

2012

## 2010-2011 Veterans Law Update


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### Recommended Citation

Kathleen Dwyer, Alec Kast, Scott A. Sigmon, & Andrew E. Tarne, *2010-2011 Veterans Law Update*, 22 Fed. Cir. B. J. 283 (2012).

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# 2010-2011 Veterans Law Update

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“[L]et us strive . . . to care for him who shall have borne the battle, and for his widow, and his orphan” – Abraham Lincoln<sup>1</sup>

## Introduction

2011 saw multiple changes to the laws relating to veterans, their rights and benefits, and the Department of Veterans Affairs (“VA”). This Article will cover select updates to the field of veterans law codified in the Code of Federal Regulations and the United States Code, proposed in the Federal Register, and adjudicated in the courts. Part I will cover updates related directly to veterans’ benefits and rights. Part II will focus on updates to rules involving veterans’ caregivers and healthcare facilities. Part III will cover proposed rules dealing with veterans’ claims and insurance. Part IV will focus on rules and case law covering the VA’s procedures and operating regulations.

## I. Veterans’ Benefits and Rights

### A. Laws

#### 1. *Restoring GI Bill Fairness Act of 2011*

On August 3, 2011, Congress passed the Restoring GI Bill Fairness Act of 2011.<sup>2</sup> The primary purpose of this Act is to allow veterans to continue to obtain higher funds to pursue higher education at non-public institutions.<sup>3</sup> The Act first provides the period during which a veteran who has been enrolled in the same non-public institution since January 4, 2011<sup>4</sup> may use

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<sup>1</sup> Abraham Lincoln, U.S. President, Second Inaugural Address (Mar. 4, 1865) (endorsed by Lincoln, Apr. 10, 1865) (transcript available in the Abraham Lincoln Papers at the Library of Congress).

<sup>2</sup> Restoring GI Bill Fairness Act of 2011, Pub. L. No. 112-26, 125 Stat. 268 (codified as amended in scattered sections of 38 U.S.C.).

<sup>3</sup> *See id.*

<sup>4</sup> *Id.* § 2 (codified as amended at 38 U.S.C. § 3313). Note that the non-public institution must (1) cost over \$700 per credit and (2) have a combined full-time tuition cost of over \$17,500. *Id.* § 2(b)(1)–(2).

these funds, extending it through the period of August 1, 2011, to July 31, 2014.<sup>5</sup> It further increases the funds that veterans may receive to the greater of (1) \$17,500, or (2) the cost of the educational program as determined by the “Post-9/11 GI Bill 2010–2011 Tuition and Fee In-State Maximums” table.<sup>6</sup>

The Act also touches on the fees that veterans must pay to the VA prior to obtaining a guaranteed housing loan under Title 38 of the United States Code.<sup>7</sup> The Act extends the inclusive date for which veterans and reservists must pay the fee for housing purchases closed before October 1, 2011; it also increases that fee amount from 3.00% to 3.30% for both veterans and reservists.<sup>8</sup> It next alters the language in clause (ii) by changing the applicable dates to loans obtained on or after “October 1, 2011, and before October 1, 2012.” The fee rates for loans obtained between those dates were also lowered from 3.30% to 2.80% for both veterans and reservists.<sup>9</sup>

## ***2. Veterans’ Compensation Cost-of-Living Adjustment Act of 2011***

On November 9, 2011, Congress passed the Veterans’ Compensation Cost-of-Living Adjustment Act of 2011.<sup>10</sup> This Act amended Title 38 of the United States Code to provide for increases in compensation rates for service-connected disabled veterans and their survivors.<sup>11</sup>

The Act requires the Secretary of Veterans Affairs to increase compensation amounts for: (1) wartime disability compensation, (2) additional compensation for dependents, (3) clothing allowance, (4) dependency and indemnity compensation for the surviving spouse, and (5) dependency and indemnity compensation to children.<sup>12</sup> The Act provides that each of these categories of compensation will increase by the same percentage that social security benefits increased as of December 1, 2011,<sup>13</sup> which is 3.6 percent.<sup>14</sup>

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<sup>5</sup> *Id.* § 2(a).

<sup>6</sup> *Id.*; see also Post-9/11 GI Bill 2010–2011 Tuition and Fee In-State Maximums, 75 Fed. Reg. 66,193 (Oct. 27, 2010).

<sup>7</sup> See Restoring GI Bill Fairness Act of 2011 § 3 (codified as amended at 38 U.S.C. § 3729).

<sup>8</sup> *Id.* § 3(a)(1) (codified as amended at 38 U.S.C. § 3729(b)(2)(B)(i)).

<sup>9</sup> *Id.* § 3(a)(2) (codified as amended at 38 U.S.C. § 3729(b)(2)(B)(ii)).

<sup>10</sup> Veterans’ Compensation Cost-of-Living Adjustment Act of 2011, Pub. L. No. 112-53, 125 Stat. 548 (codified as amended in scattered sections of 38 U.S.C.).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* § 2(b).

<sup>13</sup> *Id.* § 2(c)(1).

<sup>14</sup> See Cost-of-Living Increase and Other Determinations for 2012, 76 Fed. Reg. 66,111 (Oct. 25, 2011). Specific rate tables may be accessed on the Department of Veterans Affairs website. See *Disability Compensation and Pension Benefits Payment Rate Tables*, U.S. DEP’T OF VETERANS AFFAIRS, available at [www.vba.va.gov/bln/21/Rates/#BM01](http://www.vba.va.gov/bln/21/Rates/#BM01) (last visited Nov. 17, 2012).

### 3. *VOW to Hire Heroes Act of 2011*

On November 21, 2011, Congress passed the VOW to Hire Heroes Act of 2011.<sup>15</sup> This comprehensive legislation seeks to “aggressively attack the unacceptably high rate of veterans’ unemployment” through various measures, ranging from retention programs to training to tax incentives.<sup>16</sup>

The Act first requires the Secretary of Veterans Affairs, along with the Secretary of Labor, to establish a retraining assistance program for eligible veterans.<sup>17</sup> Essentially, the purpose of this program is to grant eligible veterans the opportunity to train in a vocation that will help them to get a job. The retraining assistance program pays for veterans to attend a vocational school and obtain an associate’s degree in certain specified fields.<sup>18</sup> The program was open to 45,000 veterans until October 2012, at which point it became open to 54,000 veterans.<sup>19</sup>

This particular program is open to veterans who: (1) are between the ages of 35 and 60, (2) were not dishonorably discharged, (3) are unemployed, (4) are not eligible for other educational assistance programs under Title 38 of the United States Code, (5) are not receiving compensation for a disability that renders them fully unemployable; and (6) were not enrolled in a state or federal training program in the past 180 days.<sup>20</sup>

The Act next provides that present members of the armed forces must participate in the Department of Defense’s transition assistance program, an existing program that seeks to educate members of the armed services in a way that transitions their military skills to civilian skills.<sup>21</sup> The Act requires that members of the armed services participate in the program unless they provide unique and indispensable services to a unit that is soon to be deployed.<sup>22</sup>

The Act further provides that certain disabled veterans may be eligible for additional rehabilitation after they have already exhausted unemployment benefits under state law.<sup>23</sup> In general, for a veteran to be eligible for participation

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<sup>15</sup> VOW to Hire Heroes Act of 2011, Pub. L. No. 112-56, 125 Stat. 711 (codified as amended in scattered sections of 38 U.S.C.).

<sup>16</sup> *VOW To Hire Heroes Act of 2011: Comprehensive Legislation to End Veteran Unemployment*, H. COMM. ON VETERANS’ AFFAIRS, <http://veterans.house.gov/vow> (last visited Sept. 25, 2012).

<sup>17</sup> VOW to Hire Heroes Act of 2011 § 211(a)(1) (codified as amended at 38 U.S.C. § 4100).

<sup>18</sup> *Id.* § 211(b).

<sup>19</sup> *Id.* § 211(a)(2).

<sup>20</sup> *Id.* § 211(e).

<sup>21</sup> *Id.* § 221(a) (codified as amended at 38 U.S.C. § 1142(c)).

<sup>22</sup> *Id.* (codified as amended at 38 U.S.C. § 1142(c)(2)(B)).

<sup>23</sup> *Id.* § 233(a) (codified as amended at 38 U.S.C. § 3102).

in these rehabilitation programs, he must (1) be unemployed, and (2) not be receiving any sort of state or federal compensation for unemployment.<sup>24</sup>

The Act also provides for preferential hiring of veterans in certain federal agencies.<sup>25</sup> The Act creates three categories of potential applicants: (1) veterans, (2) disabled veterans, and (3) preference eligible individuals.<sup>26</sup> Furthermore, the Act both provides for and increases the amount of tax credits owed to eligible entities that hire eligible veterans and disabled veterans.<sup>27</sup> Tax credits owed vary from \$12,000 to \$14,000 to \$24,000 and are determined based on the veteran's qualifying status under 26 U.S.C. § 51(d)(3)(A)(2).<sup>28</sup>

## **B. Final Rules**

### ***1. Clothing Allowances***

The VA has amended its adjudication regulations regarding clothing allowances.<sup>29</sup> The VA noted that 38 U.S.C. § 1162

authorizes VA to pay an annual clothing allowance to each veteran who, because of a service-connected disability, wears or uses a prosthetic or orthopedic appliance (including a wheelchair) which VA determines tends to wear out or tear the veteran's clothing or uses prescription medication for a skin condition that is due to a service-connected disability which VA determines causes irreparable damage to the veteran's outergarments.<sup>30</sup>

The VA had previously interpreted this provision to mean that a veteran is entitled to only one clothing allowance, regardless of circumstances.<sup>31</sup> In *Sursely v. Peake*,<sup>32</sup> however, the United States Court of Appeals for the Federal Circuit disagreed with the VA's interpretation and rejected the United States Court of Appeals for Veterans Claims' ("Veterans Court") conclusion that it would be "irrational" to permit multiple clothing allowances for use of multiple prosthetic appliances affecting a single article of clothing.<sup>33</sup> In an effort to implement the court's ruling in *Sursely*, the VA has amended 38 C.F.R.

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<sup>24</sup> *Id.* (codified as amended at 38 U.S.C. § 3102(b)).

<sup>25</sup> *See id.* § 235 (codified as amended at 5 U.S.C. § 2108a).

<sup>26</sup> *Id.* § 235(a) (codified as amended at 5 U.S.C. § 2108a(a)-(c)).

<sup>27</sup> *Id.* § 261 (codified as amended at 26 U.S.C. § 51).

<sup>28</sup> *Id.* § 261(a).

