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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AQ95

Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: In a document published in the **Federal Register** on July 10, 2020, the Department of Veterans Affairs (VA) proposed to amend its regulation regarding character of discharge (COD) determinations. After considering public comments, VA has decided to finalize its proposal with some modifications to expand VA benefits eligibility, bring more consistency to adjudications of benefits eligibility, and ensure COD determinations consider all pertinent factors.

DATES:

Effective date: This final rule is effective June 25, 2024.

Applicability date: The provisions of this final rule shall apply to all applications for benefits that are received by VA on or after June 25, 2024, or that are pending before VA, the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit (Federal Circuit) on June 25, 2024.

FOR FURTHER INFORMATION CONTACT: Robert Parks, Chief, Part 3 Regulations Staff (211C), Compensation Service, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–9700. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION:

I. COD Regulatory History

Eligibility for most VA benefits requires that a former service member (SM) be a ''veteran.'' ''Veteran'' status is bestowed to former SMs ''who served in the active military, naval, air, or space service, and who [were] discharged or released therefrom under conditions other than dishonorable.'' 38 U.S.C. 101(2). The term ''conditions other than dishonorable'' is not a term of art in the military and was chosen by Congress in 1944 to provide VA some discretion with respect to setting the standard for Veteran status and benefits eligibility of former SMs. *Garvey* v. *Wilkie,* 972 F.3d 1333, 1337, 1339 (Fed. Cir. 2020). In October 1946, VA codified 38 CFR 2.1064, which reiterated that, for a former SM to obtain benefits, the SM must have been terminated under conditions ''other than dishonorable.'' VA provided that ''dishonorable'' discharges included those due to (1) mutiny; (2) spying; or (3) an offense involving moral turpitude or willful and persistent misconduct (terms that originated in Public Law 68–242, section 23, 43 Stat. 613 (1924)). 38 CFR 2.1064(a). VA also considered dishonorable an undesirable discharge to escape trial by general court-martial (GCM) and a discharge due to homosexual acts. 38 CFR 2.1064(c), (d). VA further codified the ''statutory bars'' found in the Servicemen's Readjustment Act of 1944, Public Law 78–346, section 300, 58 Stat. 284, which precluded benefits for a person who was (1) discharged or dismissed by GCM; (2) discharged for being a conscientious objector who refused to perform military duties, wear the uniform or comply with lawful orders of competent military authorities; (3) a deserter; or (4) as an officer who resigned for the good of the service. 38 CFR 2.1064(b).

Since 1946, 38 CFR 2.1064 and its successors (most notably, current 38 CFR 3.12) have provided the criteria used by VA adjudicators for determining Veteran status and evaluating benefit eligibility for former SMs. Currently, there are six ''statutory bars'' to benefits for former SMs listed in 38 U.S.C. 5303(a) and reiterated in paragraph (c) of 38 CFR 3.12. In addition, currently, there are five ''regulatory bars'' to benefits listed in paragraph (d) of 38 CFR 3.12, which states that discharges based on the five listed offenses are ''considered to have been issued under dishonorable conditions.'' The last update to § 3.12(d) occurred in 1980, more than 40 years ago. The 1980 update provided examples of aggravated homosexual acts. 45 FR 2318 (Jan. 11, 1980).

On July 10, 2020, VA published at 85 FR 41471 its proposal to amend its regulation governing COD determinations. Specifically, VA proposed to modify the regulatory standards for discharges considered ''dishonorable'' for VA benefit eligibility purposes, such as discharges due to ''willful and persistent misconduct,'' and ''homosexual acts involving aggravating circumstances or other factors affecting the performance of duty.'' VA also proposed to extend a ''compelling circumstances'' exception to certain regulatory bars to benefits to ensure consideration of all pertinent factors. In response to the proposed rule, over 70 comments were received. Given the ''various and differing'' comments received, VA issued a Request for Information (RFI) in September 2021. 86 FR 50513. Specifically, VA asked the public questions about the factors for consideration in a compelling circumstances analysis. Regarding willful and persistent misconduct, the RFI asked whether VA should define ''serious misconduct''; whether VA should require misconduct to actually cause harm to person or property; and how VA should define persistence. VA asked about the proposed rule's definition of moral turpitude. VA asked whether removing the regulatory bars would affect military order and discipline or denigrate others' honorable service; and what specific changes could be made to the proposed rule to fairly adjudicate the benefits eligibility of historically disadvantaged and vulnerable populations.

In response to the RFI, over 45 comments were received. In addition to the proposed rule and the RFI, in October 2021, VA held a two-day listening session to receive oral comments from any member of the public on the RFI questions. Transcripts from the listening session can be found at *https://www.regulations.gov/docket/VA-2020-VBA-0018.*

II. VA's Decision To Finalize the Proposed Rule With Modifications

After extensive consideration of this issue and all the comments received, VA has decided to finalize the proposed rule with some modifications. This will expand VA benefits eligibility, bring

more consistency to adjudications of benefits eligibility, and ensure character of discharge determinations consider all pertinent factors. This decision respects concerns of the Military Departments regarding the impact to their ability to maintain good order and discipline among their troops. Specifically, that the removal of the regulatory bars would undermine their ability to use the consequence of loss of VA benefits as a deterrent to misconduct. In addition, the Military Departments were concerned that removal of the ''in lieu of general court-martial'' bar would deprive the commander, or for covered offenses, Special Trial Counsel, of a tool to dispose of misconduct in an administrative forum while balancing the interests of justice and victim preferences. Finally, the Military Departments expressed concern that the proposed rule's definition of ''an offense involving moral turpitude'' as ''a willful act that gravely violates accepted moral standards and would be expected to cause harm or loss to person or property'' would exclude certain offenses that do not include a willfulness element.

Thus, with this final rule, there will be only four regulatory bars: (1) acceptance of a discharge under other than honorable conditions or its equivalent in lieu of trial by GCM; (2) mutiny or spying; (3) moral turpitude; and (4) willful and persistent misconduct. The definition for willful and persistent misconduct has been refined for more objective application, and an expanded compelling circumstances exception now applies to both the moral turpitude (MT) and willful and persistent misconduct bars. Based upon interagency concerns, VA has decided not to alter the current regulatory bar for MT and does not adopt the language from the proposed rule. This will allow the military to retain a deterrent to misconduct that promotes good order and discipline, while also allowing VA to provide a case-by-case, more holistic analysis of whether a former SM who received a Bad-Conduct Discharge (BCD) or Other Than Honorable (OTH) discharge nevertheless warrants ''veteran'' status and VA benefits eligibility.

As indicated in its RFI, VA rigorously considered the possibility of making more sweeping liberalizing changes than finalized here. But as discussed throughout this notice, there is concern that more sweeping changes would reduce deterrents to misconduct in the military and undermine good order and discipline, as well as concerns that removal of the ''in lieu of general court-martial'' bar would deprive the commander, or for covered offenses, Special Trial Counsel, of a tool to dispose of misconduct in an administrative forum while balancing the interests of justice and victim preferences.

Given those factors, with this rule, VA seeks to strike a balance between bestowing benefits to those who have earned them, even those whose service was not without blemish, and limiting benefits for those whose service involved serious misconduct. As the Federal Circuit in *Garvey* noted, there are SMs whose significant misconduct rendered their discharge dishonorable, even if the military did not explicitly characterize their discharges as Dishonorable for reasons unrelated to the seriousness of the misconduct itself. 972 F.3d at 1338–40. Military justice is designed to be flexible, allow exercise of discretion, and balance a number of concerns with regard to how SMs are prosecuted and discharged. Military officials may choose not to prosecute an offense for a variety of reasons, including: (1) to spare crime victims, including children, or their families from the trauma of testifying; (2) to avoid evidentiary issues involving classified documents or military operations; or (3) because the SM has already been convicted of the crime in another court. In these situations, the SM may be administratively separated to avoid the burden, expense, or resources involved in GCM litigation. That decision to avoid trial, however, does not necessarily mean that the SM did not commit an offense.

On the other hand, there are some SMs whose service, while not without blemish, was generally of benefit to this Nation and therefore have earned the status of ''veteran'' and the benefits to which veterans are entitled. There are also SMs who service to our nation placed them in high-risk situations which could lead to injuries or other circumstances that increase risk for behaviors or conduct that Military Commanders deem inappropriate. For example, as consequence of repeated traumatic exposures during combat, SMs are at risk of posttraumatic stress disorder,[1] traumatic brain injury,[2] moral injury or other combat related emotional and cognitive consequences.[3] Symptoms of these medical conditions include changes to decision making and behaviors. It is therefore important to institute a robust compelling circumstances exception that considers the individual facts and evidence in a particular case. The compelling circumstances language in this final rule includes consideration of the length and character of service exclusive of a period of misconduct and potential mitigating reasons for the misconduct such as mental impairment, physical health, hardship, sexual abuse/assault, duress, obligations to others, and age, education, cultural background and judgmental maturity. The compelling circumstances exception—along with more specific criteria instituted herein for the willful and persistent misconduct regulatory bar—will help enable SMs whose conduct was not dishonorable to receive the VA benefits they have earned.

