



**THE SECRETARY OF VETERANS AFFAIRS  
WASHINGTON**

May 26, 2010

The Honorable Nancy Pelosi  
Speaker of the House of Representatives  
Washington, DC 20515

Dear Madam Speaker:

I am transmitting a draft bill, the "Veterans Benefit Programs Improvement Act of 2010." I request that this draft bill be referred to the appropriate committee for prompt consideration and enactment. The draft bill would make beneficial changes to enhance the efficiency and fairness of several Department of Veterans Affairs (VA) programs of benefits to Veterans and their families and to improve the procedures for the timely adjudication of claims and appeals for such benefits.

Title I of the draft bill would improve VA's compensation and pension programs by, among other things, eliminating a disparity arising under a judicial decision concerning payment of special monthly pension to disabled Veterans and by clarifying and simplifying the law governing month-of-death payments to surviving spouses. Title I of the draft bill would also improve VA's process for establishing presumptions of service connection for diseases associated with exposure to herbicides or hazards of Gulf War service in two ways. First, it would ensure that VA has sufficient time to give thorough consideration to the complex issues involved in such determinations. Second, it would provide that the effective dates of awards based on a new presumption may be made commensurate with the date of the Secretary's determination that the presumption is needed rather than the date of final regulatory action. Title I would also extend existing authorities pertaining to contract compensation and pension examinations and pension payments to beneficiaries receiving Medicaid-covered nursing home care.

Title II of the draft bill would implement changes to improve the timeliness and efficiency of VA's adjudication of claims and appeals. In response to recent judicial decisions, the draft bill would reaffirm VA's authority to temporarily stay adjudications when necessary to avoid waste or delay, such as where a pending judicial precedent may significantly alter governing law in a way that would otherwise necessitate widespread remands of claims previously decided. The provisions in title II of the bill would also promote greater efficiency in appeals processing by providing for increased use of videoconferencing technology to conduct hearings before the Board of Veterans' Appeals (Board), by allowing the Board to consider in the first instance additional evidence submitted on appeal, and by modifying procedures relating to the timely filing of notices of disagreement and substantive appeals. Other provisions in titles II and VI of the draft bill would promote efficient administration of benefits by extending existing authorities for conducting data matching with other Federal entities and for maintaining a regional office in the Republic of the Philippines.

The Honorable Nancy Pelosi

Improvements to VA's loan guaranty program under title III of the draft bill include a provision to ensure that a single-parent Veteran who returns to active duty may obtain a VA-guaranteed home loan if the Veteran's child occupies the home. The draft bill would also authorize the Secretary to allow superior liens created by public entities providing assistance in response to a major disaster, such as Hurricane Katrina, to ensure that Veterans may obtain such disaster relief, which may reduce the likelihood of foreclosures and claims against VA's loan guaranty.

Title IV of the draft bill would revise provisions relating to vocational rehabilitation and education benefits to increase the utility of incentives for employers to provide on-the-job training to veterans with service-connected disabilities, to promote greater efficiency in the approval of educational programs, and to permit extension of the delimiting date for education benefits for a beneficiary serving as the primary caregiver of a seriously injured Veteran.

The provisions of title V of the draft bill would provide Veterans Group Life Insurance participants who are insured for less than the maximum amount the opportunity to purchase additional coverage and would make permanent the current authority to extend Servicemembers' Group Life Insurance coverage for 2 years to Veterans who are totally disabled when they leave service.

Enclosed is a detailed section-by-section analysis of the provisions of this draft bill.

The Office of Management and Budget's preliminary estimate indicates that the bill would on net reduce direct spending by \$1.23 billion over Fiscal Years (FY) 2010-2015 and \$1.65 billion over FYs 2010-2020. The Statutory Pay-As-You-Go (PAYGO) Act of 2010 provides that revenue and direct spending legislation cannot, in the aggregate, increase the on-budget deficit. If such legislation increases the on-budget deficit and that increase is not offset by the end of the Congressional session, a sequestration must be ordered. This proposal would reduce direct spending and is therefore in compliance with the Statutory PAYGO Act.

The Office of Management and Budget advises that the transmittal of this draft bill is "in accord" with the President's program.

Sincerely,



Eric K. Shinseki

Enclosure



**THE SECRETARY OF VETERANS AFFAIRS  
WASHINGTON**

May 26, 2010

The Honorable Joseph R. Biden, Jr.  
President of the Senate  
Washington, DC 20510

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The Honorable Joseph R. Biden, Jr.

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The Office of Management and Budget advises that the transmittal of this draft bill is "in accord" with the President's program.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric K. Shinseki", with a stylized flourish at the end.