<sup>29</sup> Clothing Allowance, 76 Fed. Reg. 70,883, 70,883 (Nov. 16, 2011) (codified at 38 C.F.R. pt. 3). For the entirety of the originally proposed amendment, see Clothing Allowance, 76 Fed. Reg. 5733 (proposed Feb. 2, 2011) (to be codified at 38 C.F.R. pt. 3).

<sup>30</sup> Clothing Allowance, 76 Fed. Reg. at 5733.

<sup>31</sup> *Id.*; *see also* *Sursely v. Peake*, 551 F.3d 1351, 1355-56 (Fed. Cir. 2009).

<sup>32</sup> 551 F.3d 1351 (Fed. Cir. 2009).

<sup>33</sup> *Id.* at 1356 n. 4, 1357-58 & n.6.

§ 3.810(a)(1) to provide the criteria for entitlement to one annual clothing allowance as stated in sections 3.810(a)(1) and 3.810(a)(2).<sup>34</sup>

This rule amends section 3.810(a)(2) to reflect the criteria for more than one annual clothing allowance where distinct garments are affected.<sup>35</sup> Under the rule, “[a] veteran is entitled to an annual clothing allowance for each prosthetic or orthopedic appliance . . . or medication used by the veteran if each . . . [s]atisfies the requirements of paragraph (1) of [§ 3.810(a)]” if each appliance or medication “[a]ffects a distinct type of article of clothing or outer garment.”<sup>36</sup> The VA has also provided in section 3.810(a)(3) that:

[a] veteran is entitled to two annual clothing allowances if a veteran uses more than one prosthetic or orthopedic appliance, (including, but not limited to, a wheelchair), medication for more than one skin condition, or an appliance and a medication, and the appliances(s) or medication(s)—(i) [e]ach satisfy the requirements of paragraph (a)(1) of this section; and (ii) [t]ogether tend to wear or tear a single type of article of clothing or irreparably damage a type of outer garment at an increased rate of damage to the clothing or outer garment due to a second appliance or medication.<sup>37</sup>

## ***2. Amended Federal Acquisition Regulation on Equal Opportunity Provisions for Various Categories of Military Veterans***

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration have amended the Federal Acquisition Regulation to implement Department of Labor regulations on equal opportunity provisions for various categories of military veterans.<sup>38</sup> This rule revises coverage and definitions of veterans covered under the Vietnam Era Veterans’ Readjustment Assistance Act of 1972 (“VEVRAA”) and the Jobs for Veterans Act and updates the reporting form that contractors currently use for their annual reporting.<sup>39</sup> The agencies began by amending part 22 to include disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans as classes of protected veterans,

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<sup>34</sup> See 38 C.F.R. § 3.810(a) (2012).

<sup>35</sup> See *id.* § 3.810(a)(2).

<sup>36</sup> Clothing Allowance, 76 Fed. Reg. 5733, 5733 (proposed Feb. 2, 2011) (to be codified at 38 C.F.R. pt. 3).

<sup>37</sup> 38 C.F.R. § 3.810(a)(3) (2012).

<sup>38</sup> See Federal Acquisition Regulation; Equal Opportunity for Veterans, 76 Fed. Reg. 39,233, 39,233 (July 5, 2011) (codified at 48 C.F.R. pts. 1, 22, 52). The agencies noted that the proposed rule was adopted without amendment. See *id.* Thus, for the text of the amendments, see Federal Acquisition Regulation; Equal Opportunity for Veterans, 75 Fed. Reg. 60,249 (proposed Sept. 29, 2010) (to be codified at 48 C.F.R. pts. 1, 22, 55).

<sup>39</sup> See Federal Acquisition Regulation; Equal Opportunity for Veterans, 76 Fed. Reg. at 39,233.

thus eliminating a specific category for Vietnam veterans.<sup>40</sup> More technical amendments to parts 22 and 55 made the following changes:

As revised, part 22.1302 requires the listing of all job openings, except those for “[e]xecutive and senior management” positions, internal job postings, and positions lasting less than three days.<sup>41</sup> Additionally, the amendment provides that agencies cannot enter into contracts for personnel from providers without a current VETS-100 or VETS-100A form.<sup>42</sup>

Section 22.1303(b) was amended by removing references to “Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible,” and section 22.1303(c) was amended by removing “VETS-100 Report” and adding “VETS-100A” in its place.<sup>43</sup>

Part 22.1304 revised the introductory text, which includes the procedure for verifying whether a VETS-100 or VETS-100A form is current.<sup>44</sup>

Part 22.1305 revised the introduction to the waivers section.<sup>45</sup>

Part 22.1306 was revised to include requirements for contractors to post notices when provided by the contracting agency and to report on veteran employment at least annually.<sup>46</sup>

Part 22.1308 was revised to require contracting offices to forward complaints to the Veteran’s Employment and Training Service of the Department of Labor or its local affiliates.<sup>47</sup>

Part 22.1309 was revised to require the contracting officer to promptly implement any sanctions for non-compliance, including withholding payment.<sup>48</sup>

Part 22.1310 was revised to require the equal employment opportunity clause to be included in solicitations contracts that are more than \$100,000 in value unless the contracts are performed outside of the United States or the requirement has been waived.<sup>49</sup>

Part 52.222-35 includes the new language and standards for veterans.<sup>50</sup>

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<sup>40</sup> Federal Acquisition Regulation; Equal Opportunity for Veterans, 75 Fed. Reg. at 60,250.

<sup>41</sup> *Id.* at 60,251.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* The introductory text reads as follows: “Query the Department of Labor’s VETS-100 Database via the Internet at <http://www.vets100.com/login.aspx>. Contracting officer organization, name, e-mail, telephone, and password information are required on the Contracting Officer Registration page to register for system use.” *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 60,251–52.

<sup>48</sup> *Id.* at 60,252.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 60,252–53.

Part 52.222-37 includes the new requirements for reporting veterans employment.<sup>51</sup>

### 3. Service Dogs

The VA currently provides veterans enrolled under 38 U.S.C. § 1705 with guide dogs “trained for the aid of people who are blind and service dogs trained for the aid of the hearing impaired or persons with a spinal cord injury or dysfunction or other chronic impairment that substantially limits mobility,” as well as related travel expenses for the provision of the dogs.<sup>52</sup> Effective September 5, 2012, a final rule adopted by the VA (1) provides that the VA may provide service dogs for veterans with other disabilities, (2) establishes a single regulation for providing assistive dogs by the VA, (3) clarifies the VA’s authority to provide veterinary-care benefits, and (4) establishes a clear procedure for awarding benefits.<sup>53</sup>

Service dogs are defined as “guide or service dogs prescribed for a disabled veteran under [38 C.F.R. § 17.148].”<sup>54</sup> In order for a veteran with a service dog to be provided benefits, a VA clinician would have to diagnose the veteran seeking benefits with either a visual, auditory, or substantial mobility impairment and determine that “it is optimal for the veteran to manage the impairment and live independently through the assistance of a trained service dog.”<sup>55</sup> However, if the clinician determines that means other than a service dog, such as technological devices or rehabilitative techniques, would *completely enable* a veteran to live independently, then the veteran will not be entitled to service dog benefits.<sup>56</sup> The VA further emphasizes that the clinician will base his discretion on medical judgment rather than cost-effectiveness, thus ensuring the highest quality of care.<sup>57</sup>

Under the final rule, substantial mobility impairment is defined as “a spinal cord injury or dysfunction or other chronic impairment that substantially limits mobility.”<sup>58</sup> Additionally, the regulations state that the VA will interpret a “chronic impairment that substantially limits mobility” to include, but not be limited to, “a traumatic brain injury that compromises a veteran’s ability to make appropriate decisions based on environmental cues . . . or a seizure

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<sup>51</sup> *Id.* at 60,253–54.

<sup>52</sup> Service Dogs, 77 Fed. Reg. 54,368 (Sept. 5, 2012) (to be codified at 38 C.F.R. pt. 17).

<sup>53</sup> *Id.* at 54,368, 54,375; *see also* Service Dogs, 76 Fed. Reg. 35,162, 35,162–63 (proposed June 16, 2011) (to be codified at 38 C.F.R. pt. 17).

<sup>54</sup> Service Dogs, 77 Fed. Reg. at 54,381 (to be codified at 38 C.F.R. § 17.148(a)).

<sup>55</sup> *Id.* at 54,381–82 (to be codified at 38 C.F.R. § 17.148(b)).

<sup>56</sup> *Id.* at 54,382.

<sup>57</sup> *See id.* at 54,374; Service Dogs, 76 Fed. Reg. at 35,163.

<sup>58</sup> Service Dogs, 77 Fed. Reg. at 54,382 (to be codified at 38 C.F.R. § 17.148(b)(3)).



disorder that causes a veteran to become immobile during and after a seizure event.”<sup>59</sup>

Under this rule, the VA recognizes service dogs from organizations accredited by Assistance Dogs International (ADI) or the International Guide Dog Federation (IGDF), or both.<sup>60</sup> Because the “VA does not have the expertise, experience, or resources to develop independent criteria,” it will rely on these two organizations to determine if a dog is qualified and capable of performing the required tasks.<sup>61</sup> Under the new rules, if a veteran acquired a dog before September 5, 2012, and wishes to receive benefits, he will need to provide certification proving that “the veteran and dog, as a team, successfully completed, no later than September 5, 2013, a training program offered by” a training organization that was in existence before September 5, 2012.<sup>62</sup> Alternatively, the veteran and dog can qualify for benefits by obtaining the certification from ADI or IGDF.<sup>63</sup>

This rule also authorizes the VA to pay for the care of service dogs in order to maintain the dogs’ ability to perform.<sup>64</sup> The VA will not assist with expenses “such as license tags, nonprescription food, grooming, insurance for personal injury, non-sedated dental cleanings, nail trimming, boarding, pet-sitting or dog-walking services, over-the-counter medications, or other goods and services not covered by the [insurance] policy.”<sup>65</sup> However, the VA will provide an insurance policy and pay the premiums, co-payments, and deductibles, which are billed to the VA, not the veteran.<sup>66</sup> The insurance policy “will guarantee coverage for all treatment (and associated prescription medications), subject to premiums, copayments, deductibles or annual caps.”<sup>67</sup> Coverage will be provided for all treatments “determined to be medically necessary . . . by any veterinarian who meets the requirements of the insurer.”<sup>68</sup> The rule also bars policies from excluding dogs based on preexisting conditions, so long as those conditions “do not prevent the dog from being a service dog.”<sup>69</sup>

The rule further allows the VA to provide hardware clinically determined to be needed by the service dog to perform, as well as hardware repairs or

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (to be codified at 38 C.F.R. § 17.148(c)).

<sup>61</sup> Service Dogs, 76 Fed. Reg. at 35,162–63.