It is important to clarify here that the regulatory bars shall only be applied when they are clearly supported by the military record. The benefit of the doubt will be resolved in favor of the former SM. *See* 38 U.S.C. 5107(b), 38 CFR 3.102. In other words, when there is insufficient evidence of the alleged misconduct, racial bias in the allegation, or an approximate balance of positive and negative evidence about the alleged misconduct, the bar shall not be applied.

Further, as discussed below, VA agrees with the commenters who recommended limiting the conduct being considered for a COD determination to only that which formed the basis of the discharge from service. In short, if the military decided that a SM's misconduct did not preclude the SM from continuing to serve, then it also should not preclude benefits eligibility. This limitation will prevent conduct unrelated to the basis of the discharge from contributing to a bar from benefits.

Overall, under this final rule, more SMs will be eligible for benefits than under the prior 38 CFR 3.12(d). That said, a favorable COD determination under this rule does not result in blanket eligibility for all VA benefits or a change in the Department of Defense's (DoD) discharge characterization. Rather, certain VA benefits have specific eligibility requirements as it pertains to COD. For example, education assistance under the Montgomery GI Bill program or Post-9/11 GI Bill program is available only for periods of service resulting in an ''honorable'' discharge. *See* 38 U.S.C. 3011(a)(3)(B) and 3311(c)(1). Therefore, former SMs who do not receive an

[1] How Common is PTSD in Veterans?—PTSD: National Center for PTSD (*va.gov*), *https://www.ptsd.va.gov/understand/common/common_veterans.asp.*

[2] Traumatic Brain Injury and PTSD—PTSD: National Center for PTSD (*va.gov*), *https://www.ptsd.va.gov/understand/related/tbi_ptsd.asp.*

[3] War and Combat—PTSD: National Center for PTSD (*va.gov*), *https://www.ptsd.va.gov/understand/types/types_war_combat.asp.*

Honorable discharge from DoD are ineligible for the VA Education benefit.

Moreover, while relaxing the bars to eligibility, this final rule does not extend VA benefits eligibility to all former SMs. Former SMs who do not meet the criteria for benefits eligibility may remain entitled to certain critical benefits to address the harms caused by their military service such as mental health and substance use care, emergent suicide care, and medical care in emergency situations, as discussed below.

III. Discussion of the Comments Received by Topic (From the Proposed Rule, Request for Information and the Listening Session)

VA received 148 comments total in response to the proposed rule, RFI, and Listening Session. In this section, VA discusses in detail the public comments addressing issues raised in the proposed rule, RFI, and listening session.

Congressional Intent

Multiple commenters stated that Congress authorized the exclusion from VA benefits of only those SMs who received or should have received a dishonorable discharge or those who were discharged for conduct falling within a statutory bar. They stated Congress never intended to give VA authority to create new standards to determine veteran status nor was it Congress's intent to have those standards be more exclusionary than the statutory bars. Other commenters stated that VA is subverting congressional intent by withholding healthcare through these regulatory bars. VA thanks the commenters for these comments but believes that this final rule accords with congressional intent.

Congress has authorized VA to consider discharges based on certain conduct as dishonorable. 38 U.S.C. 101(2); *see Garvey,* 972 F.3d at 340; *Camarena* v. *Brown,* 6 Vet. App. 565, 568 (1994), *aff'd* 60 F.3d 843 (Fed. Cir. 1995) (per curiam); *see also* 90 Cong. Rec. at 3077 (Mar. 24, 1944) (Sen. Clark) (for certain conduct, ''the Veterans' Administration will have some discretion with respect to regarding the discharge from the service as dishonorable''). The bars in question have been in regulation since 1946 and the Federal Circuit has concluded that VA has the authority to institute such bars. *Garvey,* 972 F.3d at 1339–40. To the extent the current regulatory bars are viewed by some as overly restrictive, the modifications finalized in this rule should ensure that only SMs who committed serious, dishonorable misconduct in service are precluded from benefits. This approach generally accords with congressional intent. *Id.* at 1339.

Furthermore, VA disagrees with the comment that VA's regulatory bars subvert congressional intent by withholding healthcare. Under 38 CFR 3.360, VA determines a service member's eligibility for healthcare even if the SM is not eligible for other benefits. Thus, VA makes no changes in response to these comments.

Automatic Eligibility

Some commenters urged VA to establish automatic eligibility for VA benefits for all SMs who received an OTH discharge based on their service to the Nation. One commenter urged VA to update its definition of ''veteran'' to include OTH discharges and to otherwise be more SM-friendly. VA thanks these commenters for their comments, but VA cannot establish automatic eligibility, because some SMs who received an OTH discharge are statutorily barred from benefits by 38 U.S.C. 5303(a). Nevertheless, this final rule is more SM-friendly, as VA has removed one of the regulatory bars, refined another, and instituted a compelling circumstances exception to two bars, which will lead to an increase in benefits eligibility in the COD process.

Healthcare Eligibility

One commenter stated that ''VA should also provide healthcare for those veterans who are waiting for a decision by VA'' and that ''Veterans should be presumed eligible for VA health care unless proven otherwise.'' Another argued that VA should amend 38 CFR 17.34 and 17.36 to provide tentative eligibility for healthcare and update enrollment procedures. VA thanks the commenters for their comments. Currently, some OTH-discharged SMs have access to certain VA health care services, such as health care for service-incurred disabilities, mental health and substance use care, emergent suicide care, and medical care in emergency situations (if it is determined that benefits eligibility will probably be established). 38 U.S.C. 1720I, 1720J; 38 CFR 3.360, 17.34. Moreover, VA has initiated efforts to amend 38 CFR 17.34, but those amendments were not proposed in this rulemaking.

Removal of Homosexual Acts Bar

Some commenters supported the proposed rule's replacement of the word ''homosexual'' with ''sexual.'' However, many commenters still felt that lesbian, gay, bisexual, transgender and queer (LGBTQ+) SMs were subject to discrimination that would manifest even with this amendment. VA agrees that any bar that explicitly relates to sex may still disproportionally affect LGBTQ+ SMs. Additionally, the commenters felt that most of the offenses listed in this section could also be barred under moral turpitude (MT) offenses (*e.g.,* child molestation, sexual assault, etc.) or willful and persistent misconduct, further rendering this bar to benefits unnecessary. VA agrees that the homosexual acts bar is outdated and unnecessary and is entirely removing this regulatory bar. VA is also not adopting the sexual acts bar from the proposed rule, as this misconduct will be sufficiently excluded by either the statutory bars or the remaining regulatory bars.

COD Process/Eligibility

Many commenters asserted that VA presumes that former SMs with OTH discharges are ineligible for VA benefits and must be proven otherwise through the COD determination process. They also stated that VA presumes that former SMs with honorable or under honorable conditions discharges are eligible for VA benefits. Based on this, the commenters asked that VA presume former SMs with OTH discharges as eligible for benefits unless proven otherwise. One commenter stated that VA should not review OTH discharges unless they are issued in lieu of court marital (CM). Further, one commenter stated that the proposed rule did not include changes to § 3.12(a), the provision governing ''which former [SMs] . . . are presumptively excluded from VA access until successful completion of [a COD] review.''

VA thanks these commenters for their comments. VA is not persuaded that modification of § 3.12(a) is necessary here, insofar as it merely reiterates the statutory requirement that discharge must be ''under conditions other than dishonorable.'' There is no need to revise that provision to carry out the goals of this rulemaking. Moreover, there is no regulation that presumes the outcome of a COD determination for a SM with an OTH discharge. Rather, each OTH discharge is assessed to determine VA benefits eligibility.

Another commenter asked VA to presume eligibility for all SMs with administrative discharges except discharge in lieu of CM and stated that ''VA annually deems about 80 to 90 percent of veterans who received OTH have served 'dishonorably'.'' VA thanks the commenter for the comment, but that statistic is inaccurate. Between October 1, 2019, and September 30, 2022, VA deemed SMs with OTH

discharges eligible for healthcare or benefits or both more than 75% of the time. VA is providing the documentation for this data in the rulemaking record.[4] VA makes no changes based on these comments.

Still another commenter stated that VA should presume eligibility for SMs with OTH discharges and terminate benefits ''in exactly the same process as is currently used for statutory bars. This would save VA the expense of processing countless, costly denials of benefits appeals, while providing veterans benefits, they have rightfully earned in service to this country, as Congress intended.'' VA thanks the commenter for their comment. VA believes that, through the modifications of this final rule, including the compelling circumstances exception, it will be able to expand VA benefits eligibility for former SMs with OTH discharges. The reasons that VA has determined more extensive liberalization is not being advanced are discussed in greater detail below.