Eric K. Shinseki

Enclosure

111<sup>th</sup> Congress

2<sup>nd</sup> Session

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**A Bill**

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To amend title 38, United States Code, to improve and enhance the programs of compensation, pension, loan guaranty, education and vocational rehabilitation, and insurance for veterans, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) SHORT TITLE.—This Act may be cited as the “Veterans Benefit Programs Improvement Act of 2010.”

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. References to title 38, United States Code.

**TITLE I—COMPENSATION AND PENSION MATTERS**

Sec. 101. Clarification of eligibility of veterans 65 years of age or older for service pension for a period of war.

Sec. 102. Month of death benefit for every surviving spouse of a veteran who died while in receipt of compensation or pension.

Sec. 103. Time limits and effective dates for presumption determinations based on National Academy of Sciences reports on health effects of herbicide exposure and Gulf War exposures.

Sec. 104. Extension of authority for the performance of medical disability examinations by contract physicians.

Sec. 105. Extension of limit on pension payable to Medicaid-covered veteran without spouse or children.

**TITLE II—ADJUDICATION AND APPEAL MATTERS**

Sec. 201. Staying of claims.

Sec. 202. Modification of notice of disagreement filing period.

Sec. 203. Substantive appeals.

Sec. 204. Automatic waiver of agency of original jurisdiction review of new evidence.

Sec. 205. Board to determine the most expeditious manner of providing a hearing.

Sec. 206. Decisions of the Board.

- Sec. 207. Definition of prevailing party for purposes of the Equal Access to Justice Act in veterans benefits appeals.
- Sec. 208. Extension of authority to maintain regional office in the Republic of the Philippines.
- Sec. 209. Good cause extension of the period for filing a notice of appeal with the Court of Appeals for Veterans Claims.

### TITLE III—LOAN GUARANTY MATTERS

- Sec. 301. Occupancy of property by dependent child of a veteran.
- Sec. 302. Covenants and liens created by public entities in response to disaster-relief assistance.
- Sec. 303. Extension of authority to pool loans.

### TITLE IV—EDUCATION AND VOCATIONAL REHABILITATION MATTERS

- Sec. 401. Employer incentives to provide employment and training opportunities to vocational rehabilitation and employment program participants.
- Sec. 402. SAA program approval criteria.
- Sec. 403. Delimiting date extensions for caretakers of certain seriously injured veterans.
- Sec. 404. Technical amendment regarding references to institutions of higher learning.

### TITLE V—INSURANCE MATTERS

- Sec. 501. Permitting increases of Veterans' Group Life Insurance coverage.
- Sec. 502. Indefinite retention of two-year total disability extension of Servicemembers' Group Life Insurance.

### TITLE VI—OTHER MATTERS

- Sec. 601. Expanded eligibility for presidential memorial certificates.
- Sec. 602. Extension of authority to carry out income verification.
- Sec. 603. Extension of authority to use data provided by the U.S. Department of Health and Human Services for the purpose of adjusting VA benefits.

## **SEC. 2. REFERENCES TO TITLE 38, UNITED STATES CODE.**

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or a repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

## **TITLE I—COMPENSATION AND PENSION MATTERS**

### **SEC. 101. CLARIFICATION OF ELIGIBILITY OF VETERANS 65 YEARS OF AGE OR OLDER FOR SERVICE PENSION FOR A PERIOD OF WAR.**

Section 1513 of title 38, United States Code, is amended—

(1) in subsection (a), by striking “by section 1521” and all that follows and inserting “by subsection (b), (c), (f)(1), (f)(5), or (g) of that section, as applicable, and as increased from time to time under section 5312 of this title.”;

(2) by redesignating subsection (b) as subsection (c); and

(3) by inserting after subsection (a) the following new subsection (b):

“(b) The conditions in subsections (h) and (i) of section 1521 of this title shall apply to determinations of income and maximum payments of pension for purposes of this section.”.

**SEC. 102. MONTH OF DEATH BENEFIT FOR EVERY SURVIVING SPOUSE OF A VETERAN WHO DIED WHILE IN RECEIPT OF COMPENSATION OR PENSION.**

(a) SURVIVING SPOUSE’S BENEFIT FOR THE MONTH OF THE VETERAN’S DEATH.—Subsections (a) and (b) of section 5310 are amended to read as follows:

“(a) The surviving spouse of a veteran who, at the time of the veteran’s death, was in receipt of compensation or pension under chapter 11 or 15 of this title is entitled to a benefit for the month in which the veteran died in the amount the veteran would have received for that month had the veteran not died.