<sup>62</sup> Service Dogs, 77 Fed. Reg. at 54,382 (to be codified at 38 C.F.R. § 17.148(c)(2)).

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* (to be codified at 38 C.F.R. § 17.148(d)); Service Dogs, 76 Fed. Reg. at 35,164.

<sup>65</sup> Service Dogs, 77 Fed. Reg. at 54,382 (to be codified at 38 C.F.R. § 17.148(d)(4)).

<sup>66</sup> *See id.* (to be codified at 38 C.F.R. § 17.148(d)(1)(i)).

<sup>67</sup> *Id.* (to be codified at 38 C.F.R. § 17.148(d)(1)(ii)).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (to be codified at 38 C.F.R. § 17.148(d)(1)(iii)).

replacements.<sup>70</sup> Veterans can obtain this hardware and subsequent repairs by calling the Prosthetic and Sensory Aids Service at his or her local VA Medical Center.<sup>71</sup> Additionally, the VA will provide “[p]ayments for travel expenses associated with obtaining a dog under paragraph (c)(1) of [the rule].”<sup>72</sup>

Finally, in order for the VA to continue providing the benefits under this rule, “the service dog must maintain its ability to function as a service dog.”<sup>73</sup> If the VA determines that the dog is no longer capable of acting as a service dog, it will provide the veteran with “at least 30 days notice” before terminating benefits.<sup>74</sup> The VA can terminate the benefits based on information “from any source [indicating] that the dog is medically unable to [function as a service dog]” or “a clinical determination that the veteran no longer requires the dog.”<sup>75</sup>

#### ***4. Dental Conditions***

Effective February 29, 2012, the VA has amended its adjudication regulations to clarify that the principles governing the determinations of its Veterans Benefits Administration (“VBA”) regarding “service connection of dental conditions . . . apply only when VHA [Veterans Health Administration] requests information or a rating from VBA for those purposes.”<sup>76</sup> Service connection of dental conditions are used to establish eligibility for dental treatment by the VHA.

The VA has noted that 38 C.F.R. § 3.381 “identifies circumstances under which dental conditions that may not qualify as disabilities for purposes of VA disability compensation may nevertheless [qualify as] service connected for purposes of VA dental treatment under 38 U.S.C. 1712 and 38 C.F.R. 17.161.”<sup>77</sup> The amendment clarifies that the “VBA will prepare a rating decision under § 3.381 only when VHA requests such a rating or information necessary to assist in its determination.”<sup>78</sup>

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<sup>70</sup> *See id.* (to be codified at 38 C.F.R. § 17.148(d)(2)).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (to be codified at 38 C.F.R. § 17.148(d)(3)).

<sup>73</sup> *Id.* (to be codified at 38 C.F.R. § 17.148(e)).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Dental Conditions, 77 Fed. Reg. 4469, 4469 (Jan. 30, 2012) (final rule). The proposed rule was adopted without changes. *See id.* at 4469–70. Thus, references will be made to the proposed rule. Dental Conditions, 76 Fed. Reg. 14,600, 14,600 (proposed Mar. 17, 2011) (to be codified at 38 C.F.R. pt. 3).

<sup>77</sup> Dental Conditions, 76 Fed. Reg. at 14,600.

<sup>78</sup> *Id.*

Specifically, new paragraph (a) “explains the situations when VHA will refer a claim to VBA.”<sup>79</sup> The VBA will adjudicate a claim for “service connection of a dental condition” based on its determination regarding questions such as:

- (1) Former Prisoner of War status;
- (2) Whether the veteran has a compensable or noncompensable service-connected dental condition or disability;
- (3) Whether the dental condition or disability is a result of combat wounds;
- (4) Whether the dental condition or disability is a result of service trauma; or
- (5) Whether the veteran is totally disabled due to a service-connected disability.<sup>80</sup>

New paragraph (b) notes that, although conditions such as “[t]reatable carious teeth, replaceable missing teeth, dental or alveolar abscesses, and periodontal disease are not compensable disabilities,” they may still be deemed “service connected solely for the purpose of establishing eligibility for outpatient dental treatment” under section 38 C.F.R. § 17.161.<sup>81</sup>

### ***5. Autopsies***

Effective July 27, 2012, the VA has amended 38 C.F.R. § 17.170, which governs the performance of autopsies on veterans.<sup>82</sup>

#### ***a. Authorization and Consent***

The final rule amends 38 C.F.R. § 17.170(a) to clarify that the “consent for an autopsy is implied if a known surviving spouse or next of kin has either not responded to a VA request for permission or has not inquired as to the decedent for 6 months before the decedent’s death.”<sup>83</sup> The final rule also states that the surviving spouse or next of kin must respond to the VA’s request for authorization “within a specified period of time,” or consent will be implied.<sup>84</sup> Additionally, the final rule specifies that the VA may order an autopsy for only two purposes, regardless of whether the death occurred within or outside a VA facility: “(i) Completion of official records; or (ii) Advancement of medical knowledge.”<sup>85</sup>

#### ***b. Jurisdiction***

The new regulation modifies the current regulation to ensure that “the laws of the state where the autopsy will be performed” are the controlling laws for purposes of determining who has authority to grant permission for

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<sup>79</sup> *Id.* at 14,601.

<sup>80</sup> *Id.* at 14,602.

<sup>81</sup> *Id.*

<sup>82</sup> Autopsies at VA Expense, 77 Fed. Reg. 38,179 (June 27, 2012) (to be codified at 38 C.F.R. pt. 17).

<sup>83</sup> *Id.* at 38,179.

<sup>84</sup> *Id.* at 38,181 (to be codified at 38 C.F.R. § 17.170(a)).

<sup>85</sup> *Id.* (to be codified at 38 C.F.R. § 17.170(a), (e)).

the autopsy.<sup>86</sup> Applicable state law will also identify “the order of precedence among such persons.”<sup>87</sup>

### *c. Transportation*

Because an autopsy will not always be performed in a VA facility, the final rule states that the authority to order an autopsy “also includes transporting the body at VA’s expense to the facility where the autopsy will be performed.”<sup>88</sup>

## **6. Cemetery Grants for Tribal Veterans**

The Veterans Benefits, Health Care, and Information Technology Act of 2006 requires the VA to administer grants to tribal organizations “in the same manner, and under the same conditions, as grants to States.”<sup>89</sup> As a result, the VA has adopted a final rule expanding its “preapplication requirement to all veterans cemetery grants as a means to promote consistency and communication in the grant application process.”<sup>90</sup>

The VA has made several additions to the definitions section, including adding to 38 C.F.R. part 39 the term “Trust land,” defined as “any land that”:

- (1) Is held in trust by the United States for Native Americans;
- (2) Is subject to restrictions on alienation imposed by the United States on Indian lands, including native Hawaiian homelands;
- (3) Is owned by a Regional Corporation or a Village Corporation as defined in [the Alaska Native Claims Settlement Act]; or
- (4) Is on any island in the Pacific Ocean if such land is, by cultural tradition, communally-owned land, as determined by the Secretary.<sup>91</sup>

The VA also added the term “Tribal Organization,” defined as:

- (1) The recognized governing body of any Indian Tribe;
- (2) Any legally established organization of Indians that is controlled, sanctioned, or chartered by such governing body or is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities;
- (3) The Department of Hawaiian Homelands; and
- (4) Such other organizations as the Secretary may prescribe.<sup>92</sup>

The VA has further included the term “Indian Tribe,” which is defined as:

<sup>86</sup> *Id.* (to be codified at 38 C.F.R. § 17.170(d)(1)).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (to be codified at 38 C.F.R. § 17.170(e)).

<sup>89</sup> Tribal Veterans Cemetery Grants, 77 Fed. Reg. 4471, 4471 (Jan. 30, 2012) (quoting Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403) (codified at 38 C.F.R. pt. 39).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 4473 (codified at 38 C.F.R. § 39.2); *see also* 38 U.S.C. § 2408(f)(3)(B) (2006); 38 U.S.C. § 3765(1) (2006) (source of adopted definition for “Trust land”).

<sup>92</sup> Tribal Veterans Cemetery Grants, 77 Fed. Reg. at 4473 (codified at 38 C.F.R. § 39.2); *see also* 38 U.S.C. § 2408(f)(3)(A) (2006); 25 U.S.C. § 450b(l) (2006) (source of adopted definition for “Tribal Organization”).

any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or Regional or Village Corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.<sup>93</sup>

Section 39.31(c) requires that states and tribal organizations “submit written assurance” that they possess “legal authority to apply for the grant and to finance and construct the proposed facilities.”<sup>94</sup> Additionally, the final rule notes that “[i]n any case where a Tribal Organization is applying for a grant for a cemetery on land held in trust for more than one Indian Tribe,” the tribal organization must obtain certification of each Indian tribe’s approval in order to possess legal authority to apply for the grant.<sup>95</sup>

The final rule also amends 38 C.F.R. § 39.31(d) to require that:

The State or Tribal Organization must submit a copy of the State or Tribal Organization action authorizing the establishment, maintenance, and operation of the facility as a veterans cemetery in accordance with 38 C.F.R. 39.10(a). If the State or Tribal Organization action is based on legislation, enacted into law, then the legislation must be submitted.<sup>96</sup>

Tribal organizations will continue to compete with states in the prioritization process, as under part 39 prior to the revisions.<sup>97</sup>

### **C. Proposed Rules: Affirmative Action and Nondiscrimination Regarding Protected Veterans**

The Office of Federal Contract Compliance Programs (“OFCCP”) proposed to revise regulations implementing the affirmative action provisions of the Vietnam Era Veterans’ Readjustment Assistance Act of 1974.<sup>98</sup> VEVRAA, codified in part at 38 U.S.C. § 4212, serves two purposes: (1) it “prohibits employment discrimination against specified categories of veterans by Federal government contractors and subcontractors” and (2) it “requires each covered Federal government contractor and subcontractor to take affirmative action

<sup>93</sup> Tribal Veterans Cemetery Grants, 77 Fed. Reg. at 4473 (codified at 38 C.F.R. § 39.2); *see also* 25 U.S.C. § 450b(e) (2006) (source of adopted definition for “Indian Tribe”).

<sup>94</sup> Tribal Veterans Cemetery Grants, 77 Fed. Reg. at 4474 (codified at 38 C.F.R. § 39.31(c)).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 4474 (codified at 38 C.F.R. § 39.31(d)).

<sup>97</sup> *Id.* at 4471 (noting that Tribal Organizations would likely fall into Priority Group 2—projects for the establishment of new veterans cemeteries).