Another commenter stated ''[t]he majority of veterans do not undergo COD determinations for numerous reasons and those that do are overwhelmingly unsuccessful in establishing eligibility.'' VA thanks the commenter for their comment, but, again, the data above reflects otherwise. In any event, VA anticipates that the amendments in this final rule—including refining the willful and persistent misconduct bar and implementing the compelling circumstances exception for moral turpitude and willful and persistent misconduct—will increase the number of former SMs eligible for benefits.

One commenter stated that ''VA must assert independence from other federal entities'' and that ''VA has a vastly different mission statement from DoD.'' The commenter further noted that VA was proposing to use the Uniform Code of Military Justice (UCMJ) from DoD, but the basis for why DoD wants to remove a SM, such as drug use or minor infractions, does not mean that VA should deny that SM health care, mental health treatment and benefits for service-related injuries. VA recognizes that there is a relationship between dishonorable service and VA benefits eligibility, as reflected in Congress's enactment of 38 U.S.C. 101(2). This final rule precludes benefits eligibility for only those SMs who committed misconduct that renders their service effectively dishonorable.

[4] See *https://www.regulations.gov/docket/VA-2020-VBA-0018.*

Another commenter asserted that ''[c]onduct reviewed for COD determinations must be clearly defined. The review must be limited to the misconduct that led to the discharge.'' The comment includes the story of someone discharged due to absent without leave (AWOL) and disrespecting a superior officer, but the COD determination included a discussion of some AWOL that occurred in a separate enlistment. Other commenters expressed similar sentiments. VA thanks the commenters for their comments and recognizes the concern that COD determinations might consider unrelated conduct. But the introductory language of § 3.12(d) states that the regulatory bars apply to the conditions under which ''the former service member was discharged or released'' and VA affirms that this language means that only misconduct that led to the discharge may be considered in the COD determination. This is implicit in the regulations. Meaning in its COD review, VA will only consider misconduct or AWOL that according to military department records explicitly indicate led to the discharge. VA notes, however, that there remains a statutory bar of a period of AWOL of more than 180 days that only Congress can amend.

Another commenter stated that many VA employees are without the necessary information or training to fully serve SMs and that has led to employees wrongfully turning away eligible SMs. Other commenters also mentioned that many SMs who did not receive an honorable discharge attempt to apply to VA for health care and are simply turned away. VA is aware of these concerns and will continue to provide training to its employees and messaging to the public that VA encourages all SMs to apply for healthcare and benefits regardless of their COD. VA expects that the changes made by this final rule will lead to some increased benefits eligibility for former SMs without Honorable discharges.

Compelling Circumstances

A. Generally Apply Compelling Circumstances Exception

Multiple commenters requested that the compelling circumstances exception should be applied generally and used to counterbalance the negative aspects of the SM's service. Three commenters requested that VA lower the standard necessary to apply the ''benefit to the Nation'' exception found in proposed § 3.12(e)(1). Specifically, commenters stated that requiring the character of service, exclusive of the period of AWOL or misconduct, ''be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation'' is nebulous. One commenter stated that the term ''meritorious'' has a special meaning in military law. This commenter noted ''meritorious sets a higher standard than some former SMs would be able to achieve, as many were willing to, but were never, deployed; never received an award; and otherwise fulfilled their duties, but for the conduct leading to the OTH discharge. Accordingly, VA should create a standard that honors the sacrifice of all SMs, particularly considering how few Americans serve in the military.'' Another commenter recommended that VA only require the service to be ''substantially favorable. A determination of favorable service will consider (a) the overall duration and quality of service; (b) combat, overseas, or hardship service; (c) medals, awards, decorations, and other achievements or acts of merit; and (d) other facts or circumstances relevant to the inquiry.'' That commenter also stated that all service should be considered to the Nation's benefit unless proven otherwise (based on the commenter's belief that DoD is better at documenting bad behavior than good behavior). Similarly, one commenter felt that compelling circumstances should be assessed on a holistic basis considering the totality of the circumstances.

Additionally, some commenters stated that some military branches use OTH at higher rates than others, resulting in disparate discharges for similar misconduct. Some commenters noted that military discharges may vary based on the era of war in which the SM served. One commenter noted the difference between discharges for commissioned officers and enlisted personnel and a ''lack of insight'' into how the regulatory change affected officers. VA thanks these commenters for their comments. VA's intent with the compelling circumstances exception to the moral turpitude and willful and persistent misconduct bars is to provide claims processors a holistic means to evaluate the misconduct underlying a SM's discharge and to determine if that misconduct is outweighed by otherwise honorable service or can be excused due to circumstances influencing the former SM's decision-making around the time of the offense or otherwise providing context for the offense. Consistent with that intent, assessment of the length and quality of service exclusive of the misconduct necessarily must be a case-by-case determination. If VA revised the

standard to suggest that the service of all former SMs who make the sacrifice inherent in all military service is sufficient to establish compelling circumstances, however, this exception would become the rule, not the exception. Regarding the comment that all service is to the Nation's benefit unless proven otherwise, it is important to note that the only cases at issue in a compelling circumstances analysis are those which involved a discharge due to some level of misconduct. The goal of the compelling circumstances analysis is to determine whether the misconduct is mitigated by the circumstances, is outweighed by otherwise honorable service, or actually renders the service dishonorable, not to ignore the fact that misconduct may have taken place.

Moreover, the compelling circumstances exception is designed to counter the possibility that certain military branches may have favored particular types of discharges during particular periods of time, including different periods of war. It allows VA to determine whether the misconduct leading to an OTH discharge actually rendered the service dishonorable, or alternatively was outweighed by otherwise honorable service or mitigated by the circumstances. Each COD determination will be made based on each SM's facts and circumstances.

B. Apply Compelling Circumstances To Discharge in Lieu of General Court-Martial

Several commenters urged VA to apply the compelling circumstances exception to the regulatory bar of discharge in lieu of GCM, because VA proposed to apply compelling circumstances to MT offenses, which (they asserted) are arguably more serious. Other commenters stated that the GCM process is filled with misinformation and procedural gaps. One commenter stated SMs were forced into OTH discharges without being informed of their rights or because they faced retaliation. Another commenter stated innocent civilians routinely accept plea bargains to avoid trial, and some innocent SMs accept discharge in lieu of GCM. Another stated some commanding officers use the SM's acceptance of a discharge in lieu of trial by GCM as a means to force certain SMs out of the military. VA thanks the commenters for their comments. Due to interagency concerns associated with good order and discipline, VA has decided not to extend the compelling circumstances exception beyond the scope laid out in the proposed rule.

One commenter recommended that VA remove ''or its equivalent'' from the text as the commenter was unaware of any equivalent to an OTH discharge. VA thanks the commenter for this comment; however, VA included ''or its equivalent'' to account for historic discharges, such as undesirable discharges. Additionally, DoD may establish new discharge characterizations. Using this terminology allows VA's regulations to remain applicable to both past and future character of discharge determinations.

C. List of Mental and Cognitive Impairments

Several commenters expressed concern that claims adjudicators would fail to recognize the list of mental impairments in proposed § 3.12(e)(2)(i) was non-exhaustive and that claims adjudicators would consider only the listed mental impairments. One commenter stated that the mental impairments contained diagnoses (*e.g.,* bipolar disorder and posttraumatic stress disorder), symptoms (*e.g.,* depression and impulsive behavior), and a neurodevelopmental condition (attention deficit hyperactivity disorder (ADHD)) but stated that the latter is not subject to service connection under 38 CFR 3.303(c), 4.9, and 4.127. That commenter was further concerned that the rule referenced redundant co-morbid conditions when mental impairment alone is enough to trigger consideration. One commenter urged VA to have SMs who suffer from posttraumatic stress disorder, traumatic brain injury, military sexual trauma (MST), or other mental illness examined by specialists prior to being denied benefits.

VA confirms the list of mental and cognitive impairments is non-exhaustive and the included list was intended only as a guide. Additionally, VA confirms the mental or cognitive impairment need not be service connected or subject to service connection to be considered as a compelling circumstance to excuse the prolonged AWOL or misconduct. Hence, neurodevelopmental conditions, such as ADHD or personality disorders, may excuse prolonged AWOL or misconduct even if no VA benefits can be awarded for the same condition. Further, VA agrees that including co-morbid conditions is redundant because a single mental impairment is enough to trigger consideration for compelling circumstances and, if the comorbidity was both mental and physical impairments, § 3.12(e)(2)(ii) will now allow consideration of physical health in any event.