“(b) If a claim for entitlement to additional compensation under chapter 11 of this title or for additional pension under chapter 15 of this title was pending at the time of the veteran’s death and the check or other payment issued to the veteran’s surviving spouse under subsection (a) is less than the amount of the benefit the veteran was entitled to for the month of the veteran’s death pursuant to the adjudication of the pending claim, the difference between the amount to which the veteran was entitled and the amount that was paid to the surviving spouse shall be treated in the same manner as an accrued benefit under section 5121 of this title.”.

(b) MONTH OF DEATH BENEFIT EXEMPT FROM DELAYED COMMENCEMENT OF PAYMENT.—Section 5111(c)(1) is amended to read as follows:

“(c)(1) This section shall not apply to payments made pursuant to section 5310 of this title.”.

(c) APPLICABILITY DATE.—The amendments made by this section shall apply with respect to the death of a veteran on or after the date of enactment of this Act.

**SEC. 103. TIME LIMITS AND EFFECTIVE DATES FOR PRESUMPTION DETERMINATIONS BASED ON NATIONAL ACADEMY OF SCIENCES REPORTS ON HEALTH EFFECTS OF HERBICIDE EXPOSURE AND GULF WAR EXPOSURES.**

(a) DETERMINATIONS CONCERNING HERBICIDE EXPOSURE.—Section 1116(c) of title 38, United States Code, is amended—

(1) In paragraph (1)(A)--

(a) by striking "60 days after the date" and inserting "120 days after the date"; and

(b) by striking "60 days after making the determination," and inserting "170 days after making the determination,";

(2) in paragraph (1)(B), by striking "60 days after making the determination," and inserting "200 days after making the determination,"; and

(3) in paragraph (2), by striking "90 days" and inserting "230 days" and by striking “on the date of issuance” and inserting “retroactive to the date on

which the Secretary's determination under paragraph (1)(A) of this subsection was required to be made".

(b) DETERMINATIONS CONCERNING GULF WAR EXPOSURES.—Section 1118(c) of title 38, United States Code, is amended—

- (1) in paragraph (1), by striking "60 days" and inserting "120 days";
- (2) in paragraph (2), by striking "60 days" and inserting "170 days".
- (3) in paragraph (3)(A), by striking "60 days" and inserting "200 days";

and,

(4) in paragraph (4), by striking "90 days" and inserting "230 days", and by striking "on the date of issuance" and inserting "retroactive to the date on which the Secretary's determination under paragraph (1) of this subsection was required to be made".

(c) REPEAL OF REPORTING REQUIREMENT.—Section 101(i) of the Veterans Programs Enhancement Act of 1998 (Pub. L. No. 105-368, 112 Stat. 3315) is repealed.

#### **SEC. 104. EXTENSION OF AUTHORITY FOR THE PERFORMANCE OF MEDICAL DISABILITY EXAMINATIONS BY CONTRACT PHYSICIANS.**

Section 704(c) of the Veterans Benefits Act of 2003 (Public Law 108-183; 117 Stat. 2651; 38 U.S.C. 5101 note), as amended by section 105 of the Veterans' Benefits Improvement Act of 2008 (Public Law 110-389; 122 Stat. 4145), is amended by striking "December 31, 2010" and inserting "December 31, 2012".

#### **SEC. 105. EXTENSION OF LIMIT ON PENSION PAYABLE TO MEDICAID-COVERED VETERAN WITHOUT SPOUSE OR CHILDREN.**

Section 5503(d)(7) is amended by striking "September 30, 2011" and inserting "September 30, 2016".

### **TITLE II—ADJUDICATION AND APPEAL MATTERS**

#### **SEC. 201. STAYING OF CLAIMS.**

(a) AUTHORITY TO STAY CLAIMS ADJUDICATIONS.—Chapter 5 is amended by inserting before section 502 the following new section:

##### **"§ 501A. Staying of claims**

"(a) Notwithstanding any other provision of this title, the Secretary may temporarily stay the adjudication of a claim or claims before the Board of Veterans' Appeals or an agency of original jurisdiction when the Secretary determines that the stay is necessary to preserve the integrity of a program administered under this title.

"(b) The Secretary shall prescribe regulations describing the factors the Secretary will consider in determining whether and to what extent a stay is warranted.

"(c) A claimant whose claim is stayed due to an action of the Secretary under a regulation prescribed in accordance with this section may petition for review of such



action by the United States Court of Appeals for Veterans Claims, which may set aside such action if it determines that the action constitutes an abuse of discretion.”.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 5 is amended by inserting after the item relating to section 501 the following new item: “501A. Staying of claims.”.