<sup>98</sup> *See* Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans, 76 Fed. Reg. 23,358, 23,358 (proposed Apr. 26, 2011) (to be codified at 41 C.F.R. pts. 60-250, 60-300); *see also* Vietnam Era Veterans’ Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat 1578 (codified as amended in scattered sections of 38 U.S.C.).

to employ and advance in employment these veterans.”<sup>99</sup> According to the OFCCP, the proposed regulations “would strengthen these affirmative action provisions, detailing specific actions a contractor must take to satisfy its obligations,” as well as “increase the contractor’s data collection obligations, and require the contractor to establish hiring benchmarks to assist in measuring the effectiveness of its affirmative action efforts.”<sup>100</sup>

The OFCCP first proposed to entirely rescind 41 C.F.R. part 60-250 because it is likely that any contracts covered by this part are no longer in existence.<sup>101</sup> Alternatively, if contracts that are covered under part 60-250 are discovered, the OFCCP proposed a revision to part 60-250 that will mirror changes proposed to part 60-300.<sup>102</sup> As a result, only changes to 41 C.F.R. part 60-300 will be discussed below.

### ***1. § 60-300.2 Definitions***

The OFCCP noted that the proposed rule would seek to address the lack of a “clear, overarching definition of ‘protected veteran’” by including “a new definition of ‘protected veteran,’ which includes all four classifications of protected veterans separately identified and defined in [section] 60-300.2.”<sup>103</sup>

### ***2. § 60-300.5 Equal Opportunity Clause***

The proposed rule would make several changes to section 60-300.5. First, “[i]n order to satisfy the listing requirement, the contractor must provide job vacancy information to the appropriate employment service *in the manner that the employment service requires* in order to include the job in their database so that they may provide priority referral of veterans.”<sup>104</sup> This regulation applies to any contractor who uses a “privately-run job service or exchange.”<sup>105</sup> Second, the contractor must provide state employment services with the contact information for any outside job search companies that the contractor uses in its hiring.<sup>106</sup> Third, the contractor must “provide notices of employee rights and contractor obligations in a manner that is accessible and understandable to persons with disabilities,” which may include the provision of “[b]raille, large print, or other versions that allow persons with disabilities

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<sup>99</sup> Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans, 76 Fed. Reg. at 23,358.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 23,359.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 23,371 (noting that the new term replaces the phrases “disabled veteran(s), recently separated veteran(s), other protected veteran(s), or Armed Forces service medal veteran(s)”).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

to read the notice themselves.”<sup>107</sup> Finally, the OFCCP noted that electronic notices are acceptable for employees who do not work at a physical location of the contractor.<sup>108</sup>

### **3. § 60-300.21 Prohibitions**

The proposed rule would amend section 300.21, which defines and addresses discriminatory conduct under section 4212, by stating in paragraph (f)(3) “that an individual who rejects a reasonable accommodation made by the contractor may still be considered a qualified disabled veteran if the individual subsequently provides and/or pays for a reasonable accommodation.”<sup>109</sup>

### **4. § 60-300.41 Availability of Affirmative Action Program**

The proposed regulation would amend section 60-300.41 to require the contractor to inform employees who do not work at the contractor’s physical establishment “about the availability of the affirmative action program by means other than posting at its establishment.”<sup>110</sup>

### **5. § 60-300.42 Invitation to Self-Identify**

Under the proposed rule, the contractor would be required “to invite all applicants to self-identify as a ‘protected veteran’ prior to the offer of employment” and to invite individuals, post-offer, “to self-identify as a member of one or more of the four classifications of protected veterans under part 60-300.”<sup>111</sup> These changes were proposed for enhanced data collection purposes, in order to allow the contractor and the OFCCP “to identify and monitor the contractor’s employment practices with respect to protected veterans.”<sup>112</sup> Disabled veterans would not be required to disclose the specific nature of their disability.<sup>113</sup>

The proposed rule would also require the contractor to seek the advice of the applicant regarding an accommodation. In the case of multiple reasonable accommodations, it would not require the contractor to use the reasonable accommodation preferred by the employee or applicant.<sup>114</sup>

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<sup>107</sup> *Id.* at 23,372.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 23,373.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 23,373–74.

<sup>112</sup> *Id.* at 23,373.

<sup>113</sup> *Id.* at 23,374.

<sup>114</sup> *Id.*

### **6. § 60-300.43 Affirmative Action Policy**

The OFCCP proposed replacing “because of status as a” with “against.”<sup>115</sup> This change would clarify “that the non-discrimination requirements of Section 4212 are limited to protected veterans and that reverse discrimination claims may not be brought by individuals who do not fall under one of the categories of veterans protected by part 60-300.”<sup>116</sup>

### **7. § 60-300.44 Required Contents of Affirmative Action Programs**

The proposed rule would modify section 60-300.44 by including paragraph (c)(3), which “would require the contractor to contemporaneously create a written statement of reasons supporting its belief that a direct threat exists, tracking the criteria set forth in the ‘direct threat’ definition in these regulations, and maintain the written statement as set forth in the recordkeeping requirement in § 60-300.80.”<sup>117</sup> The contractor would be required to “treat the created documents as confidential medical records in accordance with § 60-300.23(d).”<sup>118</sup>

Additionally, the proposed rule would mandate that the contractor “[i]nclude its affirmative action policy in its policy manual [and] inform all applicants and employees of its affirmative action obligations.”<sup>119</sup> The contractor would also be required to “hold meetings with its employees at least once per year” to disseminate this information, either through “in-person meetings, or meetings facilitated by technology.”<sup>120</sup> Finally, the contractor would be obligated to “describe individual employee opportunities for advancement.”<sup>121</sup>

## **II. Caregivers**

### **A. Final Rules**

#### **1. Per Diem Payments for the Care Provided to Eligible Veterans Evacuated from a State Home as a Result of an Emergency**

The VA has approved a final rule impacting per diem payments for care provided to veterans who have been evacuated from state homes due to emergencies.<sup>122</sup> Currently, the “VA provides per diem payments to reimburse

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 23,375.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 23,377.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See Per Diem Payments for Care Provided to Eligible Veterans as a Result of an Emergency, 76 Fed. Reg. 55,570, 55,570 (Sept. 8, 2011) (codified as amended at 38 C.F.R. pts. 17, 51).



States for each eligible veteran receiving nursing home care, domiciliary care, and adult day health care in State home facilities that are recognized and certified by VA.<sup>123</sup> This new rule clarifies the VA's authority to continue these payments, while also establishing standards for temporary or substitute facilities used by states in emergency situations in which remaining in a recognized state home facility would be unsafe.<sup>124</sup> In order to qualify as an "emergency," the situation must satisfy three requirements: (1) it must be "an occasion or instance where . . . [i]t would be unsafe for veterans receiving care at a State home facility to remain in that facility;"<sup>125</sup> (2) the state must not be able to, or must not believe it is able to "provide care in the State home on a temporary or long-term basis for any or all of its veteran residents due to a situation involving the State home;" and (3) the state must determine "that the veterans must be evacuated to another facility or facilities."<sup>126</sup>

Discussing the regulation, the VA has also noted that:

[The regulation will] provide for the continuation of per diem payments for care provided to a veteran in an evacuation facility that is not recognized by VA as a State home if the director of the VA medical center (VAMC) of jurisdiction determines, or the director of the Veterans Integrated Service Network (VISN) in which the State home is located . . . determines, that an emergency exists and that the evacuation facility meets certain minimum standards.<sup>127</sup>

This rule includes per diem payments for domiciliary care as well as nursing home care, and also applies minimum standards to facilities when veterans are evacuated from contract nursing homes.<sup>128</sup> However, the VA made clear that "the rule does not apply to a situation where a particular veteran's medical condition requires that the veteran be transferred to another facility, such as for a period of hospitalization."<sup>129</sup>

Additionally, the rule states that per diem payments end after thirty days unless "the official who approved the emergency response under paragraph (e) of this section determines that it is not reasonably possible to return the

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The amendments made by this final rule were unaltered from the amendments found in the proposed rule. *Id.* As a result, this section will cite largely to the text of the original proposal. *See Per Diem Payments for Care Provided to Eligible Veterans as a Result of an Emergency*, 76 Fed. Reg. 16,354 (proposed Mar. 23, 2011) (to be codified at 38 C.F.R. pts. 17, 51).

<sup>123</sup> *Per Diem Payments for Care Provided to Eligible Veterans as a Result of an Emergency*, 76 Fed. Reg. at 16,355.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* (alteration in original).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (internal quotation marks omitted).

veteran to a State home within the 30-day period, in which case such official will approve additional period(s) in accordance with this section.”<sup>130</sup>

Further, the standards applicable to evacuation facilities require the facility to meet the veteran’s “needs for food, shelter, toileting, and essential medical care.”<sup>131</sup> Finally, paragraph (d) applies the section to veterans in adult day health care facilities who are evacuated for an emergency.<sup>132</sup>

### ***2. Fire Safety in Residential Care Facilities***

The VA has amended its regulations “concerning [fire safety in] community residential care facilities, contract facilities for certain outpatient and residential services, and State home facilities.”<sup>133</sup> Specifically, 38 C.F.R. §§ 17.63, 17.81(a)(1), 17.82(a)(1), and 59.130(d)(1) have been amended “to require facilities to meet the requirements in the applicable provisions” of certain National Fire Protection Association (“NFPA”) publications.<sup>134</sup> Regulations now require that facilities conform to requirements in “NFPA 10, Standard for Portable Fire Extinguishers; NFPA 99, Standard for Health Care Facilities; NFPA 101, Life Safety Code; and NFPA 101A, Guide on Alternative Approaches to Life Safety.”<sup>135</sup>

### ***3. Amendments to Conform with the Caregivers and Veterans Omnibus Health Services Act of 2010***

Effective August 22, 2011, this final rule amended VA medical regulations to incorporate statutory amendments in sections 511, 512 and 513 of the Veterans Omnibus Health Services Act of 2010.<sup>136</sup> First, the rule amended 38 C.F.R. § 17.36(b)(3), the regulation implementing enrollment priority category three, in order to make it consistent with the amendments to section 512 of the Act that added veterans who had received the Medal of Honor to those included in enrollment priority category three.<sup>137</sup> Second, the rule amended 38 C.F.R. § 17.36(a)(3) and (b)(6) to include specific dates in order

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<sup>130</sup> *Id.* at 16,356 (internal quotation marks omitted).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Updating Fire Safety Standards, 76 Fed. Reg. 70,885, 70,885 (Nov. 16, 2011) (codified as amended at 38 C.F.R. pts. 17, 59). For the full text of the original proposed rule, see Updating Fire Safety Standards, 76 Fed. Reg. 10,246 (proposed Feb. 24, 2011) (to be codified at 38 C.F.R. pts. 17, 59).

