Waiver Applicant: Rhode Island Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.

• Date waiver granted: April 15, 2010.

• Description of waiver: Allowed Rhode Island to include certain secondary schools in the pool from which it identifies its persistently lowest-achieving schools. The inclusion covered any Rhode Island secondary school that—

(A) Participated in Title I;

(B) Was not identified in Tier I; and

(C)(i) Had not made AYP for at least two consecutive years; or

(ii) Was in the lowest quintile of performance based on proficiency rates on Rhode Island's assessments in reading/language arts and mathematics combined.

26. Waiver Applicant: South Carolina Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: April 1, 2010.

• Description of waiver: Allowed South Carolina to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 30 students enrolled for a full academic year, as that term was defined in South Carolina's Accountability Workbook.

27. Waiver Applicant: South Carolina Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.

• Date waiver granted: April 1, 2010.

• Description of waiver: Allowed South Carolina to include certain secondary schools in the pool from which it identifies its persistently lowest-achieving schools. The inclusion covered any South Carolina secondary school that—

(A) Participated in Title I;

(B) Was not identified in Tier I; and

(C)(i) Had not made AYP for at least two consecutive years; or

(ii) Was in the lowest quintile of performance based on proficiency rates on South Carolina's assessments in reading/language arts and mathematics combined.

28. Waiver Applicant: South Dakota Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: April 13, 2010.

• Description of waiver: Allowed South Dakota to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 10 students enrolled for a full academic year, as that term was defined in South Dakota's Accountability Workbook.

29. Waiver Applicant: Washington Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: April 1, 2010.

• Description of waiver: Allowed Washington to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed consisted of fewer than 30 students enrolled for a full academic year, as that term was defined in Washington's Accountability Workbook.

30. Waiver Applicant: Wisconsin Department of Education

• Provision waived: The definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(a) and (b) of those requirements.

• Date waiver granted: April 13, 2010.

• Description of waiver: Allowed Wisconsin to exclude certain schools from the pool of schools from which it identifies its persistently lowest-achieving schools. The exclusion covered any school in which the ''all students'' group in the grades assessed

consisted of fewer than 40 students enrolled for a full academic year, as that term was defined in Wisconsin's Accountability Workbook.

31. Waiver Applicant: Wisconsin Department of Education

• Provision waived: Paragraph (a)(2) of the definition of ''persistently lowest-achieving schools'' in section I.A.3 of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010), and the incorporation of that definition in section I.A.1(b) of those requirements.

• Date waiver granted: April 13, 2010.

• Description of waiver: Allowed Wisconsin to include certain secondary schools in the pool from which it identifies its persistently lowest-achieving schools. The inclusion covered any Wisconsin secondary school that—

(A) Participated in Title I;

(B) Was not identified in Tier I; and

(C)(i) Had not made AYP for at least two consecutive years; or

(ii) Was in the lowest quintile of performance based on proficiency rates on Wisconsin's assessments in reading/language arts and mathematics combined.

III. Waivers Allowing an SEA, With Respect to an LEA That Receives SIG Program Funds for ''Partnership Zone'' Schools as Defined By the State, To Implement Certain State Regulatory Provisions

1. Waiver Applicant: Delaware Department of Education

• Provision waived: Section II.B.2(d) of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010).

• Date waiver granted: June 15, 2010.

• Description of waiver: Allowed Delaware, with respect to an LEA that receives FY 2009 or FY 2010 SIG funds for ''Partnership Zone'' schools, designated as such by the Delaware Secretary of Education, to, under certain circumstances, implement the State regulatory provision that requires such an LEA to use either the restart model or the school closure model in its Partnership Zone schools. If not waived, the SEA could not require an LEA to implement a particular model in one or more schools unless the SEA took over the LEA or school.

2. Waiver Applicant: Delaware Department of Education

• Provision waived: Section II.A.8(a)(i) of the SIG Final Requirements, 75 FR (Oct. 28, 2010).

• Date waiver granted: June 15, 2010.

• Description of waiver: Allowed Delaware, with respect to an LEA that receives FY 2009 or 2010 SIG funds for ''Partnership Zone'' schools, designated as such by the Delaware Secretary of Education, to implement the State regulatory provision that requires such an LEA to renegotiate its Memorandum of Understanding (MOU) with the Delaware Department of Education related to the Partnership Zone schools or, if a particular Partnership Zone school does not make AYP by the end of the second year following implementation of the MOU, select another school intervention model. If not waived, the LEA would be required to monitor each Tier I and Tier II school that received SIG funds and, as part of its monitoring, establish annual goals for student achievement based on Delaware's assessments in both reading/language arts and mathematics.

IV. Waiving the Requirement To Carry Over 25 Percent of FY 2009 SIG Funds If Not All of Tier I Schools Are Served With Those Funds

1. Waiver Applicant: Alaska Department of Education

• Provision waived: Section II.B.9(a) of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010).

• Date waiver granted: September 30, 2010.

• Description of waiver: Waived the requirement that an SEA carry over 25 percent of its FY 2009 SIG funds if not all of its Tier I schools are served with those funds and allowed the SEA to allocate more than 75 percent of its FY 2009 SIG funds to LEAs for Tier I and Tier II schools that its LEAs committed to serve beginning in the 2010–11 school year.

2. Waiver Applicant: California Department of Education

• Provision waived: Section II.B.9(a) of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010).

• Date waiver granted: October 13, 2010.