D. Abuses of a Sexual Nature, Discrimination, Disparity Between Branches, and Military Sexual Trauma

Several commenters requested that VA include additional factors to consider when evaluating the reason(s) for prolonged AWOL or misconduct found in proposed § 3.12(e)(2), including sexual harassment and intimate partner violence (IPV); bereavement; discrimination due to protected class; disparate discharge outcomes based on military branch; and ''mistreatment, misdiagnosis, or other intentional or unintentional injustice.'' One commenter stated VA should include whether the SM experienced discrimination in service or the discharge was due to a discriminatory pretextual reason instead of the stated reason(s). Other commenters requested VA add the terms MST and sexual harassment as a compelling circumstance. One was concerned application of a regulatory bar would retraumatize a SM by causing isolation from the military community.

Multiple commenters commented on the proposed rule's impact on SMs, who are homeless women and victims of sexual assault and MST. Other commenters noted disparate racial treatment in the military, including infractions for certain hairstyles or facial hair. VA thanks these commenters for their comments.

VA is committed to protecting SMs who are homeless, MST victims, and victims of harassment, all forms of discrimination and IPV. VA believes that a compelling circumstances exception—that includes factors such as mental and cognitive impairment; physical trauma; sexual abuse/assault; duress, coercion, or desperation; hardships; abuses of a sexual nature; and the former SM's age, education, cultural background, and judgmental maturity—when combined with refined criteria for defining ''willful and persistent misconduct'' will sufficiently allow victims of MST, discrimination, and misdiagnosis to receive fairer COD evaluations. VA will consider any records or attestations from SMs about experiencing these circumstances to be relevant in their consideration of COD.

Although VA acknowledges that many forms of discrimination exist and may contribute to or result in former SMs receiving OTH discharges, VA evaluates each particular SM's COD based on the record before it. When VA conducts a COD determination, VA reviews the SM's service personnel and medical treatment records and any other pertinent records. VA reviews that SM's military units' duty locations and

combat engagements. Should any given record establish discrimination as the basis for the OTH discharge, including but not limited to discrimination based on race or sex, the compelling circumstances exception would allow VA to adjudicate a favorable COD determination. And, even if no such record exists, the reforms of this final rule will ensure a fair COD adjudication, considering all pertinent factors on a case-by-case basis, for all SMs, including those who are homeless or victims of MST, IPV or potential discrimination.

E. Compelling Circumstance Unknown to Service Members

One commenter noted that the compelling circumstances factors are complicated for SMs to understand on their own. This commenter notes the standard is not helpful to many SMs who apply without assistance. VA thanks this commenter for these comments. VA encourages all former SMs and claimants to seek the assistance of qualified Veterans Service Organizations (VSOs) or other accredited representatives to assist with the claims process, including COD determinations. Further, assistance with the claims process, COD determinations, and governing regulations is available at *www.va.gov* and at Regional Offices. VA makes every effort to provide training to its employees to assist former SMs in the non-adversarial COD process. VA has a duty to assist and will work with former SMs to ensure appropriate records, including self-attestations, are well documented in the record being reviewed in the COD process. Whenever possible, VA aims to review records sympathetically and give the benefit of the doubt, particularly when records are missing or incomplete.

F. Include Due Process Errors to Legal Defense Exception

Finally, one commenter requested VA add to its compelling circumstances exception an additional legal defense for cases when the prosecution committed due process errors or violations. VA thanks the commenter for this comment. However, VA believes that due process errors would be included as a valid legal defense under § 3.12(e)(3). Therefore, no changes are necessary in response to this comment.

Acceptance of an Undesirable Discharge To Escape General Court-Martial

One commenter opined that the regulatory bar associated with discharge in lieu of GCM should be clarified. The commenter went on to state that even though ''undesirable'' is not used anymore as a discharge characterization, there are still some living veterans with ''undesirable'' discharges that should not be excluded. The commenter also noted that the proposed rule's phrase ''or its equivalent'' is vague and that some claims processors may think a ''general'' discharge is equivalent. The same commenter stated that VA should explicitly state that this bar does not apply to special CM discharges. Another commenter stated that the bar for discharge in lieu of GCM should be limited to cases where charges were referred to a GCM. Another commenter similarly stated that the regulations should clearly identify the need for documentation of a GCM charge before applying regulatory bar. Another commenter stated, ''there should be evidence of a [GCM] convening.''

VA thanks the commenters for their comments. Per the plain language of revised § 3.12(d)(1)(i), this regulatory bar requires accepting an OTH discharge in lieu of trial by *GCM;* the former SM will receive the benefit of the doubt in the determination of whether the OTH discharge was accepted *in lieu of* trial, and whether that trial would have been *by GCM.* Accordingly, VA sees no need to further amend the regulatory language.

One commenter agreed with the decision to eliminate stigma from a SM's actions by removing the language of ''undesirable'' and ''escape'' from the regulation. However, the commenter stressed the need for an in-depth and personalized evaluation of a SM's file, to determine whether a discharge was received because of coercive pressure from a commanding officer to ''get rid'' of the SM. A different commenter stated that VA should require a more thorough analysis of the conditions and circumstances surrounding a former SM's acceptance of discharge in lieu of CM, because former SMs may accept this result without committing an offense, much like civilian plea deals. Another commenter suggested that excluding former SMs discharged in lieu of trial misunderstands the nature of the administrative separation and that systematic misinformation and gaps in those procedures are well documented. The commenter also stated some SMs are unable to respond rationally when they are still engaging in misconduct (substance abuse, AWOL) that is leading to discharge. The commenter continued that it is difficult for claims processors to determine whether the discharge was in lieu of GCM or another CM. VA thanks the commenters for the comments but is not modifying this regulatory bar (beyond what was proposed) due to concerns raised by the Military Departments that further changes to this bar would undermine their ability to maintain good order and discipline within their ranks. That said, again, if there is a question about whether the discharge was in lieu of GCM or special CM, VA will consider all appropriate records and the former SM will receive the benefit of the doubt.

Moral Turpitude

One commenter stated the proposed definition of MT is too broad and does not adequately put former SMs on notice as to what constitutes an offense involving MT. The commenter also stated that it is contrary to fundamental fairness to bar a former SM from their benefits for life based on commission of an MT crime without a guilty finding in a formal proceeding with adequate procedural and due process protections. The commenter noted that the definition also does not contain any reference to deception, fraud, or depravity by the SM; therefore, a simple assault or loss of property that does not involve fraud or deceit could meet this definition.

In addition, many commenters opined that MT is unclearly defined and vague. One commenter stated that VA should simplify such a standard. Another commenter asserted that the MT standard is imprecise and legalistic, lacking definition in civilian and military jurisprudence. VA thanks the commenters for their comments.

Based on interagency concerns regarding the proposed definition of MT, VA has decided not to implement the language from the proposed rule and will maintain the current regulatory language. VAOPGC 6–87 (July 27, 1987), a VA General Counsel Opinion, states ''an offense will, for veterans' benefit purposes, be considered to involve moral turpitude if it is willful, gravely violates accepted moral standards, is committed without justification or legal excuse, and, by reasonable calculation, would be expected to cause harm or loss to person or property.'' [5] This precedential opinion continues to govern VA's application of this bar in COD determinations.

Given that the definition of moral turpitude under VAOPGC 6–87 requires a willful act that gravely violates accepted moral standards, it is difficult to imagine that minor misconduct—misconduct for which the maximum punishment is not longer than one year confinement—could ever meet that definition. This accords with common Federal appellate court decisions interpreting the term in other contexts.

[5] *https://www.va.gov/OGC/docs/1987/06-87.pdf.*

Garcia-Martinez v. *Barr,* 921 F.3d 674, 676 (7th Cir. 2019) (MT ''shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general''); *Escobar* v. *Lynch,* 846 F.3d 1019, 1023 (9th Cir. 2017) (MT ''is generally a crime that (1) is vile, base, or depraved and (2) violates accepted moral standards'').

Moreover, VA declines to require a felony conviction for MT, because the military's choice not to prosecute could be premised on a desire to protect victims or other reasons, rather than any view that the conduct was not felonious or dishonorable. Moreover, while obtaining a final conviction may be necessary for the military to confine an SM, it is not necessary for VA's purposes of evaluating the character of a SM's discharge. So long as the offense is clearly established by the record (after applying the benefit of the doubt to the advantage of the SM), VA may conclude that offense was committed. This is also supported by VAOPGC 6–87 which states ''while the conviction of a felony creates a rebuttable presumption that an offense involved moral turpitude, the absence of such conviction does not absolve an offense from the taint of moral turpitude.'' In sum, due to concerns about changes to this bar that could impact the Military Departments' ability to maintain good order and discipline, VA makes no changes to the current regulatory text based on these comments.