<sup>134</sup> Updating Fire Safety Standards, 76 Fed. Reg. at 70,885.

<sup>135</sup> *Id.*

<sup>136</sup> Technical Revisions to Conform to the Caregivers and Veterans Omnibus Health Services Act of 2010, 76 Fed. Reg. 52,272, 52,272 (Aug. 22, 2011) (codified as amended at 38 C.F.R. pt. 17).

<sup>137</sup> *Id.*

to bring the regulations in compliance with the amended time frame found in section 513 for enrollment eligibility based on active duty service in Southwest Asia during the Gulf War.<sup>138</sup> Third, 38 C.F.R. § 17.108(d), 17.110(c), and 17.111(f) have been amended to add a new exemption category consistent with section 511's amendments to 38 U.S.C. § 1730, adding catastrophically disabled veterans to the list of veterans exempt from co-pay requirements.<sup>139</sup>

#### ***4. Reimbursement of Medical Care and Services for Non-Service Connected Conditions***

Effective July 25, 2011, the VA enacted a final rule that amended its regulations on reimbursement of medical care and services delivered to veterans in non-service-connected conditions.<sup>140</sup> Where third-party payers are required to reimburse the VA for costs related to care provided by the VA to veterans covered under the third-party payer plans, “[t]his final rule add[ed] a new section barring offsets by third-party payers and require[d] that third-party payers submit a request for a refund” in the event of an alleged overpayment.<sup>141</sup> This new regulation is an attempt to discontinue the practice of third-party payers who, believing that they had recently overpaid, withhold portions of future payments unilaterally to recoup their losses, thus making review of payments to the VA extraordinarily difficult.<sup>142</sup>

#### ***5. Regulations for Contracting with Community-Based Treatment Facilities in the Health Care for Homeless Veterans***

Effective September 22, 2011, the VA established new regulations through a final rule concerning contracts with community-based treatment facilities under the Health Care for Homeless Veterans program.<sup>143</sup> This final rule formalized the program's policies and procedures, which were designed to assist homeless veterans in obtaining treatment from non-VA community-based providers, and “clarif[e] that veterans with substance use disorders may qualify for the program” in some circumstances.<sup>144</sup> However, as the program

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Reimbursement Offsets for Medical Care or Services, 76 Fed. Reg. 37,202, 37,202 (June 24, 2011) (codified as amended at 38 C.F.R. pt. 17).

<sup>141</sup> *Id.* at 37,202.

<sup>142</sup> *See id.*

<sup>143</sup> Health Care for Homeless Veterans Program, 76 Fed. Reg. 52,575, 52,575 (Aug. 23, 2011) (codified as amended at 38 C.F.R. pt. 63).

<sup>144</sup> *Id.*

was prescribed by 38 U.S.C. § 2031, not all veterans with substance abuse disorders will qualify.<sup>145</sup>

### ***6. Payment or Reimbursement for Emergency Services for Non-Service-Connected Conditions in Non-VA Facilities***

The VA has amended its regulations to conform to changes made by the 2010 Expansion of Veteran Eligibility for Reimbursement Act (the “2010 Act”).<sup>146</sup> The rule removes “current 38 C.F.R. § 17.1001(a)(5), which includes automobile insurance in the definition of ‘health-plan contract.’”<sup>147</sup> This rule modifies the regulations so that they conform with the 2010 Act, which provides that veterans “covered by a health-plan contract are ineligible for VA payment or reimbursement.”<sup>148</sup>

The VA noted that “[u]nder the 2010 Act, claimants who are entitled to partial payment from a third party for providing non-VA emergency services to a veteran are no longer barred from also receiving VA payment or reimbursement for such care.”<sup>149</sup> Thus, “[i]n order to remove this partial payment exclusion from VA regulations,” the rule removes “or in part” from 38 C.F.R. § 17.1002(g) in an effort to make the language parallel with the language implemented by the 2010 Act.<sup>150</sup>

Under the 2010 Act’s authorization, the rule allows the VA to provide retroactive reimbursement for emergency treatment furnished to a veteran before the enactment of the 2010 Act.<sup>151</sup> The final rule requires such emergency treatment to have been received on or after July 19, 2001.<sup>152</sup> The applicability of this retroactive authority is limited to claims filed within one year after May 21, 2012, the effective date of the final rule.<sup>153</sup>

Additionally, the final rule amends section 17.1005 to make the VA the “secondary payer” in cases where a third party is financially responsible for part of the veteran’s emergency treatment expenses.<sup>154</sup> Section 17.1005(e)(2)

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<sup>145</sup> *See id.*

<sup>146</sup> Payment or Reimbursement for Emergency Services for Nonservice-Connected Conditions in Non-VA Facilities, 77 Fed. Reg. 23,615, 23,615 (Apr. 20, 2012) (codified at 38 C.F.R. pt. 17); *see also* Pub. L. No. 111-137, 123 Stat. 3495 (2010) (codified as amended at 38 U.S.C. § 1725).

<sup>147</sup> Payment or Reimbursement for Emergency Services, 77 Fed. Reg. at 23,615.

<sup>148</sup> *Id.*; *see also* 38 U.S.C. § 1725(c)(4)(D).

<sup>149</sup> Payment or Reimbursement for Emergency Services, 77 Fed. Reg. at 23,615.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 23,617–18 (codified at 38 C.F.R. § 17.1004(f)).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 23,618 (codified at 38 C.F.R. § 17.1005(e)).

was also added and states: “[s]ubject to the limitations of this section, VA will pay the difference between the amount VA would have paid under this section for the cost of the emergency treatment and the amount paid (or payable) by the third party.”<sup>155</sup> Thus, combined payments are considered “as payment in full and extinguish the veteran’s liability to the provider.”<sup>156</sup> However, section 17.1005(f) states that the “VA will not reimburse a claimant . . . for any deductible, copayment or similar payment that the veteran owes the third party.”<sup>157</sup>

### **7. Medical Foster Homes**

The VA’s community residential care program<sup>158</sup> “has provided health care supervision to eligible veterans who are not able to live independently and have no suitable family or significant others to provide needed supervision and supportive care.”<sup>159</sup> Alternatively, a medical foster home, such as nursing home care, “provides a greater level of care than a community residential care facility.”<sup>160</sup> In order to account for this alternative form of care, the VA has issued regulations that govern all community residential care facilities to include regulations specifically designed to govern medical foster homes.<sup>161</sup>

#### **a. § 17.73 Medical Foster Homes—General**

Section 17.73 was amended to define “medical foster home” as the following:

a private home in which a medical foster home caregiver provides care to a veteran resident and: (i) The medical foster home caregiver lives in the medical foster home; (ii) The medical foster home caregiver owns or rents the medical foster home; and (iii) There are not more than three residents receiving care (including veteran and non-veteran residents).<sup>162</sup>

The final rule also outlines three eligibility criteria that must be met before the VA will refer a veteran to a medical foster home.<sup>163</sup> Section 17.73(c)(1) conditions eligibility on the veteran being “unable to live independently safely or [being] in need of nursing home level care.”<sup>164</sup> Section 17.73(c)(2) conditions eligibility on enrollment in “either a VA Home Based Primary

<sup>155</sup> *Id.* (codified at 38 C.F.R. § 17.1005(e)(2)).

<sup>156</sup> *Id.* (codified at 38 C.F.R. § 17.1005(e)(3)).

<sup>157</sup> *Id.* (citing proposed rule to be codified at 38 C.F.R. § 17.1005(f)).

<sup>158</sup> *See* 38 U.S.C. § 1730 (2006); 38 C.F.R. § 17.61–17.72 (2012).

<sup>159</sup> Medical Foster Homes, 76 Fed. Reg. 28,917, 28,917 (proposed May 19, 2011) (to be codified at 38 C.F.R. pt. 17).

<sup>160</sup> *Id.*

<sup>161</sup> Medical Foster Homes, 77 Fed. Reg. 5186, 5186–87 (Feb. 2, 2012) (codified at 38 C.F.R. pt. 17).

<sup>162</sup> *Id.* at 5189 (codified at 38 C.F.R. § 17.73(b)).

<sup>163</sup> *See id.* (codified at 38 C.F.R. § 17.73(c)).

<sup>164</sup> *Id.*

Care or VA Spinal Cord Injury Homecare program.”<sup>165</sup> Section 17.73(c)(3) requires VA approval of the medical foster home in accordance with proposed section 17.73(d).<sup>166</sup>

***b. § 17.74 Standards Applicable to Medical Foster Homes***

The VA noted that most medical foster homes should be in compliance with the proposed rule because the Medical Foster Home program, which conforms to current practice and enforcement policy, pre-dated this rule.<sup>167</sup> Therefore, when the rule was proposed, the “VA [did] not believe there [were] any approved medical foster homes that [were] not presently in compliance with the requirements of [the] rule.”<sup>168</sup>

Specifically, the final rule adds section 17.74(a)(2), which states that “[v]entilation for cook stoves is not required”<sup>169</sup> because this requirement is not necessary for the “smaller, home-based facilities that provide food for a small number of residents.”<sup>170</sup> The rule also adds section 17.74(b), which prescribes that some community residential care facility standards be applicable to medical foster homes.<sup>171</sup> Additionally, paragraph (c) requires the homes to “plan and facilitate appropriate recreational and leisure activities” in an effort to ensure the quality of life of veterans living within the facilities.<sup>172</sup>

Paragraph (d) requires each veteran resident to have a bedroom “(1) [w]ith a door that closes and latches; (2) [t]hat contains a suitable bed and appropriate furniture; and (3) [t]hat is single occupancy, unless the veteran agrees to a multi-occupant bedroom.”<sup>173</sup> Paragraph (e) allows medical foster homes a period of sixty days after a veteran is placed in the home to come into compliance with the secondary means of escape requirement.<sup>174</sup> Paragraph (f) permits “[s]pecial locking devices that do not comply with section 7.2.1.5 of NFPA 101 . . . where the clinical needs of the veteran resident require specialized security measures.”<sup>175</sup> This exception requires written approval from the VA clinician and the VA fire/safety specialist or Director of the VA Medical Center

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 5188.

<sup>168</sup> Medical Foster Homes, 76 Fed. Reg. 28,917, 28,919 (proposed May 19, 2011) (to be codified at 38 C.F.R. pt. 17).

<sup>169</sup> Medical Foster Homes, 77 Fed. Reg. at 5189 (codified at 38 C.F.R. § 17.74(a)); Medical Foster Homes, 76 Fed. Reg. at 28,919 (proposed rule).

<sup>170</sup> Foster Homes, 76 Fed. Reg. at 28,919 (proposed rule).