• Description of waiver: Waived the requirement that an SEA carry over 25 percent of its FY 2009 SIG funds if not all of its Tier I schools were served with those funds, and allowed the SEA to allocate more than 75 percent of its FY 2009 SIG funds to LEAs for Tier I and Tier II schools that its LEA committed to serve beginning in the 2010–11 school year. The funds made available for the FY 2009 competition through the waiver allowed California to make awards to additional LEAs that had demonstrated the commitment and capacity to implement one of the four rigorous school intervention models in their Tier I and Tier II schools beginning in fall 2010.

3. Waiver Applicant: Colorado Department of Education

• Provision waived: Section II.B.9(a) of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010).

• Date waiver granted: August 18, 2010.

• Description of waiver: Waived the requirement that an SEA carry over 25 percent of its FY 2009 SIG funds if not all of its Tier I schools were served with those funds, and allowed the SEA to allocate more than 75 percent of its FY 2009 SIG funds to LEAs for Tier I and Tier II schools that its LEA committed to serve beginning in the 2010–11 school year. The funds made available for the FY 2009 competition through the waiver allowed Colorado to make awards to additional LEAs that had demonstrated the commitment and capacity to implement one of the four rigorous school intervention models in their Tier I and Tier II schools beginning in fall 2010.

4. Waiver Applicant: Connecticut Department of Education

• Provision waived: Section II.B.9(a) of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010).

• Date waiver granted: July 26, 2010.

• Description of waiver: Waived the requirement that an SEA carry over 25 percent of its FY 2009 SIG funds if not all of its Tier I schools were served with those funds, and allowed the SEA to allocate more than 75 percent of its FY 2009 SIG funds to LEAs for Tier I and Tier II schools that its LEA committed to serve beginning in the 2010–11 school year. The funds made available for the FY 2009 competition through the waiver allowed Connecticut to make awards to additional LEAs that had demonstrated the commitment and capacity to implement one of the four rigorous school intervention models in their Tier I and Tier II schools beginning in fall 2010.

5. Waiver Applicant: Maine Department of Education

• Provision waived: Section II.B.9(a) of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010).

• Date waiver granted: September 16, 2010.

• Description of waiver: Waived the requirement that an SEA carry over 25 percent of its FY 2009 SIG funds if not all of its Tier I schools were served with those funds, and allowed the SEA to allocate more than 75 percent of its FY 2009 SIG funds to LEAs for Tier I and Tier II schools that its LEA committed to serve beginning in the 2010–11 school year. The funds made available

for the FY 2009 competition through the waiver allowed Maine to make awards to additional LEAs that had demonstrated the commitment and capacity to implement one of the four rigorous school intervention models in their Tier I and Tier II schools beginning in fall 2010.

6. Waiver Applicant: Missouri Department of Education

• Provision waived: Section II.B.9(a) of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010).

• Date waiver granted: September 14, 2010.

• Description of waiver: Waived the requirement that an SEA carry over 25 percent of its FY 2009 SIG funds if not all of its Tier I schools were served with those funds, and allowed the SEA to allocate more than 75 percent of its FY 2009 SIG funds to LEAs for Tier I and Tier II schools that its LEA committed to serve beginning in the 2010–11 school year. The funds made available for the FY 2009 competition through the waiver allowed Missouri to make awards to additional LEAs that had demonstrated the commitment and capacity to implement one of the four rigorous school intervention models in their Tier I and Tier II schools beginning in fall 2010.

7. Waiver Applicant: Oregon Department of Education

• Provision waived: Section II.B.9(a) of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010).

• Date waiver granted: September 22, 2010.

• Description of waiver: Waived the requirement that an SEA carry over 25 percent of its FY 2009 SIG funds if not all of its Tier I schools were served with those funds, and allowed the SEA to allocate more than 75 percent of its FY 2009 SIG funds to LEAs for Tier I and Tier II schools that its LEA committed to serve beginning in the 2010–11 school year. The funds made available for the FY 2009 competition through the waiver allowed Oregon to make awards to additional LEAs that had demonstrated the commitment and capacity to implement one of the four rigorous school intervention models in their Tier I and Tier II schools beginning in fall 2010.

8. Waiver Applicant: Pennsylvania Department of Education

• Provision waived: Section II.B.9(a) of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010).

• Date waiver granted: October 22, 2010.

• Description of waiver: Waived the requirement that an SEA carry over 25 percent of its FY 2009 SIG funds if not all of its Tier I schools were served with those funds, and allowed the SEA to allocate more than 75 percent of its FY 2009 SIG funds to LEAs for Tier I and Tier II schools that its LEA committed to serve beginning in the 2010–11 school year. The funds made available for the FY 2009 competition through the waiver allowed Pennsylvania to make awards to additional LEAs that had demonstrated the commitment and capacity to implement one of the four rigorous school intervention models in their Tier I and Tier II schools beginning in fall 2010.

9. Waiver Applicant: Washington Department of Education

• Provision waived: Section II.B.9(a) of the SIG Final Requirements, 75 FR 66363 (Oct. 28, 2010).

• Date waiver granted: June 23, 2010.

• Description of waiver: Waived the requirement that an SEA carry over 25 percent of its FY 2009 SIG funds if not all of its Tier I schools are served with those funds, and allowed the SEA to allocate more than 75 percent of its FY 2009 SIG funds to LEAs for Tier I and Tier II schools that its LEA committed to serve beginning in the 2010–11 school year. The funds made available for the FY 2009 competition through the waiver allowed Washington to make awards to additional LEAs that had demonstrated the commitment and capacity to implement one of the four rigorous school intervention models in their Tier I and Tier II schools beginning in fall 2010.