(c) BOARD OF VETERANS’ APPEALS DOCKET.—Section 7107(a)(1) is amended by inserting before the period at the end the following: “, but the Board may consider and decide a particular case before another case with an earlier docket number if the earlier case has been stayed, or if a decision on the earlier numbered case has been delayed for any reason and the later numbered case is fully developed and ready for decision”.

(d) APPLICABILITY DATE.—The amendments made by this section shall apply to—

(1) any claim for benefits under any law administered by the Secretary of Veterans Affairs that is received by the Department of Veterans Affairs on or after the date of enactment of this Act; and

(2) any claim for such benefits that was pending before the Department of Veterans Affairs on the date of enactment of this Act or that was remanded by a court to the Department on or after that date.

## **SEC. 202. MODIFICATION OF NOTICE OF DISAGREEMENT FILING PERIOD.**

(a) PERIOD FOR FILING NOTICE OF DISAGREEMENT.—Subsection (b)(1) of section 7105 is amended—

(1) by striking “one year” and inserting in its place “180 days” in the first sentence; and

(2) by striking “one-year” and inserting in its place “180-day” in the third sentence.

(b) FILING PERIOD FOR SEEKING ADMINISTRATIVE REVIEW.—Section 7106 is amended by striking “one-year” and inserting in its place “180-day” in the first sentence.

## **SEC. 203. SUBSTANTIVE APPEAL.**

Section 7105 is amended—

(1) in subsection (d)—

(A) in paragraph (3), by striking “The claimant will be afforded” and all that follows through the end of the paragraph; and

(B) by striking paragraphs (4) and (5); and

(2) by adding at the end the following new subsection:

“(e)(1) In order to complete the appeal, the claimant must file a substantive appeal within sixty days from the date the statement of the case is mailed. This period may be extended for a reasonable period, not to exceed sixty days, for good cause shown on a request submitted in writing prior to the expiration of the initial sixty-day period. The substantive appeal shall identify the particular determination or determinations being appealed and allege specific errors of fact or law made by the agency of original jurisdiction in each

determination being appealed. The claimant may not be presumed to agree with any statement of fact contained in the statement of the case to which the claimant does not specifically express disagreement.

"(2) If the claimant does not file an adequate substantive appeal in accordance with this chapter within the prescribed period, the agency of original jurisdiction shall dismiss the appeal and shall notify the claimant of the dismissal, including an explanation of the procedure for obtaining review of the dismissal by the Board of Veterans' Appeals.

"(3) In order to obtain review by the Board of Veterans' Appeals of a dismissal of an appeal by the agency of original jurisdiction, the claimant shall file a request for such review with the Board within sixty days after the date on which notice of the dismissal is mailed pursuant to paragraph (e)(2) of this section.

"(4) If the claimant does not file a request for review by the Board of Veterans' Appeals in accordance with paragraph (e)(3) of this section within the prescribed period or if such a request is timely filed and the Board affirms the dismissal of the appeal, the determination of the agency of original jurisdiction regarding the claim for benefits under this title shall become final and the claim may not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

"(5) If an appeal is not dismissed by the agency of original jurisdiction, the Board of Veterans' Appeals may nonetheless dismiss any appeal which is untimely or fails to allege specific error of fact or law in the determination being appealed."

#### **SEC. 204. AUTOMATIC WAIVER OF AGENCY OF ORIGINAL JURISDICTION REVIEW OF NEW EVIDENCE.**

Section 7105 amended by adding at the end the following new subsection:

"(f) If, either at the time or after the agency of original jurisdiction receives the substantive appeal, the claimant or the claimant's representative submits evidence to either the agency of original jurisdiction or the Board of Veterans' Appeals for consideration in connection with the issue or issues with which disagreement has been expressed, such evidence will be subject to initial review by the Board of Veterans' Appeals unless the claimant or the claimant's representative, if any, requests in writing that the agency of original jurisdiction initially review such evidence. Such request for review must accompany the submission of the evidence."

#### **SEC. 205. BOARD TO DETERMINE THE MOST EXPEDITIOUS MANNER OF PROVIDING A HEARING.**

(a) IN GENERAL.—Subsection (d)(1) of section 7107 is amended to read as follows"

"(d)(1) Upon request for a hearing, the Board will determine, for purposes of scheduling the hearing for the earliest possible date, whether a hearing before

the Board will be held at its principal location or at a facility of the Department or other appropriate Federal facility located within the area served by a regional office of the Department. The Board will also determine whether to provide a hearing through the use of the facilities and equipment described in subsection (e)(1) or by the appellant personally appearing before a Board member or panel. The Board's decision as to the location and type of hearing is final, unless the appellant can demonstrate, on motion, good cause or special circumstances warranting a different location or type of hearing."