<sup>171</sup> Medical Foster Homes, 77 Fed. Reg. at 5189 (codified at 38 C.F.R. § 17.74(b)).

<sup>172</sup> *Id.* (codified at 38 C.F.R. § 17.74(c)).

<sup>173</sup> *Id.* (codified at 38 C.F.R. § 17.74(d)).

<sup>174</sup> *Id.* (codified at 38 C.F.R. § 17.74(e)).

<sup>175</sup> *Id.* (codified at 38 C.F.R. § 17.74(f)).

of jurisdiction.<sup>176</sup> Paragraph (g) provides for a sixty-day provisional approval period for homes that do not have smoke and carbon monoxide detectors that meet the requirements of the proposed paragraph so long as the owners of the homes mitigate the risk through battery-operated single station alarms.<sup>177</sup> Paragraph (h) requires sprinkler systems for new construction pursuant to NFPA 13.<sup>178</sup> Additionally, pre-existing sprinkler systems must be “inspected, tested, and maintained in accordance with NFPA 25.”<sup>179</sup>

The final rule also adds section 17.74(o)(1), which prescribes that “[e]xtension cords must be three-pronged, grounded, sized properly, and not present a hazard due to inappropriate routing, pinching, damage to the cord, or risk of overloading an electric panel circuit.”<sup>180</sup> Paragraph (o)(2) requires that “[f]lammable or combustible liquids and other hazardous material must be safely and properly stored in either the original, labeled container or a safety can as defined by section 3.3.44 of NFPA 30.”<sup>181</sup>

Section 17.74(p) requires that medical foster home caregivers “demonstrate the ability to evacuate all occupants within three minutes to a point of safety outside of the medical foster home that has access to a public way.”<sup>182</sup> Paragraph (p)(3) allows a sixty-day provisional approval during which time the medical foster home must establish an alternative to such evacuation.<sup>183</sup> Proposed paragraph (q) incorporates all records requirements in current section 17.63(i), except for the statement of needed care requirement.<sup>184</sup> Paragraph (s) allows approval of equivalencies in extremely rare circumstances, and only in cases of specified approval based on compliance with explicit requirements.<sup>185</sup>

Section 17.74(t)(1) clarifies that “[p]ayment for the charges to veterans for the cost of medical foster home care is not the responsibility of the United States Government.”<sup>186</sup> However, paragraphs (t)(2) and (t)(3) prevent medical foster homes approved by the VA from charging unreasonable rates or rates not “comparable” to prices charged to non-veterans in the same or comparable medical foster homes.<sup>187</sup>

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 5189–90 (codified at 38 C.F.R. § 17.74(g)).

<sup>178</sup> *Id.* at 5190 (codified at 38 C.F.R. § 17.74(h)).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* (codified at 38 C.F.R. § 17.74(o)).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* (codified at 38 C.F.R. § 17.74(p)).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (codified at 38 C.F.R. § 17.74(q)).

<sup>185</sup> *Id.* at 5190–91 (codified at 38 C.F.R. § 17.74(s)).

<sup>186</sup> *Id.* at 5191 (codified at 38 C.F.R. § 17.74(t)).

<sup>187</sup> *Id.*

### **B. Interim Final Rules: Caregivers Program**

Effective May 5, 2011, the VA enacted an interim final rule “provid[ing] certain medical, travel, training, and financial benefits to caregivers of certain veterans and servicemembers who were seriously injured in the line of duty on or after September 11, 2001.”<sup>188</sup> This amendment is an attempt to codify a program of general caregiver support services, as mandated under the Caregivers and Veterans Omnibus Health Services Act of 2010.<sup>189</sup>

### **C. Proposed Rules: Payment for Home Health Services and Hospice Care by Non-VA Providers**

The VA has proposed to amend 38 C.F.R. § 17.56, regulating the payment of home health services and hospice care for veterans by non-VA providers.<sup>190</sup> As the VA noted, both the “separate administration of hospice care and home health services by the VHA’s Office of Geriatrics and Extended Care . . . and challenges regarding information technology systems necessary to move to the new [Centers for] Medicare [and Medicaid] rate,” have prevented immediate implementation of the new pricing methodology adopted by this original rule.<sup>191</sup>

However, the VA determined that these providers receive adequate notice and thus it has proposed a rule to make 38 C.F.R. § 17.56 applicable to them.<sup>192</sup> Additionally, this proposed rule “would remove the exception so that the billing methodology in § 17.56 would apply to payments for home health services and hospice care.”<sup>193</sup> The rule would also notify home health services and hospice care providers that the “VA would rescind all conflicting internal VA guidance that could be interpreted as providing an alternate billing methodology applicable only to these services.”<sup>194</sup> Alternatively, the VA noted that “a VHA Handbook provides guidance specific to payments for non-VA home health services and hospice care.”<sup>195</sup>

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<sup>188</sup> Caregivers Program, 76 Fed. Reg. 26,148, 26,148 (May 5, 2011) (codified as amended at 38 C.F.R. pts. 17, 71).

<sup>189</sup> *Id.*

<sup>190</sup> Payment for Home Health Services and Hospice Care by Non-VA Providers, 76 Fed. Reg. 71,920, 71,920 (proposed Nov. 21, 2011) (to be codified at 38 C.F.R. pt. 17).

<sup>191</sup> *Id.* at 71,920.

<sup>192</sup> *See id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (citing VETERANS HEALTH ADMIN., U.S. DEP’T OF VETERANS AFFAIRS, VHA HANDBOOK 1140.3, HOME HEALTH AND HOSPICE CARE REIMBURSEMENT HANDBOOK (2004)).



### III. Claims and Insurance

#### A. Final Rules: Servicemembers' Group Life Insurance and Veterans' Group Life Insurance—Slayer's Rule Exclusion

The VA amended regulations governing Servicemembers' Group Life Insurance ("SGLI"), Veterans' Group Life Insurance ("VGLI"), and SGLI Traumatic Injury Protection ("TSGLI").<sup>196</sup> Under the current law, if a servicemember dies before proceeds of SGLI can be made, the proceeds are payable to the person(s) entitled to receive proceeds of the insurance on the servicemember's life.<sup>197</sup> If no beneficiary is designated, no designated beneficiary survives the decedent, or payments are to be made by law,

SGLI and VGLI proceeds are paid in the following order: (1) To the decedent's surviving spouse; (2) to the decedent's children and their descendants in equal shares; (3) to the decedent's parents in equal shares or to the survivor of them; (4) to the duly appointed executor or administrator of the decedent's estate; or (5) to other next of kin of the decedent.<sup>198</sup>

TSGLI proceeds are also paid in this manner if an insured servicemember entitled to such payment dies before TSGLI payments are made.<sup>199</sup>

As stated by the VA, "[t]he Federal common-law slayer's rule is a public policy that generally precludes killers from benefitting from their victims' deaths" that "[c]ourts have applied . . . in resolving disputes over entitlement to SGLI proceeds."<sup>200</sup> The final rule bars a person "who is convicted of intentionally and wrongfully killing [a] decedent or determined in a civil proceeding to have intentionally and wrongfully killed [a] decedent," as well as a person who assisted the "slayer," from receiving payment of insurance proceeds, including SGLI, VGLI, or TSGLI payments and benefits.<sup>201</sup>

The VA also incorporated an "extended slayer rule," which disqualifies members of a slayer's family from receiving proceeds.<sup>202</sup> Specifically, the amendments bar a "member of the family" of a slayer or a slayer's accomplice from receiving SGLI or VGLI proceeds or TSGLI payments so long as the

<sup>196</sup> Servicemembers' Group Life Insurance and Veterans' Group Life Insurance—Slayer's Rule Exclusion, 77 Fed. Reg. 60,304, 60,304–05 (Oct. 3, 2012) (to be codified at 38 C.F.R. pt. 9).

<sup>197</sup> Servicemembers' Group Life Insurance and Veterans' Group Life Insurance—Slayer's Rule Exclusion, 76 Fed. Reg. 77,455, 77,455 (proposed Dec. 13, 2011) (to be codified at 38 C.F.R. pt. 9) (citing 38 U.S.C. § 1970(i)).

<sup>198</sup> *Id.* (citing 38 U.S.C. § 1970(a)).

<sup>199</sup> *Id.* (citing 38 U.S.C. § 1980A(g)(2)).

<sup>200</sup> *Id.* (citations omitted).

<sup>201</sup> Servicemembers' Group Life Insurance and Veterans' Group Life Insurance—Slayer's Rule Exclusion, 77 Fed. Reg. at 60,304–05.

<sup>202</sup> *Id.* at 60,306 (to be codified at 38 C.F.R. § 9.1(l), 9.5(e)).

family members “are not related to the decedent by blood, legal adoption, or marriage.”<sup>203</sup> The rule defines the term “member of the family” to include: “(1) [s]pouse; (2) [b]iological, adopted, or step child; (3) [b]iological, adoptive, or step parent; (4) [b]iological, adopted, or step sibling; or (5) [b]iological, adoptive, or step grandparent or grandchild.”<sup>204</sup>

Next, the rule bars entitlement to proceeds or payment in these circumstances “even though the criminal conviction or civil determination is pending appeal.”<sup>205</sup> Further, if a person is disqualified from receipt, the insurance proceeds or TGSLI payment are to be paid to the first person or persons in the following order of precedence:

- (A) To the next eligible beneficiary designated by the decedent in a writing received by the appropriate office of the applicable uniformed service before the decedent’s death in the uniformed services in the case of [SGLI] proceeds or a [TGSLI] benefit, or in a writing received by the administrative office . . . before the decedent’s death in the case of [VGLI] proceeds; (B) To the decedent’s widow or widower; (C) To the decedent’s child or children, in equal shares, and descendants of deceased children by representation; (D) To the decedent’s parents, in equal shares, or to the survivor of them; (E) To the duly appointed executor or administrator of the decedent’s estate; (F) To other next of kin of the decedent as determined by the insurer . . . under the laws of the domicile of the decedent at the time of the decedent’s death.<sup>206</sup>

Finally, the VA noted that this rule applies to any claim filed before the effective date of the final rule so long as it had not been paid or denied prior to November 2, 2012, as well as any claim filed on or after November 2, 2012.<sup>207</sup>

## B. Proposed Rules: Substitution in Case of Death of Claimant

The VA proposed a rule implementing section 212 of the Veterans’ Benefits Improvement Act of 2008 (“VBIA of 2008”),<sup>208</sup> “which allows an eligible survivor to substitute for a deceased claimant in order to complete the processing of the deceased claimant’s claim.”<sup>209</sup> The proposed rule would clarify the procedures and requirements for eligibility.<sup>210</sup>

<sup>203</sup> *Id.* (to be codified at 38 C.F.R. § 9.5(e)(1)–(2)).