V. Substitute Assessments

1. Waiver Applicant: New York State Department of Education

• Provisions waived: Section 1111(b)(3)(C)(i) of the ESEA and 34 CFR 200.3(a)(1)(i).

• Date waiver granted: July 2, 2010.

• Description of waiver: Permitted New York to use the Advanced International Certificate of Education Mathematics Examination, the Advanced Placement Calculus AB or BC Examinations, the International Baccalaureate Mathematical Studies or Mathematics Methods Standard-Level Examinations, the International Baccalaureate Mathematics Higher-Level Examination, the International General Certificate of Secondary Education, or the SAT II Mathematics Level 1 or 2 Examinations, from the 2009–10 school year through the 2012–13 school year, in place of the high school New York Regents Examination in Integrated Algebra. This was permitted, even though the same assessment would not be used by all students, and some students might have taken an assessment that did not cover the full breadth and depth of the State's academic content standards.

VI. Delayed Release of Assessment Results and/or Public School Choice Notice

1. Waiver Applicant: Arizona Department of Education

• Provisions waived: Section 1116(b)(1)(E)(i) of the ESEA and 34 CFR 200.37(b)(4)(iv).

• Date waiver granted: June 14, 2010.

• Description of waiver: Allowed Arizona to postpone—

(A) Notice of public school choice for the start of the 2010–11 school year until assessment results were available; and

(B) Notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that—

(i) Were newly identified for improvement for the 2010–11 school year; or

(ii) Made AYP in the previous year but did not exit from improvement status.

2. Waiver Applicant: California Department of Education

• Provisions waived: Section 1116(b)(1)(E)(i) of the ESEA and 34 CFR 200.37(b)(4)(iv).

• Date waiver granted: December 7, 2010.

• Description of waiver: Allowed California to postpone—

(A) Notice of public school choice for the start of the 2010–11 school year until assessment results were available; and

(B) Notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that—

(i) Were newly identified for improvement for the 2010–11 school year; or

(ii) Made AYP in the previous year but did not exit improvement status.

3. Waiver Applicant: Colorado Department of Education

• Provision waived: 34 CFR 200.37(b)(4)(iv).

• Date waiver granted: September 13, 2010.

• Description of waiver: Allowed Colorado to postpone—

(A) Notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that—

(i) Were newly identified for improvement for the 2010–11 school year; or

(ii) Made AYP in the previous year but did not exit improvement status.

4. Waiver Applicant: Florida Department of Education

• Provision waived: 34 CFR 200.37(b)(4)(iv).

• Date waiver granted: August 3, 2010.

• Description of waiver: Allowed Florida to postpone—

(A) Notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that—

(i) Were newly identified for improvement for the 2010–11 school year; or

(ii) Made AYP in the previous year but did not exit improvement status.

5. Waiver Applicant: Idaho Department of Education

• Provisions waived: Sections 1116(a)(2) and 1116(b)(l)(E)(i) of the ESEA, and 34 CFR 200.37(b)(4)(iv).

• Date waiver granted: June 30, 2010.

• Description of waiver: Allowed Idaho to postpone—

(A) Release of results from the State academic assessment administered in the 2009–10 school year;

(B) Notice of public school choice for the start of the 2010–11 school year until assessment results were available; and

(C) Notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that—

(i) Were newly identified for improvement for the 2010–11 school year; or

(ii) Made AYP in the previous year but did not exit improvement status.

6. Waiver Applicant: Indiana Department of Education

• Provisions waived: Sections 1116(a)(2) and 1116(b)(l)(E)(i) of the ESEA, and 34 CFR 200.37(b)(4)(iv).

• Date waiver granted: October 29, 2010.

• Description of waiver: Allowed Indiana to postpone—

(A) Release of results from the State academic assessment administered in the 2009–10 school year;

(B) Notice of public school choice for the start of the 2010–11 school year until assessment results were available; and

(C) Notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that—

(i) Were newly identified for improvement for the 2010–11 school year; or

(ii) Made AYP in the previous year but did not exit improvement status.

7. Waiver Applicant: Kentucky Department of Education

• Provision waived: Sections 1116(a)(2) and 1116(b)(l)(E)(i) of the ESEA, and 34 CFR 200.37(b)(4)(iv).

• Date waiver granted: April 15, 2010.

• Description of waiver: Allowed Kentucky to postpone—

(A) The release of results from the State academic assessment administered in the 2009–10 school year;

(B) Notice of public school choice for the start of the 2010–11 school year until assessment results were available; and

(C) Notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that—

(i) Were newly identified for improvement for the 2010–11 school year or

(ii) Made AYP in the previous year but did not exit improvement status.

8. Waiver Applicant: Nebraska Department of Education

• Provision waived: 34 CFR 200.37(b)(4)(iv).

• Date waiver granted: July 12, 2010.

• Description of waiver: Allowed Nebraska to postpone—

(A) Notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that—

(i) Were newly identified for improvement for the 2010–11 school year; or

(ii) Made AYP in the previous year but did not exit improvement status.

9. Waiver Applicant: New York State Department of Education

• Provisions waived: Section 1116(b)(1)(E)(i) of the ESEA and 34 CFR 200.37(b)(4)(iv).

• Date waiver granted: August 24, 2010.