(b) CONFORMING AMENDMENT.—Section 7107(e)(2) is amended by striking the last sentence.

## **SEC. 206. DECISIONS OF THE BOARD.**

(a) FORM OF DECISION.—Subsection (d) of section 7104 is amended by inserting "be in writing and" immediately after "Each decision of the Board shall".

(b) RATIONALE IN DECISIONS.—Subsection (d)(1) of section 7104 is amended to read as follows:

"(1) a plausible statement of the reasons for the Board's ultimate findings of fact and conclusions of law; and".

## **SEC. 207. DEFINITION OF PREVAILING PARTY FOR PURPOSES OF THE EQUAL ACCESS TO JUSTICE ACT IN VETERANS BENEFITS APPEALS.**

Section 2412(d)(2)(H) of title 28, United States Code, is amended —

(1) by inserting "(i)" after the first comma; and

(2) by inserting before the semicolon "; or, (ii) in the case of an appeal before the United States Court of Appeals for Veterans Claims, means a party who, as a result of the court's final disposition of the appeal, or as a result of a final disposition by the Secretary of Veterans Affairs on remand from the court with respect to the remanded matter, is awarded a monetary or other benefit, to include a status making the party eligible for a benefit, under the laws administered by the Secretary. Both the court and the Secretary have authority to prescribe all rules and regulations which are necessary or appropriate to implement the definition in this clause, to include the court's retention of jurisdiction over remands involving agency error for the limited purpose of awarding fees and expenses when a court remand leads to an award of benefits on remand".

## **SEC. 208. EXTENSION OF AUTHORITY TO MAINTAIN REGIONAL OFFICE IN THE REPUBLIC OF THE PHILIPPINES.**

Section 315(b) is amended by striking "December 31, 2010" and inserting "December 31, 2015".

**SEC. 209. GOOD CAUSE EXTENSION OF THE PERIOD FOR FILING A NOTICE OF APPEAL WITH THE COURT OF APPEALS FOR VETERANS CLAIMS.**

- (a) IN GENERAL.—Section 7266 of title 38, United States Code, is amended—
- (1) in subsection (d), by striking “subsection (c)(2)” and inserting “subsection (d)(2)”;
- (2) by redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively; and
- (3) by inserting after subsection (a) the following new subsection (b):
- “(b) The Court may, upon motion filed with the Court not later than 120 days after expiration of the original 120-day appeal period prescribed under subsection (a), extend the time to file a notice of appeal for a period not to exceed 120 days from the expiration of the original 120-day appeal period upon a showing of good cause. If a motion for extension is filed after expiration of the original 120-day appeal period, the notice of appeal must be filed concurrent with or prior to the filing of the motion. The Court’s decision on the motion for extension or any issue concerning the motion shall be final and not subject to review by any other Court.”
- (b) EFFECTIVE AND APPLICABILITY DATES.—
- (1) The amendments made by subsection (a) shall take effect on the date of the enactment of this Act.
- (2) The amendments made by subsection (a) shall apply with respect to cases in which a final decision by the Board of Veterans’ Appeals is issued on or after the date of the enactment of this Act and to any other cases in which the 120-day period for filing a motion for extension following the original 120-day appeal period has not expired on the date of the enactment of this Act.

**TITLE III—LOAN GUARANTY MATTERS**

**SEC. 301. OCCUPANCY OF PROPERTY BY DEPENDENT CHILD OF A VETERAN.**

- Section 3704(c)(2) is amended to read as follows:
- “(2) In any case in which a veteran is in active duty status as a member of the Armed Forces and is unable to occupy a property because of such status, the occupancy requirements of this chapter shall be considered to be satisfied if—
- “(A) the veteran’s spouse occupies or intends to occupy the property as a home, and the spouse makes the certification required by paragraph (1) of this subsection; or
- “(B) the veteran’s dependent child occupies or will occupy the property as a home, and the veteran’s attorney-in-fact or a legal guardian of the veteran’s dependent child makes the certification required by paragraph (1) of this subsection.”.