<sup>204</sup> *Id.* (to be codified at 38 C.F.R. § 9.1(l)).

<sup>205</sup> *Id.* (to be codified at 38 C.F.R. § 9.5(e)(3)).

<sup>206</sup> *Id.* (to be codified at 38 C.F.R. § 9.5(e)(4)).

<sup>207</sup> *Id.* at 60,305.

<sup>208</sup> Veterans’ Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 212, 122 Stat. 4145 (codified as amended at 38 U.S.C. § 5121A).

<sup>209</sup> Substitution in Case of Death of Claimant, 76 Fed. Reg. 8666, 8666 (proposed Feb. 15, 2011) (to be codified at 38 C.F.R. pts. 3, 14, 20).

<sup>210</sup> *Id.*

### ***1. Amendments to Part 3***

#### ***a. Eligibility for and Scope of Substitution***

As proposed, 38 C.F.R. § 3.1010(a) would state that:

[I]f a claimant dies on or after the effective date of the [VBIA of 2008]—October 10, 2008—then a person who would be eligible to receive accrued benefits under § 3.1000(a) of the accrued benefits regulations may request to become a substitute for the deceased claimant in a claim for periodic monetary benefits (other than insurance and servicemen’s indemnity) under laws administered by the Secretary, or an appeal of a decision with respect to such a claim that was pending, when the claimant died.<sup>211</sup>

If the VA chooses to grant a request for substitution, substitutes “may continue the claim or appeal on behalf of the deceased claimant.”<sup>212</sup>

#### ***b. Requests to Substitute and Determinations***

Proposed section 3.1010(b) would require a person to file a request to substitute with the agency of original jurisdiction (the “AOJ”) within one year following the claimant’s death.<sup>213</sup> The AOJ would decide in the first instance all requests to substitute, including substitution in a pending appeal.<sup>214</sup> An appeal is not considered pending once the Board of Veterans’ Appeals (the “Board”) issues a final decision.<sup>215</sup> Only the AOJ has jurisdiction to decide an initial request to substitute, but the Board may hear an appeal of a denial of that request.<sup>216</sup>

This proposed section would not contain any “provision allowing a person requesting to substitute the option of waiving the right to one review on appeal” and would not include a “provision for waiver of AOJ consideration of a request to substitute in the first instance.”<sup>217</sup> Only one person of a “joint class,” defined as “a group of two or more persons eligible to substitute under the same priority group under 38 C.F.R. 3.1000(a)(1) through (a)(5),” would be allowed to substitute at any one time and would serve as representative of the joint class.<sup>218</sup>

#### ***c. Format of Request to Substitute***

Proposed section 3.1010(c) would require that the request to substitute be in writing, contain the word “substitute” or “substitution,” contain the claim or appeal number, and contain the names of the deceased claimant and the

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<sup>211</sup> *Id.* at 8667.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 8667–68.

<sup>217</sup> *Id.* at 8668.

<sup>218</sup> *Id.*

person requesting to substitute.<sup>219</sup> In certain circumstances, a claim for accrued benefits, death pension, or dependency and indemnity compensation by an eligible person would be considered to include a request to substitute, but the eligible person may waive this right to substitute.<sup>220</sup>

***d. Evidence of Eligibility to Substitute***

Under section 3.1010(d), the VA has proposed requiring that a person requesting to substitute file the request no later than one year after the claimant's death.<sup>221</sup> The VA would send notice to the requestor if the request included insufficient evidence of eligibility, but would not send notice "if the person filing the request could not be an eligible person."<sup>222</sup> The requestor would be allowed sixty days from the date of the VA's insufficient evidence notification or one year after the claimant's death, whichever is later, to provide the VA with sufficient evidence of eligibility.<sup>223</sup>

***e. Adjudications Before the Agency of Original Jurisdiction***

The proposed regulations would apply to the substitute all part 3 regulations that would have applied to the deceased claimant.<sup>224</sup> Under the proposed rule, "if the required notice was not sent to the deceased claimant or if the notice sent to the deceased claimant was inadequate," the VA would send notice to a substitute of information and possibly evidence necessary to substantiate a claim.<sup>225</sup> Proposed section 3.1010(f)(2) would prohibit a substitute from bringing new issues or expanding an existing claim in AOJ adjudications, but would allow a substitute to raise new theories of entitlement to the claim.<sup>226</sup> The substitute would be permitted to submit evidence and "generally would have the same rights regarding hearings, representation, and appeals as would have applied to the [deceased] claimant."<sup>227</sup>

***f. Limitations on Substitution***

Proposed section 3.1010(g) would limit substitution to claims or appeals that are undecided, and therefore pending.<sup>228</sup> The VA interprets "pending" to mean "a claim or appeal must have been initiated by the claimant before death in order for an eligible person to substitute for the claimant upon the claimant's

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 8668–69.

<sup>221</sup> *Id.* at 8669.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *See id.*

death.”<sup>229</sup> Therefore, if “a claimant dies before initiating a claim or appeal, substitution is not available.”<sup>230</sup> Further amendments to section 3.1010(g) include those proposed to paragraph (g)(2), which would clarify that “past-due benefits are those benefits . . . for the period between the effective date of the award and the last day of the month preceding the claimant’s death.”<sup>231</sup>

Additionally, proposed section 3.1010(g)(3) would “repeat the limitation under the accrued benefits statute at 38 U.S.C. 5121(a)(6),” describing when benefits awarded to a substitute and his or her joint class would be limited to the expense of last sickness and burial.<sup>232</sup> Paragraph (g)(4) would “clarify that, if an eligible person in a priority category fails or waives the right to file a request to substitute, persons of a lower category are not permitted to substitute.”<sup>233</sup> This would not increase the amount payable to other persons in the joint class.<sup>234</sup> Proposed paragraph (g)(5) would permit substitution for a deceased substitute “only if the substitute died while a claim was pending before the AOJ or the Board or an appeal of a decision on a claim was pending before the AOJ or the Board.”<sup>235</sup> Such a request to substitute for the deceased substitute would need to be filed within the one-year period from the date of the claimant’s death.<sup>236</sup>

## ***2. Amendments to Part 14: Representation of Substitutes***

The proposed rule would add a new paragraph to section 14.630, explaining that “as long as a new VA Form 21-22a, ‘Appointment of Individual as Claimant’s Representative,’ is filed,” “a person authorized to represent a claimant on a one-time basis pursuant to § 14.630 may also represent the substitute” for that same claim.<sup>237</sup> Proposed paragraph (e) “would permit such representation notwithstanding § 14.630(b)” because the process would bring that claim to completion.<sup>238</sup> Additionally, in order to permit such representation, the representative must file a new VA Form 21-22 or VA Form 21-22a signed by the substitute who authorizes the representation.<sup>239</sup> The rule also would provide that, “if the substitute wants the representation of a person under

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<sup>229</sup> *Id.* at 8670.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* (citation omitted).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

§ 14.630(a), a statement signed by the person and the substitute that no compensation will be charged or paid for the services would be required.”<sup>240</sup>

### ***3. Amendments to Part 20: Adjudications Before the Board***

The VA has proposed to amend 38 C.F.R. § 20.900 to ensure “that substitutes in appeals that were pending before the Board when the appellant died will get the benefit of the claim’s original docket number.”<sup>241</sup>

The VA has also proposed to amend 38 C.F.R. § 20.1106 by adding that: [c]ases in which a person substitutes for a deceased veteran under 38 U.S.C. 5121A are not claims for death benefits and are not subject to this section. Cases in which a person substitutes for a deceased death benefits claimant under 38 U.S.C. 5121A are claims for death benefits subject to this section.<sup>242</sup>

Additionally, the VA proposed an amendment to section 20.1302 in order to clarify that “an appeal pending before the Board when the appellant dies will be dismissed ‘without prejudice.’”<sup>243</sup> This amendment would allow an appeal to continue after a grant of request to substitute as well as ensure that the case would assume its original place on the docket.<sup>244</sup> Proposed paragraph (b)(1) “would permit the grant of a request to substitute by the AOJ prior to the dismissal of an appeal by the Board when the appellant had requested a hearing before the AOJ prior to death and a written request to substitute has been received at or before that hearing.”<sup>245</sup>

The VA has also proposed to amend 38 C.F.R. § 20.1304(b)(1) to “add to the list of items required in a motion for acceptance of [] requests”—i.e., for a change in representation, for a personal hearing, or for submission of additional evidence received more than ninety days following notice of certification of an appeal and transfer of the appellate record to the Board—“or evidence based on good cause ‘the name of any substitute claimant or appellant.’”<sup>246</sup>

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 8671.

<sup>242</sup> *Id.* (alteration in original) (quoting proposed amendment to be codified at 38 C.F.R. § 20.1106).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

## IV. Department of Veterans Affairs: Procedures and Regulations

### A. Case Law

#### *1. Federal Circuit Court Jurisdiction over Denials of Rulemaking Petitions*

In *Preminger v. Secretary of Veterans Affairs*,<sup>247</sup> the Federal Circuit held that it had jurisdiction under 38 U.S.C. § 502 to review denials of petitions for rulemaking to the Secretary of Veterans Affairs.<sup>248</sup> Preminger, the Democratic Committee Chairman for Santa Clara County, sought to register to vote the residents of a Veterans Affairs Hospital in the county.<sup>249</sup> VA regulations, however, prohibit partisan activities at VA facilities without approval.<sup>250</sup> The hospital, therefore, denied Preminger's request.<sup>251</sup> Preminger next petitioned the Secretary of Veterans Affairs for a new rule that would permit partisan voter registration at VA facilities.<sup>252</sup> The Secretary denied the petition.<sup>253</sup>

Preminger appealed this denial to the Federal Circuit, presenting it with an issue of first impression: whether it had jurisdiction to review denials of petitions for rulemaking.<sup>254</sup> After analyzing the relevant sections of Titles 5 and 38 of the United States Code, the court found that 38 U.S.C. § 502 vests the court with jurisdiction to review denials of rulemaking petitions made pursuant to 5 U.S.C. § 553(e), as well as the jurisdiction to review final rules or the repeal of such rules.<sup>255</sup>

#### *2. Industrial Surveys and Claims of Total Disability Based on Individual Unemployability*

In *Smith v. Shinseki*,<sup>256</sup> the veteran appealed a denial of his claim of "total disability based on individual unemployability ("TDIU")" based on VA medical examiners' opinions.<sup>257</sup> The veteran argued that, in order to comply with 38 U.S.C. § 5103(a), the VA was required to obtain an industrial survey for each occupational field for which he claimed disability.<sup>258</sup> The Federal

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<sup>247</sup> 632 F.3d 1345 (Fed. Cir. 2011) (per curiam).