• Description of waiver: Allowed New York to postpone—

(A) Notice of public school choice for the start of the 2010–11 school year until assessment results were available; and

(B) Notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that—

(i) Were newly identified for improvement for the 2010–11 school year; or

(ii) Made AYP in the previous year but did not exit improvement status.

10. Waiver Applicant: Oklahoma Department of Education

• Provision waived: 34 CFR 200.37(b)(4)(iv).

• Date waiver granted: October 18, 2010.

• Description of waiver: Allowed Oklahoma to postpone—

(A) Notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that—

(i) Were newly identified for improvement for the 2010–11 school year; or

(ii) Made AYP in the previous year but did not exit improvement status.

11. Waiver Applicant: Tennessee Department of Education

• Provisions waived: Section 1116(b)(1)(E)(i) of the ESEA and 34 CFR 200.37(b)(4)(iv).

• Date waiver granted: August 10, 2010.

• Description of waiver: Allowed Tennessee to postpone—

(A) Notice of public school choice for the start of the 2010–11 school year until assessment results were available; and

(B) Notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that—

(i) Were newly identified for improvement for the 2010–11 school year; or

(ii) Made AYP in the previous year but did not exit improvement status.

12. Waiver Applicant: Washington Department of Education

• Provisions waived: Sections 1116(a)(2) and 1116(b)(l)(E)(i) of the ESEA, and 34 CFR 200.37(b)(4)(iv).

• Date waiver granted: June 30, 2010.

• Description of waiver: Allowed Washington to postpone—

(A) The release of results from the State academic assessment administered in the 2009–10 school year;

(B) Notice of public school choice for the start of the 2010–11 school year until assessment results were available; and

(C) Notice of public school choice options beyond 14 days before the start of the school year to parents of eligible children attending schools that—

(i) Were newly identified for improvement for the 2010–11 school year; or

(ii) Made AYP in the previous year but did not exit improvement status.

VII. AYP Determinations

1. Waiver Applicant: California Department of Education

• Provisions waived: Sections 1111(b)(3)(C)(vii), 1111(b)(3)(C)(v)(II), and 1116(a)(1)(A) of the ESEA, and 34 CFR 200.5(a)(2), 34 CFR 200.5(b), and 34 CFR 200.12.

• Date waiver granted: June 23, 2010.

• Description of waiver: Allowed some schools in Calexico Unified School District to exclude assessments administered in the 2009–10 school year when making AYP determinations and to assign the same AYP status to its schools as it assigned AYP determinations based on 2008–09 assessments. This was necessary because the April 4, 2010, earthquake and aftershocks resulted in schools closing for six weeks during the time that Calexico would have administered the assessments required under the ESEA.

2. Waiver Applicant: Florida Department of Education

• Provisions waived: Sections 1111(b)(2)(I)(ii) of the ESEA and 34 CFR 200.20(c)(l)(i).

• Date waiver granted: September 22, 2010.

• Description of waiver: Allowed Florida to exclude, from assessment participation rate calculations used in when making AYP determinations for the 2009–10 school year, those students who enrolled in Florida schools after having been displaced as a result of the January 12, 2010, earthquake in Haiti.

3. Waiver Applicant: Wyoming Department of Education

• Provisions waived: Sections 1111(b)(3)(A), 1111(b)(3)(C)(vii), 1111(b)(3)(C)(v)(II), 1116(a)(1)(A), and 1116(c)(1)(A) of the ESEA, and 34 CFR 200.2(a)(1), 34 CFR 200.5(a)(2), 34 CFR 200.5(b), 34 CFR 200.30, and 34 CFR 200.50(a).

• Date waiver granted: November 16, 2010.

• Description of waiver: Allowed Wyoming to exclude assessments administered in the 2009–10 school year in making AYP determinations due to a statewide failure of Wyoming's online assessment system that prevented the State from collecting valid statewide assessment data for that same school year.

VIII. Title I Within-District Allocation Waivers

1. Waiver Applicant: Clay County Schools, WV

• Provisions waived: Section 1113(c)(1) of the ESEA and 34 CFR 200.78(c).

• Date waiver granted: May 21, 2010.

• Description of waiver: Enabled the Clay County Schools to allocate more Title I funds per poor child to several schools with a lower poverty rate than to schools with a higher poverty rate.

2. Waiver Applicant: Community High School District 99, IL

• Provisions waived: Sections 1113(a)(2) and 1113(c)(2)(A) of the ESEA.

• Date waiver granted: December 13, 2010.

• Description of waiver: Enabled Community High School District 99 to allocate Title I funds to its second high school, which was below the District-wide poverty rate of 35 percent and, therefore, not eligible for Title I funds. The waiver further enabled the District to allocate an amount per poor child to both its high schools that was less than 125 percent of the per-pupil amount for the District as a whole.

IX. Allowing an SEA To Use Its Title I Allocation Reserved for Academic Achievement Awards Programs To Reward Qualified Schools That Are Eligible for, But Do Not Receive, Title I Funds

1. Waiver Applicant: Wisconsin Department of Education

• Provision waived: Section 1117(c)(2)(A) of the ESEA.

• Date waiver granted: December 23, 2010.

• Description of waiver: Permitted Wisconsin to use Title I funds reserved for academic achievement award programs by the SEA to reward qualified schools that were eligible for, but did not receive, Title I funds. Because of the funds made available for Title I through ARRA, Wisconsin was able to reserve significantly more FY 2009 funds to reward schools, and sought to take the opportunity to financially reward not only 120 qualifying Title I schools that received Title I funds, but also 17 high-poverty schools that were eligible for, but did not receive, Title I funds and had made significant strides in improving student achievement.