Willful and Persistent Misconduct

A. VA's Proposed Definition

Some commenters stated that the definition of willful and persistent misconduct should be redefined to be more favorable to former SMs. Others conveyed that minor misconduct should not be a disqualification. Multiple commenters were concerned that the proposed rule continued to punish offenders removed from the military for minor offenses with a maximum sentence of one year. Other commenters commented on those who received an OTH discharge due to drug possession or use, including those who became addicted to painkillers after surgery in the military, and noted such members should not be deprived of VA benefits for the same. Another was concerned that VA's definition would result in ''lengthy, complex investigations for rating officers.'' One commenter stated this regulatory bar allows VA to exclude former SMs for misconduct that would not lead to a dishonorable discharge. Other commenters stated that using the maximum punishment for the offense ignores instances where the offense is adjudicated as minor by the prosecuting authority. One commenter stated that the only conduct considered should be that causing harm to a person or property. VA thanks these commenters for their comments.

VA noted in the preamble to the proposed rule that ''willful misconduct'' is already defined in 38 CFR 3.1(n) as ''an act involving conscious wrongdoing or known prohibited action'' that must involve ''deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.'' Additionally, VA noted that 38 CFR 3.1(n)(2) states that ''[m]ere technical violations of police regulations or ordinances will not per se constitute willful misconduct.'' But the term ''persistent,'' VA explained, was undefined. Thus, VA proposed a framework for determining ''persistence'' derived from the statutes of limitations for punishment in the Manual for Court-Martial United States (MCM)[6] and UCMJ. This makes sense, because—if the military will no longer prosecute an offense after a certain period of time—there is no reason for VA to link that offense to other misconduct in order to find persistence.

Overall, the proposed rule (and this final rule) brings both objectivity and liberalization to the ''willful and persistent misconduct'' standard. The bar only applies if there are (1) instances of minor misconduct (as defined in reference to the MCM) occurring within two years of each other; (2) an instance of minor misconduct occurring within two years of more serious misconduct; or (3) instances of more serious misconduct occurring within five years of each other. Moreover, the compelling circumstances exception applies to this bar, such that even SMs whose misconduct meets the definition of ''willful and persistent'' will receive an individualized review that considers whether the misconduct should be considered mitigated or outweighed by otherwise meritorious service or other factors. To the extent this is still unsatisfactory to certain commenters, VA declines to make further amendments due to interagency concerns regarding the Military Departments' ability to use the loss of VA benefits as a deterrent to misconduct in order to promote good order and discipline.

[6] *See https://jsc.defense.gov/Portals/99/2024%20MCM%20files/MCM%20(2024%20ed)%20-%20TOC%20no%20index.pdf?ver=b7JVpxV5rbIHg0ENlCRVKQ%3D%3D.*

B. Minor Misconduct

Several commenters stated that minor misconduct should not be used as a bar because Congress never intended for former SMs to be barred from VA benefits due to minor misconduct. One commenter asserted that almost every UCMJ punitive article is punishable by either one-year confinement or a dishonorable discharge, rendering almost any SM subject to a bar to benefits. Instead, the commenter stated, VA should only bar people for serious misconduct. Others noted that adjudicators must determine COD on only that which led to discharge, and not prior misconduct. VA thanks these commenters for these comments.

VA clarifies that, even though it uses the term ''minor'' to distinguish one type of misconduct from another, this regulatory bar applies only to former SMs who have not received an Honorable or General (under honorable conditions) discharge. If a SM has an Honorable or General discharge, VA does not conduct a COD determination and this bar is irrelevant. *See* 38 CFR 3.12(a). Therefore, VA does not bar former SMs simply because they have minor offenses in their record. And even for SMs with a BCD or OTH discharge, VA will not bar benefits for sporadic, minor misconduct, given the definition of ''persistent'' in this final rule. Finally, any misconduct that meets the definition of ''persistent'' can also be outweighed by otherwise meritorious service or mitigated by the circumstances in a compelling circumstances analysis. Accordingly, as a practical matter, VA commits that the only former SMs who will be barred under the willful and persistent misconduct standard of this final rule are those that committed willful, frequent misconduct, which according to documentation in their military discharge records led to their discharge, outweighed the merit of their service, and was not mitigated by any relevant factors. To the extent this is still unsatisfactory to certain commenters, VA declines to make further amendments due to interagency interest in maintaining deterrents to misconduct that promote good order and discipline.

C. Definition of Persistent

Several commenters believed VA's use of the term ''persistent'' did not comport with the dictionary definition of ''persistent.'' Specifically, the commenters felt that the dictionary definition of persistent would either require three instances of misconduct or be habitual misconduct. Additionally, some commenters thought that VA

should consider service members' patterns of offenses instead of the offenses in succession. Commenters also suggested VA consider multiple offenses that are committed within a short time period and/or have a similar origin, such as mental distress, as a single instance of misconduct. Others were concerned VA adjudicators would consider actions beyond those considered by the service branch for discharge. VA thanks these commenters for their comments and clarifies here that VA will consider multiple offenses that originate from a single event or circumstance (*e.g.,* attempted robbery leading to fleeing and then leading to resisting arrest) as one ''instance'' of misconduct. Moreover, VA cited a dictionary definition in the preamble to its proposed rule and maintains that it is appropriate to align its definition of ''persistent'' with military statutes of limitations in order to exclude earlier misconduct that would not have been considered in a discharge. To the extent this is unsatisfactory to certain commenters, VA declines to make further amendments due to interagency interest in maintaining deterrents to misconduct that promote good order and discipline within the military.

D. Department of Defense and Congress

One commenter stated the willful and persistent misconduct bar should apply only if the commanding officer discharges or releases a SM for such misconduct. The commenter felt that VA should rely on DoD or the commanding officers to determine the conduct's nature rather than making its own assessment. Another commenter stated the willful and persistent misconduct bar was ''unlawful'' and should be removed as contravening congressional intent. This commenter states any exclusion should be based on only severe misconduct. VA thanks the commenters for their comments.

VA agrees that the willful and persistent misconduct bar should be reserved only for misconduct that is willful and persists and ultimately renders the service dishonorable. To the extent this bar has been susceptible to subjectivity, this final rule provides (1) the time frame in which the misconduct must occur, and (2) a compelling circumstances analysis, which combine to ensure that this regulatory bar will be applied only against SMs who willfully and persistently committed misconduct in service that explicitly led to their discharge, is not mitigated by any circumstances, and was not outweighed by otherwise meritorious service. VA believes this is consistent with congressional intent. Finally, as stated above, VA assures that misconduct that did not lead to discharge will not be considered—because conduct that did not concern DoD or the commanding officer in a dispositive way should similarly not concern VA.

Concerns Over the COD Adjudicatory Process

Multiple commenters expressed concern that the proposed rules will create an onerous and time-consuming adjudicatory process for VA and SMs. Some of these commenters also noted that the process left too much discretion to individual adjudicators. VA thanks these commenters for these comments. However, VA notes no additional burden is placed on VA's adjudicators than currently exists. Indeed, the objective criteria for willful and persistent misconduct should accelerate the COD process. Moreover, VA has robust training procedures and subregulatory guidance to ensure consistency among decisionmakers and accordingly makes no changes based on these comments.

Enforcement of Military Discipline and the Message to Honorable Veterans

Many commenters stated that they supported this rule but urged VA to not further liberalize current COD rules. One commenter noted that additional liberalization of the COD rules would send ''a message to those [SMs] committing misconduct, that there are few if any repercussions for doing so.'' Another commenter asserted VA should not liberalize benefits for OTH SMs unless such discharge is upgraded to at least a general discharge because the basis for OTH discharges is at least the violation of a lawful order. The commenter continued that allowing benefits for such SMs communicated that there were no ''adverse repercussions'' for wrongful actions, and such behavior would ''severely undermine good order and discipline in units. Problem [SMs] get the message that committing misconduct will have little to no adverse [e]ffect on their subsequent civilian lives and therefore are not deterred from continuing misconduct.'' The commenter was concerned about the demoralization of law-abiding SMs, who would be ''in no better steed [sic] than the derelicts, malingerers, rule breakers, malfeasant and criminal amongst them in the ranks.'' This commenter further asked whether VA wished to send the message that one could be ''a crook in the Army and get VA benefits notwithstanding.''

Another commenter, a former master sergeant, stated ''[t]he VA should not denigrate our honorable service by changing the rules to provide care to people who could not, or would not, serve in the same manner. There are, and must remain to be, consequences for people who fail to live up to the ideals expected of military service. Treating those who failed in the same manner as those who succeeded detracts from the status of all of us who served honorably and will be looked at as a slap in the face to most of us.'' Another commenter stated that this rule means ''get discharged with an OTH and get benefits anyway. This is bad for moral [sic] and dangerous, military people need to have a form of trust, without this, it will create more poor serving members.'' That commenter noted that ''[h]onor and honesty saves lives.''