**SEC. 302. COVENANTS AND LIENS CREATED BY PUBLIC ENTITIES IN RESPONSE TO DISASTER-RELIEF ASSISTANCE.**

- Section 3703(d)(3) is amended to read as follows:

“(3) Any real estate housing loan (other than for repairs, alterations, or improvements) shall be secured by a first lien on the realty. In determining whether a loan is so secured, the Secretary may either disregard or allow for subordination to a superior lien created by a duly recorded covenant running with the realty in favor of--

“(A) a public entity that has provided or will provide assistance in response to a major disaster as determined by the President under the Disaster Relief and Emergency Assistance Act (42 U.S.C. §§ 5121, et seq.); or

“(B) a private entity to secure an obligation to such entity for the homeowner's share of the costs of the management, operation, or maintenance of property, services, or programs within and for the benefit of the development or community in which the veteran's realty is located, if the Secretary determines that the interests of the veteran borrower and of the Government will not be prejudiced by the operation of such covenant. In respect to any such superior lien created after June 6, 1969, the Secretary's determination must have been made prior to the recordation of the covenant.”.

### **SEC. 303. EXTENSION OF AUTHORITY TO POOL LOANS.**

Section 3720(h)(2) is amended by striking “2011” and inserting “2013”.

## **TITLE IV—EDUCATION AND VOCATIONAL REHABILITATION MATTERS**

### **SEC. 401. EMPLOYER INCENTIVES TO PROVIDE EMPLOYMENT AND TRAINING OPPORTUNITIES TO VOCATIONAL REHABILITATION AND EMPLOYMENT PROGRAM PARTICIPANTS.**

Section 3116(b)(1) is amended by striking “who have been rehabilitated to the point of employability” and inserting “who are participating in a vocational rehabilitation program under this chapter”.

### **SEC. 402. SAA PROGRAM APPROVAL CRITERIA.**

(a) Section 3671(b)(2) is amended by striking “In” and inserting “Except as otherwise provided in this chapter, in”.

(b) Section 3672 is amended—

(1) In subsection (b), by inserting “(1)” after “(b)”; and

(2) By inserting at the end the following new subparagraph:

“(2)(A) Subject to sections 3034(d)(3), 3675 (b)(1) and (b)(2), 3680A, 3684, and 3696 of this title, the following programs are deemed to be approved:

“(i) Accredited standard college degree programs offered at public and not-for-profit proprietary educational institutions that are accredited by agencies or associations recognized for that purpose by the Secretary of Education;

“(ii) Federal Aviation Administration approved flight training courses offered by a certified pilot school that possesses a valid Federal Aviation Administration pilot school certificate; and

“(iii) Apprenticeship programs registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship (OA) or a State Apprenticeship Agency recognized by OA, pursuant to the National Apprenticeship Act (29 U.S.C. 50).

“(B) Subject to section 3684 of this title, any program leading to a secondary school diploma offered by a secondary school approved in the State in which it is operating is deemed to be approved.

“(C) Subject to section 3675(b)(1) of this title, any licensure test offered by a Federal, State, or Local government is deemed to be approved.”.

(c) Section 3673 is amended by adding at the end the following new subsection:

“(d) **Compliance and oversight authority.**--The Secretary may utilize the services of the State approving agency for such compliance and oversight purposes as the Secretary determines appropriate regardless of whether the Secretary or the particular agency approved the courses offered in its State.”.

(d)(1) Section 3675(a)(1) is amended by striking “A State approving agency may approve the courses offered by an educational institution when—” and inserting “The Secretary or a State approving agency may approve non-degree accredited programs and accredited programs offered by proprietary for-profit educational institutions when—”.

(2) Section 3675(b)(1) is amended by inserting “the Secretary or” after “as prescribed by”.

(e) Section 3679(a) is amended—

(1) by inserting “Secretary or the” after “disapproved by the”; and

(2) by inserting “the Secretary or” after “courses disapproved by”.

(f) Section 3689(a)(1) is amended by inserting “the test is approved under 3672 of this title or” after “unless”.

(g) Section 3034(d)(3) is amended to read as follows:

“(3) the flight school courses are approved by the Federal Aviation Administration and are offered by a certified pilot school that possesses a valid FAA pilot school certificate.”.

#### **SEC. 403. DELIMITING DATE EXTENSIONS FOR CARETAKERS OF CERTAIN SERIOUSLY INJURED VETERANS.**

(a) Section 3031(d) is amended to read as follows:

“(d) In the case of an individual eligible for educational assistance under this chapter –

“(1)(A) who was prevented from pursuing such individual’s chosen program of education before the expiration of the 10-year period for the use of entitlement under this chapter otherwise applicable under section because of a physical or mental disability which was not the result of the individual’s own willful misconduct, or

“(B) who was prevented from pursuing such individual’s chosen program of education before the expiration of the 10-year period for the use of entitlement under this chapter otherwise applicable under section because he or she was acting as the primary

caretaker of a servicemember or veteran who suffered from a serious injury, not resulting from that servicemember's or veteran's own willful misconduct, that was incurred after September 10, 2010,

“(2) such 10-year period shall not run with respect to such individual during the period of time that such individual was so prevented from pursuing such program and such 10-year period will again begin running on the first day following such individual's recovery from such disability, the first day following the recovery of the servicemember or veteran for whom the individual is the servicemember's or veteran's primary caretaker from such disability, or the first day following the date upon which the individual ceases to be the servicemember's or veteran's primary caretaker, on which it is reasonably feasible, as determined under regulations which the Secretary shall prescribe, for such individual initiate or resume pursuit of a program of education with educational assistance under this chapter.”.