X. Participation or Attendance Rate Waivers Due to Breakouts of the H1N1 Virus

1. Waiver Applicant: Maryland Department of Education

• Provisions waived: Sections 1111(b)(2)(I)(ii) of the ESEA and 34 CFR 200.20(c)(l)(i).

• Date waiver granted: April 20, 2010.

• Description of waiver: Allowed Maryland to exclude schools or LEAs from assessment participation rate calculations when making AYP determinations for the 2009–10 school year for those student subgroups that failed to make the required 95 percent participation rate and experienced 50 percent or more of its absences on two or more days during the testing window due to the H1N1 flu virus or other flu-like illnesses. This waiver permitted a school or LEA in Maryland to use the school's or LEA's 2008–09 school year participation rate when making AYP determinations based on assessments administered during the 2009–10 school year.

2. Waiver Applicant: New Mexico Department of Education

• Provisions waived: Sections 1111(b)(2)(I)(ii) of the ESEA and 34 CFR 200.20(c)(l)(i).

• Date waiver granted: August 4, 2010.

• Description of waiver: Allowed New Mexico to exclude schools or LEAs from attendance rate as an ''other academic indicator'' when making AYP determinations for the 2009–10 school year for a school or LEA that failed to make AYP for the attendance rate due to the H1N1 flu virus or other flu-like illnesses. This waiver permitted a school or LEA in New Mexico to use the school's or LEA's 2009–10 school year attendance rate for an ''other academic indicator'' when making AYP determinations.

3. Waiver Applicant: South Carolina Department of Education

• Provisions waived: Sections 1111(b)(2)(I)(ii) of the ESEA and 34 CFR 200.20(c)(l)(i).

• Date waiver granted: January 21, 2010.

• Description of waiver: Allowed South Carolina to exclude schools or LEAs from attendance rate as the ''other academic indicator'' when making AYP determinations for the 2009–10 school year for a school or LEA that failed to make AYP for the attendance rate and experienced 50 percent or more of its absences due to the H1N1 flu virus or other flu-like illnesses. This waiver permitted a school or LEA in South

Carolina to use the school or LEA's 2008–09 school year attendance rate for ''other academic indicator'' when making AYP determinations.

XI. Annual Measurable Achievement Objective Waiver

1. Waiver Applicant: Wyoming Department of Education

- Provisions waived: Section 3122(b)(1) of the ESEA.
- Date waiver granted: May 10, 2010.
- Description of waiver: Allowed Wyoming to make annual measurable achievement objective (AMAO) determinations for the 2009–10 school year based on AMAO 2 (attainment) and AMAO 3 (AYP for limited English proficiency subgroup). Wyoming adopted a new annual English language proficiency assessment and did not have consistent data to make AMAO determinations regarding AMAO 1 (progress) for districts receiving Title III funds for the 2009–10 school year.

XII. Two Percent Transition Flexibility

1. Waiver Applicant: Georgia Department of Education

- Provision waived: 34 CFR 200.20(g).
- Date waiver granted: July 2, 2010.
- Description of waiver: Permitted Georgia to extend the use of the two percent flexibility for calculating AYP for the ''students with disabilities'' subgroup for the 2010–11 school year based on 2009–10 assessment results. Due to severe resource issues, Georgia was not able to implement an operational alternate assessment based on modified academic achievement standards (AA–MAS) in spring 2010.

XIII. Paraprofessional Qualifications

1. Waiver Applicant: Texas Education Agency

- Provision waived: Section 1119(c) of the ESEA.
- Date waiver granted: April 30, 2010.
- Description of waiver: Permitted Texas' instructional paraprofessionals in schools receiving Title I, Part A funds for the first time in school year 2009–10 to have until the first day of the second semester of the current school year to meet the requirements for paraprofessionals. This waiver applied to paraprofessionals in these schools who were hired prior to the first day of the 2009–10 school year.

XIV. Consolidated Grant Restrictions

1. Waiver Applicant: American Samoa Department of Education

- Provisions waived: Sections 6222 and 6224(d) of the ESEA.
- Date waiver granted: February 26, 2010.
- Description of waiver: Provided American Samoa the flexibility to use ARRA FY 2009 funds through a consolidated grant for programs under Title VI, Part B of the ESEA.

2. Waiver Applicant: Guam Department of Education

- Provisions waived: Sections 6222 and 6224(d) of the ESEA.
- Date waiver granted: March 10, 2010.
- Description of waiver: Provided Guam the flexibility to use ARRA FY 2009 funds through a consolidated grant for programs under Title VI, Part B of the ESEA.

XV. Allowing SEAs or LEAs To Approve Schools or LEAs In Need of Improvement To Become SES Providers

1. Waiver Applicant: Alaska Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: June, 16, 2010.
- Description of waiver: Permitted Alaska to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

2. Waiver Applicant: Arizona Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 4, 2010.
- Description of waiver: Permitted Arizona to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

3. Waiver Applicant: Delaware Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: June 15, 2010.
- Description of waiver: Permitted Delaware to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–10 school year.