In contrast, however, other commenters (further discussed below) requested VA remove all regulatory bars because they are not necessary to enforce military discipline. As one commenter noted, ''[w]ith such a robust system in place within the military itself, we doubt that any commander in the U.S. Military relies on VA's eligibility rules to maintain good order and discipline within her command.''

VA recognizes the challenging nature of this subject and included it in the RFI for this very reason. VA thanks all the commenters for their comments on the issues of military discipline and denigration of honorable service. After extensive interagency discussion, VA was advised that Commanders within the Military Departments use the prospect of VA benefits bars as one tool to enforce good order and discipline, and that the Military Departments were concerned that any expansion of VA benefits to former SMs who committed serious misconduct would have the effect of removing disincentives to misconduct. Thus, VA is retaining four of the regulatory bars, with modifications. Those modifications will help distinguish those who committed serious misconduct that renders their service dishonorable from those whose misconduct comes with a mitigating circumstance or is outweighed by otherwise meritorious service. This strikes an appropriate balance: it expands VA benefits eligibility, but also avoids sending a message that misconduct has no repercussions. It aligns with the necessary Military Department incentives for military discipline, while also guaranteeing a more holistic and equitable COD review for former SMs.

One commenter requested that VA not extend benefits to those with BCD or OTH discharges. The commenter stated that ''determination of character of service should reside solely with the

service department'' and not VA employees. The commenter continued: ''There is already a legal mechanism in place to allow the individual to appeal the character of discharge with the service department.'' Another commenter stated: ''Getting a BCD, OTH, or dishonorable discharge is extremely difficult, and the process has numerous layers to ensure the integrity of the process. Those individuals who receive these discharges are not worthy of the military and totally undeserving of veteran benefits . . . Providing hard earned benefits to those who could not and did not serve honorable [sic] is a slap in the face to the millions of veterans who did the right things during their service.'' A commenter stated that ''VA should be prohibited from deciding why a character of discharge is issued. Allowing this change disrupts the military process and weakens the authority of the Secretary of each military branch and within due process. VA employees do not follow the same regulatory requirements as those who service on military boards.''

VA thanks the commenters for their comments. It is true that character of service determinations remain DoD's responsibility, and upgrades are available from the Military Departments. But VA has both the authority and responsibility to determine eligibility for veterans' benefits. It has been performing this function for decades via 38 CFR 3.12 and its predecessors. Even if DoD has a different approach to or framework for characterizing the service of its former members, VA maintains its authority to determine COD for purposes of VA benefits eligibility.

One commenter stated ''I do not believe that anyone who receives a bad conduct or dishonorable discharge deserves to be treated by VA. Veterans wait forever for appointments and it's not right to add another million people to the rolls. We, honorable veterans, will never be seen. The VA needs to improve its track record before starting to reclassify people. The VA needs a lot more doctors and a lot more hospitals already.'' Another added that ''the added patient workload will also adversely impact the availability and timeliness of care received by all veterans at VA health care facilities.'' VA thanks the commenters for their comments and assures the commenters that those who received a Dishonorable discharge from the military are excluded from benefits eligibility. That said, VA has determined (after several rounds of public input) that the current regulatory approach to SMs with BCD and OTH discharges needs a restructuring to strike the appropriate balance between bestowing benefits to those who have earned them, while also limiting benefits for those whose service involved serious misconduct. This final rule's revision of § 3.12(d) attempts to strike that balance.

Similarly, a few commenters stated that former SMs with ''Bad Paper,'' OTH or dishonorable discharges should not be eligible for VA benefits, do not deserve any VA assistance and that their eligibility may delay the receipt of care for former SMs with honorable service. VA thanks these commenters for their comments. As noted above, VA aims to strike an appropriate balance between bestowing benefits to those who have earned them and limiting benefits for those whose service involved serious misconduct. VA believes this final rule does so by eliminating one of the regulatory bars, refining another, and applying a compelling circumstances exception to two of the regulatory bars, which provides a more holistic assessment of all appropriate factors in determining whether a former SM, despite a BCD or OTH discharge, has nevertheless earned ''veteran'' status.

Another commenter opined that ''[u]nless a discharge is upgraded, every OTH, BC[D], and D[ishonorable] D[ischarge] should be barred from getting any VA benefit. Doing otherwise would teach servicemembers that misconduct does not have repercussions which undermines good order and discipline.'' The commenter stated that ''I have experience processing CODs for VA and every case, the misconduct was severe, not simple things like eating too much or being late. If we allow these people to receive benefits, the message to the public will be deleterious. If there has been a miscarriage of justice in the discharge by the military, the military has upgrade boards to fix that.'' Still another commenter cautioned against changes that give people license to behave badly knowing they can still get benefits. ''The military relies on trust, and this undermines that. Personal experience of having two soldiers, under his/her command, get court-martialed out due to drugs and team remained understaffed. OTH are given to non-conforming or repeat offenders, or just criminals.''

VA thanks the commenter for this comment. VA has refined the willful and persistent misconduct bar, as well as implemented a compelling circumstances exception, to distinguish between serious misconduct worthy of a ''dishonorable'' determination and misconduct that is mitigated by the circumstances or outweighed by otherwise meritorious service. The aim is to provide benefits in the latter situation, but not the former.

One commenter stated that ''[c]hanges to VA shouldn't be bureaucratic, they should be legislative. In addition, Veterans should serve honorably throughout their contract otherwise they shouldn't be entitled to VA benefits.'' VA thanks the commenter for their comment. As discussed above, Congress delegated to VA the ability to set criteria for what constitutes ''other than dishonorable'' service for purposes of VA benefits eligibility. This rulemaking is necessary to refine those criteria. VA makes no changes to the regulatory text based on this comment.

Support Expanding Benefits Eligibility

Some commenters requested that all regulatory bars be removed. They stated that removing the regulatory bars would not affect military order and discipline. One commenter stated that, ''having served as a lower enlisted soldier, I can tell you I had no idea what the regulatory or statutory bars to VA benefits were. What was most important to me was . . . the people to my right and my left . . ., and the idea that [the bars] would have any impact on my behavior [i]s frankly absurd to me.'' Another commenter, former military defense counsel, stated ''I've done hundreds of cases. I can tell you very confidently that when people [commit repeated but minor misconduct], the last thing on their minds is VA benefits.'' Another commenter, a former SM, stated that most SMs ''have little or no knowledge of VA regulations or practice.'' Another commenter noted that misconduct during service can result in a criminal conviction and concluded that ''it is difficult to believe that the loss of disability compensation is not dwarfed by the incentive to avoid a criminal conviction.'' Another commenter asserted that ''[a]ny concerns regarding military order and discipline should be reflected in [DoD's] policies and regulations,'' and that removal of the regulatory bars would have ''minimal if any affect [sic] on military order and discipline as there are other remedies readily available to the chain of command.''

Relatedly, some commenters stated that expanding benefits eligibility would not denigrate other veterans' honorable service. One commenter in particular, a former SM, stated that ''any argument that providing a disabled former [SM] with life-saving healthcare, an ability to eat or an ability to be sheltered somehow denigrates honorable service is [ ] patently [ ] inhumane.'' Another commenter, a former SM, stated: ''What would *truly*

denigrate my honorable service would be to leave those comrades behind, to suffer from poverty, homelessness, and the lack of access to healthcare while I enjoy the benefits of my discharge'' (emphasis added). Similarly, another commenter, a former SM, stated: ''I'm not honored by seeing other [SMs] left homeless, by seeing them without medical care . . . That does not honor me or my service.'' Another commenter stated that the provision of VA benefits is not about bestowing or withholding ''honor''; it is about delivering lifesaving and life-changing benefits to those who served this country. Another commenter similarly stated that VA should ''leave to the DoD the matter of conferring or withholding honor'' and focus on its ''top clinical priority [of] preventing suicide among all Veterans,'' regardless of discharge status.

VA thanks the commenters for these comments. As noted above, VA recognizes the challenging nature of this subject and included it in the RFI for this very reason. Ultimately, after considering the comments for and against further limitation or removal of the regulatory bars to benefits, VA has determined that the provisions of this final rule strike a balance that will better ensure consistency in VA character of discharge determinations while also respecting the Military Departments' interest in disincentivizing significant misconduct prejudicial to good order and discipline. VA recognizes that the Military Departments use the prospect of VA benefits bars as one tool to enforce good order and discipline, and, for that reason, VA has decided not to remove all the regulatory bars, but to remove one and modify one. In that way, the changes in this final rule expand VA benefits to more SMs than ever before, but still align with the necessary incentives for military discipline.