(b) Section 3512(c) is amended to read as follows:

“(c)(1) Subject to paragraph (2), notwithstanding the provisions of subsection (a) of this section, an eligible person may be afforded educational assistance beyond the age limitation applicable to such person under such subsection if (A) such person suspends pursuit of such person's program of education after having enrolled in such program within the time period applicable to such person under such subsection, (B) such person is unable to complete such program after the period of suspension and before attaining the age limitation applicable to such person under such subsection, and (C) the Secretary finds that the suspension was due to conditions beyond the control of such person; but in no event shall educational assistance be afforded such person by reason of this subsection beyond the age limitation applicable to such person under subsection (a) of this section plus a period of time equal to the period such person was required to suspend the pursuit of such person's program, or beyond such person's thirty-first birthday, whichever is earlier.

“(2) The provisions of paragraph (1) shall also apply in the case of an eligible person who was the primary caregiver of a servicemember or veteran who suffered from a serious injury, not the result of his or her own misconduct, incurred after September 10, 2010. In such a case, the termination the period of mental or physical disability referred to in that paragraph shall refer to the disability of the servicemember or veteran to whom care was being provided by the eligible person. Any period of suspension of a program of education during which such person acted in such capacity shall be considered as being due to conditions beyond the control of that person, and such person's period of eligibility shall not be subject to any age limitation.”.

(c) Section 3319(h)(5) is amended by adding at the end the following:

“The age limitation in this paragraph shall not apply to a child who was prevented from pursuing or completing his or her chosen program of education because he or she was acting as the primary caretaker of a servicemember or veteran who suffered from a serious injury, not resulting from that servicemember's or veteran's own willful misconduct, that was incurred after September 10, 2010. In such a case, the child may pursue his or her program of education for a period not to exceed the period during which he or she was the servicemembers' or veteran's primary caretaker. Such period will begin on the date the child is no longer the primary caretaker or the child is no longer prevented from pursuing his or her education.”.

**SEC. 404. TECHNICAL AMENDMENT REGARDING REFERENCES TO INSTITUTIONS OF HIGHER LEARNING.**

Section 3313 is amended by striking “higher education” each place it appears and inserting “higher learning”.

**TITLE V—INSURANCE MATTERS**

**SEC. 501. PERMITTING INCREASES OF VETERANS’ GROUP LIFE INSURANCE COVERAGE.**

Section 1977(a) is amended—

(1) in paragraph (1), by striking the second sentence; and

(2) by adding at the end the following new paragraph:

“(3) A veteran who is less than 60 years old and is insured under Veterans’ Group Life Insurance for an amount less than the maximum amount for Servicemembers’ Group Life Insurance in effect under section 1967(a)(3)(A)(i) of this title may increase the amount of Veterans’ Group Life Insurance coverage by \$25,000 at the time of renewal, if any, subject to the limitation in the second sentence of paragraph (1) of this subsection.”.

**SEC. 502. INDEFINITE RETENTION OF TWO-YEAR TOTAL DISABILITY EXTENSION OF SERVICEMEMBERS’ GROUP LIFE INSURANCE.**

(a) MEMBERS SEPARATED OR RELEASED FROM ACTIVE DUTY OR ACTIVE DUTY FOR TRAINING.—Section 1968(a)(1)(A) is amended by striking clause (ii) and inserting:

“(ii) The date that is two years after the date of separation or release from such active duty or active duty for training, in the case of such a separation or release occurring on or after June 15, 2005.”.

(b) MEMBERS SEPARATED OR RELEASED FROM READY RESERVE.—

Section 1968(a)(4) is amended by striking subparagraph (B) and inserting:

“(B) The date that is two years after the date of separation or release from such assignment, in the case of such a separation or release occurring on or after June 15, 2005.”.