4. Waiver Applicant: Florida Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 25, 2010.
- Description of waiver: Permitted Florida to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

5. Waiver Applicant: Hawaii Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A).
- Date waiver granted: August 20, 2010.
- Description of waiver: Permitted Hawaii to approve a school identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

6. Waiver Applicant: Indiana Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: July 2, 2010.
- Description of waiver: Permitted Indiana to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

7. Waiver Applicant: Iowa Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: August 3, 2010.
- Description of waiver: Permitted Iowa to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

8. Waiver Applicant: Maine Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: September 9, 2010.
- Description of waiver: Permitted Maine to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

9. Waiver Applicant: Massachusetts State Board of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
- Date waiver granted: July 19, 2010.
- Description of waiver: Permitted Massachusetts to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

10. Waiver Applicant: Missouri Department of Education

- Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: August 10, 2010.

• Description of waiver: Permitted Missouri to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

11. Waiver Applicant: Montana Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: June 23, 2010.

• Description of waiver: Permitted Montana to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

12. Waiver Applicant: Nebraska Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: July 12, 2010.

• Description of waiver: Permitted Nebraska to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

13. Waiver Applicant: New Hampshire Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: August 4, 2010.

• Description of waiver: Permitted New Hampshire to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

14. Waiver Applicant: New Mexico Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: July 20, 2010.

• Description of waiver: Permitted New Mexico to approve a school or LEA identified for improvement to serve as a provider of SES during the 2010–11 school year.

15. Waiver Applicant: New York State Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: March 3, 2010.

• Description of waiver: Permitted New York to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–10 school year.

16. Waiver Applicant: North Carolina Department of Public Instruction

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: July 21, 2010.

• Description of waiver: Permitted North Carolina to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

17. Waiver Applicant: North Dakota Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: June 15, 2010.

• Description of waiver: Permitted North Dakota to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

18. Waiver Applicant: Ohio Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: July 20, 2010.

• Description of waiver: Permitted Ohio to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

19. Waiver Applicant: Oklahoma Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: June 15, 2010.

• Description of waiver: Permitted Oklahoma to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

20. Waiver Applicant: Pennsylvania Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: August 3, 2010.

• Description of waiver: Permitted Oregon to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

21. Waiver Applicant: Red Clay Consolidated School District, DE

• Provision waived: 34 CFR 200.47(b)(1)(iv)(B).

• Date waiver granted: February 4, 2010.

• Description of waiver: Permitted the Red Clay Consolidated School District in Delaware, an LEA identified for improvement, to serve as a provider of SES during the 2009–10 school year.

22. Waiver Applicant: Rhode Island Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: June 16, 2010.

• Description of waiver: Permitted Rhode Island to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

23. Waiver Applicant: South Carolina Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: July 12, 2010.

• Description of waiver: Permitted South Carolina to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

24. Waiver Applicant: South Dakota Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: June 16, 2010.

• Description of waiver: Permitted South Dakota to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

25. Waiver Applicant: Tennessee Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: October 14, 2010.

• Description of waiver: Permitted Tennessee to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

26. Waiver Applicant: Texas Education Agency

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: April 30, 2010.

• Description of waiver: Permitted Texas to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–10 school year.

27. Waiver Applicant: Utah Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).

• Date waiver granted: January 19, 2010.
• Description of waiver: Permitted Utah to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2009–10 school year.

28. Waiver Applicant: Washington Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
• Date waiver granted: July 27, 2010.
• Description of waiver: Permitted Washington to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

29. Waiver Applicant: Wisconsin Department of Education

• Provision waived: 34 CFR 200.47(b)(1)(iv)(A) and (B).
• Date waiver granted: August 10, 2010.
• Description of waiver: Permitted Wisconsin to approve a school or LEA identified for improvement, corrective action, or restructuring to serve as a provider of SES during the 2010–11 school year.

XVI. Allowing LEAs to Provide SES, In Addition to Public School Choice, to Eligible Students In Title I Schools In the First Year of School Improvement and To Count the Costs of Both Toward Meeting the LEA's ''20 Percent Obligation''

A. New Applicants

1. Waiver Applicant: Delaware Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: June 15, 2010.
• Description of waiver: For the 2010–11 school year, permitted LEAs in Delaware to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

2. Waiver Applicant: Florida Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: August 25, 2010.
• Description of waiver: For the 2010–11 school year, permitted LEAs in Florida to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

3. Waiver Applicant: Minnesota Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: January 19, 2010.
• Description of waiver: For the 2010–11 school year, permitted LEAs in Minnesota to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

4. Waiver Applicant: New York State Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: March 3, 2010.
• Description of waiver: For the 2010–11 school year, permitted LEAs in New York to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

B. Continuation Applicants

1. Waiver Applicant: Alabama Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: August 10, 2010.
• Description of waiver: For the 2010–11 school year, permitted LEAS in Alabama to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

2. Waiver Applicant: Arizona Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: August 4, 2010.
• Description of waiver: For the 2010–11 school year, permitted LEAs in Arizona to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

3. Waiver Applicant: California Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: December 7, 2010.
• Description of waiver: For the 2010–11 school year, permitted LEAs in California to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

4. Waiver Applicant: Iowa Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: August 3, 2010.
• Description of waiver: For the 2010–11 school year, permitted LEAs in Iowa to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

5. Waiver Applicant: Massachusetts Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: July 19, 2010.
• Description of waiver: For the 2010–11 school year, permitted LEAs in Massachusetts to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

6. Waiver Applicant: Michigan Department of Education

• Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
• Date waiver granted: August 10, 2010.
• Description of waiver: For the 2010–11 school year, permitted LEAs in Michigan to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to

count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

7. Waiver Applicant: Missouri Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: August 10, 2010.
- Description of waiver: For the 2010–11 school year, permitted LEAs in Missouri to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