One commenter stated VA should look into the circumstances underlying a ''bad paper discharge.'' The commenter continued that ''VA should clear up the definition of willful and persistent misconduct.'' VA thanks the commenter for their comment. In this final rule, VA has crafted objective criteria to limit willful and persistent misconduct to specific parameters, and implemented a compelling circumstances exception that examines potential reasons why the misconduct underlying an OTH discharge may be mitigated or outweighed by otherwise meritorious service.

One commenter asked VA to ''[p]lease revise the rules to allow all who have served our country to receive VA Benefits and Healthcare but have been denied based on their character of discharge. Cold War Veterans, and particularly those who served during Vietnam and post-Vietnam were hit hard with many poor leaders. Many [v]eterans suffered significantly from mental health issues during a time in which mental health programs were not readily available, and to those who took advantage where they were available, were given bad paper.'' VA thanks the commenter for their comment. Instances of injustice or inequity in the military about discharges should be addressed to the Boards for Correction of Military Records and/or the Discharge Review Board. That said, the compelling circumstances exception is designed to consider factors like mental impairment and overseas-related hardship, and to consider whether (notwithstanding misconduct) the service was honest, faithful, and meritorious.

Other Comments (General)

One commenter noted concerns over the effect of OTH discharges on homeless former SMs. VA thanks this commenter for this comment, and notes that VA currently provides certain healthcare and homeless support benefits to former SMs with OTH, and in some cases, BCD, discharges. As the commenter offered no regulatory change, VA makes no changes based on this comment.

One commenter suggested that VA should not use the term ''insanity'' in 38 CFR 3.12(b). VA thanks the commenter for their comment; however, VA proposed no changes to the definition of insanity, and solicited no comments on that definition, in the proposed rule. Further, the regulatory language originates in statute, so VA has a legal basis for using it. 38 U.S.C. 5303(b). Thus, VA is not changing the definition in this final rule.

Numerous commenters stated their general opposition to VA-related matters outside of the scope of COD determinations, such as opposition to the privatization of VA services and the Choice Act. VA thanks the commenters for their comments, though they are outside the scope of this rulemaking and will not be addressed here.

Some commenters requested assistance with VA benefits unrelated to the rulemaking package. VA thanks these commenters for their comments. However, as they are not related to the rulemaking, and offer no change to the regulatory text, VA makes no changes in response to these comments. These commenters are encouraged to seek out VSOs, other accredited representatives, or employees at VA Regional Offices to assist with VA benefits questions.

One commenter noted that the new rule would help that commenter's case personally. VA thanks the commenter for the comment, but as the commenter offered no regulatory change, VA makes no changes based on this comment.

IV. Uncharacterized Discharges and Coast Guard Discharges

VA wishes to clarify the applicability of this rule to uncharacterized discharges and Coast Guard discharges. Per 38 CFR 3.12(k) (redesignated in this rule to § 3.12(l)), there are three types of uncharacterized separations: (1) entry level separation; (2) void enlistment or induction; and (3) dropped from the rolls. An entry level separation is considered under conditions other than dishonorable; accordingly, this rulemaking does not apply to this type of uncharacterized separation. *See* 38 CFR 3.12(a). Void enlistments are reviewed under the factors listed in 38 CFR 3.14, and thus are also not impacted by this rulemaking.

However, when a former SM was dropped from the rolls, the facts and circumstances surrounding the separation must be reviewed to determine whether the separation was under conditions other than dishonorable. These determinations are conducted in the same manner as if such former SM received an OTH discharge. Accordingly, these former SMs will be favorably impacted by this rulemaking for the reasons discussed above.

The Coast Guard serves a unique place in the armed Forces. The term ''armed forces'' means the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard. 10 U.S.C. 101(a)(4). The military departments are the Departments of the Army, Navy, and Air Force. 10 U.S.C. 101(a)(8). The Secretary of the Air Force has authority over the Air Force and the Space Force, and the Secretary of the Navy has authority over the Navy and Marine Corps. 10 U.S.C. 101(a)(9)(B), (C). The Coast Guard serves under the Department of Homeland Security, except upon Presidential direction to transfer it to the Department of the Navy or a declaration of war including a direction for its transfer to the Department of the Navy. 14 U.S.C. 101; 14 U.S.C. 103(a), (b); 10 U.S.C. 101(a)(9)(B). The Coast Guard issues the following discharges for officers: honorable, general/under honorable conditions, OTH, dismissal pursuant to GCM or administrative separation. For an enlisted SM, the discharges are the same as any other SM—honorable, general/under honorable conditions, OTH, bad conduct or dishonorable. SMs may also receive uncharacterized

discharges. As these discharges are identical to any other SM, this rulemaking will have the same effect on the SMs or officers who receive a BCD or OTH discharge and apply for VA benefits or health care or seek a COD determination.

V. Past Denials and Effective Date

In view of the complexity of the law VA administers, a brief discussion of the effect of prior COD adjudications and how to re-adjudicate the same is likely to reduce confusion, both by claimants and by VA adjudicators, and may facilitate timely access to benefits.

When this rule becomes effective, any claimant with a prior unfavorable COD determination, to include the no longer used undesirable discharge, may request a new COD determination under new § 3.12. *Cf. Routen* v. *West,* 142 F.3d 1434, 1441 (Fed. Cir. 1998). For those claimants found eligible for benefits under new § 3.12, the effective date of such benefits would be governed by 38 U.S.C. 5110(g) and 38 CFR 3.114. In short, if the claim is submitted within one year of the effective date of this final rule, the effective date of benefits could be as early as the effective date of this final rule. 38 CFR 3.114(a)(1).

However, VA makes clear this regulatory change is not a ground for clear and unmistakable error (CUE) in prior COD determinations. Although this final rule departs from VA's prior approach to COD, that does not render VA's prior regulation unlawful, *Garvey,* 972 F.3d at 1339, and, even if it were, a change in law cannot support a claim of CUE, *George* v. *McDonough,* 142 S. Ct. 1953, 1957 (2022). Accordingly, prior final decisions would not be subject to revision for CUE based on the new rulemaking. Claims for CUE on bases other than a change in regulation shall be considered on a case-by-case basis.

VI. Severability

The purpose of this section is to clarify VA's intent with respect to the severability of provisions of this rule. Each provision of this rulemaking is capable of operating independently, and VA intends them to operate independently. If any provision of this rule is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the remainder of this rule invalid. For example, amendments to any given regulatory bar are intended to operate independently, and are capable of operating independently, from amendments to other regulatory bars. Likewise, if the application of any portion of this rule to a particular circumstance is determined to be invalid, VA intends that the rule remain applicable to all other circumstances.

VII. Amendment Summary

As noted above, 38 U.S.C. 101(2) defines a ''veteran'' as an individual ''who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable.'' Pursuant to binding judicial precedent, VA has the discretion to determine who satisfies the ''under conditions other than dishonorable'' requirement. Moreover, 38 U.S.C. 501(a) provides that ''[t]he Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by [VA] and are consistent with those laws, including—(1) 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.'' These authorities permitted VA to establish a COD regulation, 38 CFR 3.12, and to amend that regulation herein.

In this final rule, VA amends the section heading to read ''Benefit eligibility based on character of discharge'' to reflect the fact that VA does not have the authority to alter character of service determinations made by the Armed Forces. Rather, VA utilizes the characterization to determine basic VA benefit eligibility.

Consistent with the proposed rule, VA amends paragraphs (a) and (b) by adding descriptive headers and implementing non-substantive changes for clarity.

VA adds a descriptive header to paragraph (c) and amends paragraph (c)(1) to make ''lawful order'' plural so that it accurately reflects the text of 38 U.S.C. 5303(a). VA also amends paragraph (c)(6) by dividing the language of current paragraph (c)(6) into two subordinate paragraphs and making edits to that language, as well as moving current paragraphs (c)(6)(i) through (iii) to new paragraphs (e)(1) through (3) and making edits to that language.

VA amends paragraph (d) to add a descriptive header ''Regulatory bars to benefits''; to revise the regulatory bars as discussed above, and to remove the homosexual acts bar.

New paragraph (e) addresses the ''compelling circumstances'' exception. As noted above, new paragraphs (e)(1) through (3) expand upon current paragraphs (c)(6)(i) through (iii), with minor wording changes to reflect the fact that this language will now be applied to not just prolonged AWOL but also certain misconduct.

Current paragraphs (e) through (k) are redesignated as paragraphs (f) through (l). Several of these paragraphs are provided descriptive headers and updated cross-references after the addition of new paragraph (e). Moreover, the authority citation for redesignated paragraph (i) has been embedded into that paragraph's text. Finally, VA is amending the authority citation for the section to clarify the statutory authorities through which 38 CFR 3.12 is promulgated.