<sup>248</sup> *Id.* at 1352.

<sup>249</sup> *Id.* at 1347.

<sup>250</sup> *See id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 1348.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 1347–48.

<sup>255</sup> *Id.* at 1350–52.

<sup>256</sup> 647 F.3d 1380 (Fed. Cir. 2011).

<sup>257</sup> *Id.* at 1382.

<sup>258</sup> *Id.* at 1382–83.

Circuit noted that the issue of whether the VA had a duty to use an industrial survey was one of first impression.<sup>259</sup> Ultimately, both the Veterans Court and the Federal Circuit rejected the veteran's argument and held "that the statute does not require the VA to obtain a survey in all cases in which a veteran is unable to return to his former occupation."<sup>260</sup>

The Federal Circuit, applying the Supreme Court's opinion in *Auer v. Robbins*,<sup>261</sup> noted that it had "previously held that VA interpretations of its own regulations in its Adjudication Procedures Manual are 'controlling' as long as they are not 'plainly erroneous or inconsistent with the regulation.'"<sup>262</sup> In this instance, because the statute in question did not make any explicit reference to industrial surveys or placing consideration on the availability of jobs, the Federal Circuit concluded that deference to the VA's denial was appropriate.<sup>263</sup>

### ***3. Additional Disability Compensation Requires at Least One Rating of Total Disability***

In *Guerra v. Shinseki*,<sup>264</sup> the Veterans Court held that a veteran's request for special monthly compensation under 38 U.S.C. § 1114(s) must be denied.<sup>265</sup> Although the veteran qualified for total disability compensation under 38 U.S.C. § 1114(j), his rating was not based on any single rating of total disability or on TDIU.<sup>266</sup> As a result, the Veterans Court held that, because the veteran did not have any total disability ratings, he was not entitled to extra compensation under subsection (s).<sup>267</sup>

The Federal Circuit affirmed and determined that the Veterans Court correctly interpreted the statute.<sup>268</sup> The court held that the VA's interpretation was both supported by the text of the statute and entitled to *Chevron* deference.<sup>269</sup>

## **B. Final Rules: Submission and Processing of Freedom of Information Act Requests**

Effective September 19, 2011, this rule amends the VA "regulations governing the submission and processing of requests for information under

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<sup>259</sup> *Id.* at 1383.

<sup>260</sup> *Id.* at 1383–84.

<sup>261</sup> 519 U.S. 452 (1997).

<sup>262</sup> *Smith*, 647 F.3d at 1385 (citing *Thun v. Shinseki*, 572 F.3d 1366, 1369 (Fed. Cir. 2009)).

<sup>263</sup> *See id.*

<sup>264</sup> 642 F.3d 1046 (Fed. Cir. 2011).

<sup>265</sup> *Id.* at 1048.

<sup>266</sup> *See id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 1047.

<sup>269</sup> *Id.* at 1049 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).



the Freedom of Information Act (FOIA) in order to implement provisions of the OPEN Government Act of 2007, and to reorganize and clarify existing regulations.<sup>270</sup>

### ***1. Amendments to Part 1***

Section 1.550 lists the purpose of the rule and the code citations for additional acts that affect FOIA requests.<sup>271</sup>

Section 1.551 defines terms used in sections 1.550 through 1.562.<sup>272</sup>

Section 1.552 provides a link for FOIA information provided online for veterans wishing to access the VA's publically accessible information.<sup>273</sup> Section 1.552 also addresses the provision of liaison officers and the VA's annual FOIA report, which is also available at the aforementioned link.<sup>274</sup>

Section 1.553 contains information about electronic and physical VA public reading rooms and also notes that some information may be redacted to protect privacy.<sup>275</sup>

Section 1.554 lists the requirements for making various forms of FOIA requests, such as: (1) requests by letter or facsimile with a signature and legible return address; (2) requests via e-mail that include an image of a signature submitted to a VA FOIA e-mail address not addressed directly to VA personnel; and (3) requests for another individual's records that may require legal authorization.<sup>276</sup> Additionally, section 1.554 lists general requirements for each form of request, noting that the request must be in writing and sufficiently specify the information sought.<sup>277</sup> Finally, the FOIA officer may require a written agreement from the requester to pay estimated fees, particularly if the fee exceeds \$250.00 or if the requester has previously failed to pay the FOIA fee in a timely manner.<sup>278</sup>

Section 1.555 enumerates who is responsible for responding to requests, establishes FOIA officers for each VA component, establishes their authority to grant, deny, or refer requests, and describes procedures for such actions.<sup>279</sup>

<sup>270</sup> Release of Information from Department of Veterans Affairs Records, 76 Fed. Reg. 51,890, 51,890 (Aug. 19, 2011) (codified as amended at 38 C.F.R. pts. 1, 2).

<sup>271</sup> 38 C.F.R. § 1.550 (2012).

<sup>272</sup> *See id.* § 1.551.

<sup>273</sup> *See id.* § 1.552 (noting that parties interested can visit <http://www.foia.va.gov/> to access VA's information electronically available via FOIA).

<sup>274</sup> *Id.* § 1.552(b)–(c).

<sup>275</sup> *See id.* § 1.553.

<sup>276</sup> *Id.* § 1.554(a)–(c).

<sup>277</sup> *Id.* § 1.554(a), (d).

<sup>278</sup> *Id.* § 1.554(e).

<sup>279</sup> *Id.* § 1.555.

Section 1.556 covers the timing of responses to requests.<sup>280</sup> Paragraph (a) states that requests will be answered in order of receipt and in accordance with FOIA guidelines.<sup>281</sup> Paragraph (b) states that the VA will use two different processing tracks, including a faster track for “simple” requests that follow FOIA guidelines, and a slower track for “complex” requests.<sup>282</sup> The FOIA Officer responding to the request will inform the requester which track his request has been placed on.<sup>283</sup> If the request is placed on the slower track, the VA official will also provide information on limiting the scope of the request in order to allow it to be processed on the faster track.<sup>284</sup> Paragraph (c) covers “unusual circumstances.” This section defines unusual circumstances as circumstances under which “it is not possible to meet the statutory time limits for processing the request” and allows the FOIA Officer to extend the normal twenty business-day timeframe for responding to a request by up to ten business days.<sup>285</sup> Paragraph (d) covers the “expedited processing” of requests by explaining when it may be appropriate and providing that, when requested, the FOIA Officer will make a determination on whether expedited processing is appropriate within ten days.<sup>286</sup>

Section 1.557 covers responses to FOIA requests.<sup>287</sup> Paragraph (a) requires acknowledgement of the request by the VA FOIA Officer.<sup>288</sup> Paragraph (b) requires the FOIA Officer to make reasonable efforts to search for and respond to requests upon receipt of a perfected request.<sup>289</sup> This subsection also allows FOIA officers to limit or redact information so long as officers indicate the amount of information deleted and note the specific exemption when technically feasible.<sup>290</sup> Paragraph (c) establishes a twenty business-day time limit for responding to requests, which is extendable for up to ten business days in unusual circumstances.<sup>291</sup> Paragraph (d) covers the procedures for adverse determinations by FOIA officers and requires notification of the adverse determination along with the forms of explanations that must be provided to the requester.<sup>292</sup>

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<sup>280</sup> *See id.* § 1.556.

<sup>281</sup> *Id.* § 1.556(a).

<sup>282</sup> *Id.* § 1.556(b)(1).

<sup>283</sup> *Id.* § 1.556(b)(2).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* § 1.556(c).

<sup>286</sup> *Id.* § 1.556(d).

<sup>287</sup> *See id.* § 1.557.

<sup>288</sup> *Id.* § 1.557(a).

<sup>289</sup> *Id.* § 1.557(b).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* § 1.557(c).

<sup>292</sup> *Id.* § 1.557(d).

Section 1.558 lays out procedures for requests for business information.<sup>293</sup>

Section 1.559 covers appeals.<sup>294</sup> Paragraph (a) recommends the requester seek informal resolution of the dispute with the FOIA Officer in question before filing a formal appeal.<sup>295</sup> Paragraph (b) provides directions for filing a written appeal.<sup>296</sup> Paragraph (c) gives directions for filing an appeal via e-mail.<sup>297</sup> Paragraph (d) covers time limits for and the content of appeals, requiring that the appeal must be postmarked no later than sixty calendar days following the adverse determination.<sup>298</sup> Paragraph (e) requires the Office of the General Counsel of the Office of Inspector General, as applicable, to respond in writing to any appeals.<sup>299</sup> Paragraph (f) requires the foregoing appeals process to be used prior to judicial review of an appeal.<sup>300</sup>

## ***2. Amendments to Part 2***

Part 2, section 2.6 delegates authority to make final determinations on FOIA request appeals to the Office of the Inspector General.<sup>301</sup>

## **C. Interim Final Rules: Restrictions on Garnishing Federal Benefit Payments**

Effective May 1, 2011, this multi-agency interim final rule was enacted by the Department of the Treasury, the Social Security Administration, the VA, the Railroad Retirement Board, and the Office of Personal Management in an effort to implement statutory restrictions on garnishments of federal benefits payments.<sup>302</sup> Under this regulation, financial institutions that receive a garnishment order on an account must determine the sum in the account from the past two months of federal benefits payments and preserve either this amount or the current account balance for the account holder, whichever is less.<sup>303</sup>

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<sup>293</sup> See *id.* § 1.558.

<sup>294</sup> See *id.* § 1.559.

<sup>295</sup> *Id.* § 1.559(a).

<sup>296</sup> See *id.* § 1.559(b).

<sup>297</sup> See *id.* § 1.559(c).

<sup>298</sup> *Id.* § 1.559(d).

<sup>299</sup> *Id.* § 1.559(e).

<sup>300</sup> See *id.* § 1.559(f).

<sup>301</sup> *Id.* § 2.6(g)(3).

<sup>302</sup> Garnishment of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. 9939, 9939 (Feb. 23, 2011) (to be codified at 5 C.F.R. pts. 831, 841; 20 C.F.R. pts. 350, 404, 416; 31 C.F.R. pt. 212; 38 C.F.R. pt. 1).

<sup>303</sup> See *id.* at 9939, 9956.

## Conclusion

The field of veterans law is comprised of a complex and interwoven network of federal law, federal regulations, and judicial decisions. 2011 saw multiple changes to this field. However, the constant that has remained is that America continues to work toward both providing and facilitating quality care for her heroes. As President Lincoln said toward the close of the bloodiest war in American history, “Let us strive . . . to care for him who shall have borne the battle, and for his widow, and his orphan.”<sup>304</sup>

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<sup>304</sup> Lincoln, *supra* note 1.