8. Waiver Applicant: Nebraska Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: July 12, 2010.
- Description of waiver: For the 2010–11 school year, permitted LEAs in Nebraska to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

9. Waiver Applicant: Nevada Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: June 15, 2010.
- Description of waiver: For the 2010–11 school year, permitted LEAs in Nevada to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

10. Waiver Applicant: New Hampshire Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: August 4, 2010.
- Description of waiver: For the 2010–11 school year, permitted LEAs in New Hampshire to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

11. Waiver Applicant: New Mexico Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: July 20, 2010.
- Description of waiver: For the 2010–11 school year, permitted LEAs in New Mexico to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

12. Waiver Applicant: North Carolina Department of Public Instruction

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: July 21, 2010.
- Description of waiver: For the 2010–11 school year, permitted LEAs in North Carolina to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

13. Waiver Applicant: Ohio Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: July 20, 2010.
- Description of waiver: For the 2010–11 school year, permitted LEAs in Ohio to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

14. Waiver Applicant: Oklahoma Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: November 9, 2010.
- Description of waiver: For the 2010–11 school year, permitted LEAs in Oklahoma to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

15. Waiver Applicant: Tennessee Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: October 14, 2010.
- Description of waiver: For the 2010–11 school year, permitted LEAs in Tennessee to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

16. Waiver Applicant: Virginia Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: August 4, 2010.
- Description of waiver: For the 2010–11 school year, permitted LEAs in Virginia to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

17. Waiver Applicant: Washington Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48.
- Date waiver granted: July 27, 2010.
- Description of waiver: For the 2010–11 school year, permitted LEAs in Washington to offer SES, in addition to public school choice, to eligible students in Title I schools in the first year of school improvement and to count the costs of providing SES to these students toward meeting the LEA's ''20 percent obligation.''

XVII. Waivers Related to Title I, Part A Funding Provided Under ARRA

A. Allowing an LEA To Exclude Its Title I, Part A Allocation Received Under ARRA When Calculating Its Obligation to Spend the Equivalent of 20 Percent of Title I, Part A Funds for Public School Choice-Related Transportation and SES

1. Waiver Applicant: Kansas Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: April 6, 2010.
- Description of waiver: Allowed LEAs in Kansas to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at

least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

2. Waiver Applicant: Minnesota Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: January 19, 2010.
- Description of waiver: Allowed LEAs in Minnesota to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

3. Waiver Applicant: Mississippi Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: May 10, 2010.
- Description of waiver: Allowed LEAs in Mississippi to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

4. Waiver Applicant: New York State Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: March 3, 2010.
- Description of waiver: Allowed LEAs in New York to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

5. Waiver Applicant: Puerto Rico Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: April 6, 2010.
- Description of waiver: Allowed the Puerto Rico LEA to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

6. Waiver Applicant: Red Clay Consolidated School District, DE

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: February 4, 2010.
- Description of waiver: Allowed the Red Clay Consolidated School District in Delaware to exclude all or part of its Title I, Part A ARRA funds when calculating its obligation to spend at least the equivalent of 20 percent of its fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

7. Waiver Applicant: Texas Education Agency

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: April 30, 2010.
- Description of waiver: Allowed LEAs in Texas to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of their fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

8. Waiver Applicant: Utah Department of Education

- Provisions waived: Section 1116(b)(10) of the ESEA and 34 CFR 200.48(a)(2).
- Date waiver granted: January 19, 2010.
- Description of waiver: Allowed LEAs in Utah to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least the equivalent of 20 percent of its fiscal year 2009 Title I, Part A funds for public school choice-related transportation and SES.

B. Allowing an LEA and/or a SCHOOL To Exclude Its Title I, Part A Allocation Received Under ARRA When Calculating Its Obligation To Spend 10 Percent of Title I, Part A Funds For Professional Development

1. Waiver Applicant: Kansas Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: April 6, 2010.
- Description of waiver: Allowed LEAs and schools in Kansas that were in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

2. Waiver Applicant: Minnesota Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: January 19, 2010.
- Description of waiver: Allowed LEAs and schools in Minnesota that were in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

3. Waiver Applicant: Mississippi Department of Education

- Provisions waived: Section 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.41(c)(5).
- Date waiver granted: May 10, 2010.
- Description of waiver: Allowed schools in Mississippi that were in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

4. Waiver Applicant: Montana Department of Education

- Provisions waived: Section 1116(c)(7)(A)(iii) of the ESEA and 34 CFR 200.52(a)(3)(iii).
- Date waiver granted: October 19, 2010.
- Description of waiver: Allowed LEAs in Montana that were in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

5. Waiver Applicant: New York State Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: March 3, 2010.
- Description of waiver: Allowed LEAs and schools in New York that were in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds

when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

6. Waiver Applicant: Puerto Rico Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: April 6, 2010.
- Description of waiver: Allowed the Puerto Rico LEA and its schools that were in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

7. Waiver Applicant: Red Clay Consolidated School District, DE

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: February 4, 2010.
- Description of waiver: Allowed the LEA and the schools in the Red Clay District in Delaware that were in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

8. Waiver Applicant: Utah Department of Education

- Provisions waived: Sections 1116(c)(7)(A)(iii) and 1116(b)(3)(A)(iii) of the ESEA, and 34 CFR 200.52(a)(3)(iii) and 34 CFR 200.41(c)(5).
- Date waiver granted: January 19, 2010.
- Description of waiver: Allowed LEAs and schools in Utah that were in improvement, corrective action, or restructuring status to exclude all or part of the Title I, Part A ARRA funds when calculating their obligation to spend at least 10 percent of fiscal year 2009 Title I, Part A funds for professional development.