Executive Orders 12866, 13563 and 14094

Executive Order 12866 (Regulatory Planning and Review) directs 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 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rule is a significant regulatory action under Executive Order 12866, section 3(f)(1), as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

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). The anticipated costs of this regulatory action are directly and only attributed to VA's internal processing and budgetary appropriations. There are no small entities involved or impacted by this regulatory action. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

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.

Paperwork Reduction Act (PRA)

Although this final rule contains a collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), there are no provisions associated with this rulemaking constituting any new collection of information or any revisions to the current collection of information. The collection of information for 38 CFR 3.12 is currently approved by the Office of Management and Budget (OMB) and has valid OMB control numbers of 2900–0747, 2900–0886, 2900–0002 and 2900–0004.

Congressional Review Act

Under the Congressional Review Act, this regulatory action may result in an annual effect on the economy of $100 million or more, 5 U.S.C. 804(2), and so is subject to the 60-day delay in effective date under 5 U.S.C. 801(a)(3). In accordance with 5 U.S.C. 801(a)(1), VA will submit to the Comptroller General and to Congress a copy of this regulation and the Regulatory Impact Analysis (RIA) associated with the regulation.

List of Subjects in 38 CFR Part 3

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

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on April 23, 2024, 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.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 3 as set forth below:

PART 3—ADJUDICATION

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

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

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

■ 2. Amend § 3.12 as follows:
■ a. Revise the section heading and paragraphs (a), (b), (c) introductory text, (c)(1) and (6), and (d).
■ b. Redesignate paragraphs (e) through (k) as paragraphs (f) through (l).
■ c. Add new paragraph (e).
■ d. Add a heading at the beginning of newly redesignated paragraph (f).
■ e. Revise newly redesignated paragraphs (g), (h) introductory text, and (i) introductory text.
■ f. Remove the authority citation after newly redesignated paragraph (i).
■ g. Revise newly redesignated paragraph (j).
■ h. Add a heading at the beginning of newly redesignated paragraph (k).
■ i. Revise the authority citation at the end of the section.

The revisions and additions read as follows:

§ 3.12 Benefit eligibility based on character of discharge.

(a) *General rule.* If the former service member did not die in service, then pension, compensation, or dependency and indemnity compensation is payable for claims based on a period of service that was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. 101(2)) A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

(b) *Insanity exception.* No bar to benefits under this section shall be applied if VA determines that the former service member was insane at the time he or she committed the offense(s) leading to the discharge or release under dishonorable conditions. (38 U.S.C. 5303(b)) Insanity is defined in § 3.354.

(c) *Statutory bars to benefits.* Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities.

* * * * *

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days (38 U.S.C. 5303(a)).

(i) *Compelling circumstances exception.* This paragraph (c)(6) does not apply if compelling circumstances mitigate the prolonged unauthorized absence, as discussed in paragraph (e) of this section.

(ii) *Applicability prior to October 8, 1977.* This paragraph (c)(6) applies to any person awarded an honorable or general discharge prior to October 8, 1977, under one of the programs listed in paragraph (i) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Department of Veterans Affairs benefits. *Basic eligibility* for purposes of this paragraph (c)(6)(ii) means either a Department of Veterans Affairs determination that an other than honorable discharge was issued 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 paragraph (i) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can establish basic eligibility to receive Department of Veterans Affairs benefits.

(d) *Regulatory bars to benefits.* Benefits are not payable where the former service member was discharged or released under one of the conditions listed in paragraph (d)(1) or (2) of this section.

(1) Compelling circumstances exception is not applicable for:

(i) *Discharge in lieu of trial.* Acceptance of a discharge under other than honorable conditions or its equivalent in lieu of trial by general court-martial.

(ii) *Mutiny or espionage.* Mutiny or spying.

(2) Compelling circumstances exception is applicable for:

(i) *An offense involving moral turpitude.* This paragraph (d)(2)(i) includes, generally, conviction of a felony.

(ii) *Willful and persistent misconduct.* For purposes of this section, instances of minor misconduct occurring within two years of each other are persistent; an instance of minor misconduct occurring within two years of more serious misconduct is persistent; and instances of more serious misconduct occurring within five years of each other are persistent. For purposes of this section, minor misconduct is misconduct for which the maximum sentence imposable pursuant to the

Manual for Courts-Martial United States would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial.

(e) *Compelling circumstances exception.* The bar to benefits for prolonged AWOL under paragraph (c)(6) of this section and the two types of misconduct described in paragraph (d)(2) of this section will not be applied if compelling circumstances mitigate the AWOL or misconduct at issue. The following factors will be considered in a determination on this matter:

(1) *Length and character of service exclusive of the period of prolonged AWOL or misconduct.* Service exclusive of the period of prolonged AWOL or misconduct should generally be of such quality and length that it can be characterized as honest, faithful, and meritorious and of benefit to the Nation.

(2) *Reasons for prolonged AWOL or misconduct.* Factors considered are as follows:

(i) Mental or cognitive impairment at the time of the prolonged AWOL or misconduct, to include but not limited to a clinical diagnosis of (or evidence that could later be medically determined to demonstrate existence of) posttraumatic stress disorder (PTSD), depression, bipolar disorder, schizophrenia, substance use disorder, attention deficit hyperactivity disorder (ADHD), impulsive behavior, or cognitive disabilities.

(ii) Physical health, to include physical trauma and any side effects of medication.

(iii) Combat-related or overseas-related hardship.

(iv) Sexual abuse/assault.

(v) Duress, coercion, or desperation.

(vi) Family obligations or comparable obligations to third parties.

(vii) Age, education, cultural background, and judgmental maturity.

(3) Whether a valid legal defense would have precluded a conviction for AWOL or misconduct under the Uniform Code of Military Justice. For purposes of this paragraph (e)(3), the defense must go directly to the substantive issue of absence or misconduct rather than to procedures, technicalities, or formalities.

(f) *Board of corrections upgrade.* * * *

(g) *Discharge review board upgrades prior to October 8, 1977.* An honorable or general discharge issued prior to October 8, 1977, under authority other than that listed in paragraphs (i)(1) through (3) of this section by a discharge review board established under 10 U.S.C. 1553, sets aside any bar to benefits imposed under paragraph (c) or (d) of this section except the bar contained in paragraph (c)(2) of this section.

(h) *Discharge review board upgrades on or after October 8, 1977.* An honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under 10 U.S.C. 1553, sets aside a bar to benefits imposed under paragraph (d) of this section, but not under paragraph (c) of this section, provided that:

* * * * *

(i) *Special review board upgrades.* Under 38 U.S.C. 5303(e), unless a discharge review board established under 10 U.S.C. 1553 determines on an individual case basis that the discharge would be upgraded under uniform standards meeting the requirements set forth in paragraph (h) of this section, an honorable or general discharge awarded under one of the following programs does not remove any bar to benefits imposed under this section:

* * * * *

(j) *Overpayments after October 8, 1977, due to discharge review board upgrades.* No overpayments shall 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 (i) of this section which would not be awarded under the standards set forth in paragraph (h) of this section. Accounts in payment status on or after October 8, 1977, shall be terminated the end of the month in which it is determined that the original other than honorable discharge was not issued under conditions other than dishonorable following notice from the appropriate discharge review board that the discharge would not have been upgraded under the standards set forth in paragraph (h) of this section, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment or April 7, 1978, whichever is the earliest.

(k) *Overpayments after October 8, 1977, based on application of AWOL statutory bar.* * * *

(Authority: 38 U.S.C. 101, 501, and 5303)

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[FR Doc. 2024–09012 Filed 4–25–24; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 4

[PS Docket Nos. 21–346, 15–80; ET Docket No. 04–35; FCC 24–5; FR ID 214797]

Resilient Networks; Disruptions to Communications; Correction

AGENCY: Federal Communications Commission.

ACTION: Final rule; correction.

SUMMARY: The Federal Communications Commission published a document in the **Federal Register** on April 11, 2024, containing the effective and compliance dates for a new rule. While the **DATES** section at the beginning of the document was correct, Section E of the document, ''Timelines for Compliance,'' requires a correction.

DATES: Effective April 26, 2024.

FOR FURTHER INFORMATION CONTACT: Scott Cinnamon, Attorney Advisor, 202–418–2319.

SUPPLEMENTARY INFORMATION:

Federal Register Correction

In rule document 2024–07402 at 89 FR 25535 in the issue of April 11, 2024, on page 25541, in the second column, the first sentence of Section E, ''Timelines for Compliance,'' is corrected to read as follows:

We set a single date for compliance by all subject providers for implementing these rules as the later of 30 days after the FCC publishes notice in the **Federal Register** that the OMB has completed its review of Paperwork Reduction Act requirements, or November 30, 2024.

Dated: April 17, 2024.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer, Office of the Secretary.

[FR Doc. 2024–08646 Filed 4–25–24; 8:45 am]

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