C. Allowing an LEA To Exclude Title I, Part A Funds Received Under ARRA When Calculating the Per-Pupil Amount for SES

1. Waiver Applicant: Kansas Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: April 6, 2010.
- Description of waiver: Allowed LEAs in Kansas to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

2. Waiver Applicant: Minnesota Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: January 19, 2010.
- Description of waiver: Allowed LEAs in Minnesota to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

3. Waiver Applicant: Mississippi Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: May 10, 2010.
- Description of waiver: Allowed LEAs in Mississippi to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

4. Waiver Applicant: New York State Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: March 3, 2010.
- Description of waiver: Allowed LEAs in New York to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

5. Waiver Applicant: Puerto Rico Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: April 6, 2010.
- Description of waiver: Allowed the Puerto Rico LEA to exclude all or part of its' Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

6. Waiver Applicant: Red Clay Consolidated School District, DE

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: February 4, 2010.
- Description of waiver: Allowed the Red Clay Consolidated School District to exclude all or part of its Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

7. Waiver Applicant: Texas Education Agency

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: April 30, 2010.
- Description of waiver: Allowed LEAs in Texas to exclude all or part of their Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

8. Waiver Applicant: Utah Department of Education

- Provisions waived: Section 1116(e)(6) of the ESEA and 34 CFR 200.48(c)(1).
- Date waiver granted: January 19, 2010.
- Description of waiver: Allowed LEAs in Utah to exclude all or part of its Title I, Part A ARRA funds when calculating the per-pupil amount for SES.

D. Authorizing an SEA To Waive the Carryover Limitation for an LEA That Needs an Additional Waiver Because of Its Receipt of Title I, Part A ARRA Funds

1. Waiver Applicant: Minnesota Department of Education

- Provisions waived: Section 1127(b) of the ESEA.
- Date waiver granted: January 19, 2010.
- Description of waiver: Authorized Minnesota to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

2. Waiver Applicant: Mississippi Department of Education

- Provisions waived: Section 1127(b) of the ESEA.
- Date waiver granted: May 10, 2010.
- Description of waiver: Authorized Mississippi to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

3. Waiver Applicant: Montana Department of Education

- Provisions waived: Section 1127(b) of the ESEA.
- Date waiver granted: June 23, 2010.
- Description of waiver: Authorized Montana to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

4. Waiver Applicant: New York State Department of Education

- Provisions waived: Section 1127(b) of the ESEA.
- Date waiver granted: March 3, 2010.
- Description of waiver: Authorized New York to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

5. Waiver Applicant: Red Clay Consolidated School District, DE

- Provisions waived: Section 1127(a) of the ESEA.
- Date waiver granted: February 4, 2010.
- Description of waiver: Authorized the Red Clay Consolidated School District in Delaware to exceed the carryover limitation more than once within three years if it needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

6. Waiver Applicant: Utah Department of Education

- Provisions waived: Section 1127(b) of the ESEA.
- Date waiver granted: January 19, 2010.
- Description of waiver: Authorized Utah to waive the carryover limitation more than once within three years for an LEA that needs a second (or third) waiver because of its receipt of Title I, Part A ARRA funds.

FOR FURTHER INFORMATION CONTACT: Luz Curet, U.S. Department of Education, 400 Maryland Avenue SW., Room 3W344, Washington, DC 20202. Telephone: (202) 205–3728 or by email: *luz.curet@ed.gov*.

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Dated: November 22, 2013.

Deborah S. Delisle,

Assistant Secretary for Elementary and Secondary Education.

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FEDERAL REGISTER

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Part V

The President

Proclamation 9061—National Family Week, 2013

Federal Register
Vol. 78, No. 229
Wednesday, November 27, 2013

Presidential Documents

Title 3—

The President

Proclamation 9061 of November 22, 2013

National Family Week, 2013

By the President of the United States of America

A Proclamation

Whether united by blood or bonds of kinship—whether led by a mother and father, same-sex couple, single parent, or guardian—families are the building blocks of American society. During National Family Week, we celebrate the spirit that moves family members to care for one another, to grow and dream together, and to instill in their children the character that keeps our Nation strong.

As we honor America's families, we must also lift them up. We must restore the basic bargain that built our country—the idea that if you work hard and meet your responsibilities, you can get ahead. That is why my Administration has prioritized high-quality job creation, affordable health insurance for America's families, and a world-class education for every child. Earlier this year, I signed the American Taxpayer Relief Act, which permanently extended middle class tax cuts while expanding the Child Tax Credit and marriage penalty relief. I am calling on the Congress to increase the minimum wage, a step that would raise incomes for millions of working families. And because we must serve our military families as well as they serve us, First Lady Michelle Obama and Dr. Jill Biden's Joining Forces initiative is connecting service members, veterans, and military spouses with companies looking to hire.

This week, let us renew our family bonds. Whether by sharing a family meal, reading a bedtime story, or creating a holiday tradition, let us carve out a place in the lives of our loved ones. And as we do so, let us resolve that every family should have the opportunity to raise America's next generation of innovators, scholars, and leaders.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 24 through November 30, 2013, as National Family Week. I invite all States, communities, and individuals to join in observing this week with appropriate ceremonies and activities to honor our Nation's families.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of November, in the year of our Lord two thousand thirteen, and of the Independence of the United States of America the two hundred and thirty-eighth.

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