**TITLE VI—OTHER MATTERS**

**SEC. 601. EXPANDED ELIGIBILITY FOR PRESIDENTIAL MEMORIAL CERTIFICATES.**

Section 112(a) is amended—



- (1) by inserting “and persons who died in the active military, naval, or air service,” after “under honorable conditions,”; and
- (2) by striking “veteran’s” and inserting “deceased individual’s”.

**SEC. 602. EXTENSION OF AUTHORITY TO CARRY OUT INCOME VERIFICATION.**

Section 5317 (g) is amended by striking “2011” and inserting in its place “2016.”

**SEC. 603. EXTENSION OF AUTHORITY TO USE DATA PROVIDED BY THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES FOR THE PURPOSE OF ADJUSTING VA BENEFITS.**

(a) IN GENERAL.—Section 5317A(d) is amended by striking “2011” and inserting in its place “2021”.

(b) CONFORMING AMENDMENT.—Section 453(j)(11)(G) of the Social Security Act (42 U.S.C. 653(j)(11)(G)) is amended by striking “2011” and inserting in its place “2021”.

## SECTION-BY-SECTION ANALYSIS

### TITLE I—COMPENSATION AND PENSION MATTERS

#### **Sec. 101. Clarification of eligibility of Veterans 65 years of age or older for service pension for a period of war.**

Section 101 would amend 38 U.S.C. § 1513 to clarify that permanent and total disability is a necessary predicate for entitlement to special monthly pension under 38 U.S.C. § 1521.

Section 1521(a) provides that the Department of Veterans Affairs (VA) must pay a pension to an eligible wartime Veteran “who is permanently and totally disabled from non-service-connected disability not the result of the Veteran’s willful misconduct.” Section 1521(e) provides for an increased pension amount, known as special monthly pension, for Veterans who, in addition to being permanently and totally disabled, have “additional disability or disabilities independently ratable at 60 per centum or more” or are permanently housebound due to a disability or disabilities. Section 207 of the Veterans Education and Benefits Expansion Act of 2001 established provisions in 38 U.S.C. § 1513(a) authorizing VA to pay to wartime Veterans aged 65 years or older pension “at the rates prescribed by section 1521 . . . and under the conditions (other than the permanent and total disability requirement) applicable to pension paid under that section.” Section 1513(b) specifies that a Veteran who would qualify for basic pension entitlement under both section 1513(a) (based on age) and section 1521 (based on disability) shall be paid only under section 1521.

In Hartness v. Nicholson, 20 Vet. App. 216 (2006), the United States Court of Appeals for Veterans Claims (Veterans Court) interpreted 38 U.S.C. §§ 1513(a) and 1521(e) to require an award of special monthly pension to a wartime Veteran if, in addition to being at least 65 years old, he or she is considered permanently housebound or possesses a minimum disability rating of 60 percent. By operation of 38 U.S.C. § 1513(b), under the court’s interpretation, elderly Veterans who are not permanently and totally disabled could receive a greater pension than elderly Veterans who are permanently and totally disabled.

For example, a Veteran who is 65 years old and has a disability rated 60 percent disabling would obtain basic pension entitlement only under section 1513(a), based on his or her age. Under the Hartness decision, the Veteran would also be entitled to special monthly pension under section 1521(e) by reason of having a disability rated 60 percent disabling. In contrast, a Veteran who is 65 years old and is also permanently and totally disabled would, under 38 U.S.C. § 1513(b), obtain basic pension entitlement only under section 1521(a), based on his or her permanent and total disability. The latter Veteran would not be entitled to special monthly pension under 38 U.S.C. § 1521 unless he or she had an “additional disability or disabilities independently ratable at 60 per centum or more,” above and beyond his permanent and total disability. Under Hartness, therefore, elderly Veterans who are not permanently and totally disabled could receive a higher pension rate than elderly Veterans who are permanently and

totally disabled. We believe that, in enacting section 1513(a) to extend basic pension entitlement to elderly wartime Veterans, Congress intended to retain the requirement in section 1521(e) that permanent and total disability is a necessary predicate for entitlement to special monthly pension.

Congress established special monthly pension to provide enhanced financial assistance to wartime Veterans who had additional expenses due to their high degree of disability, e.g., those in need of aid and attendance (see 38 U.S.C. § 1521(d)), those who are permanently housebound as a result of their serious disabilities, and those with a disability or disabilities rated 60 percent or higher in addition to a permanent and total disability. A wartime Veteran who is 65 years of age or older without a permanent and total disability will not incur the same disability-related expenses, and does not have the same need for enhanced pension, as a Veteran with a totally disabling condition and another disability rated 60 percent or higher. In other words, if a Veteran has a totally disabling condition and a second seriously disabling condition, the Veteran's living expenses are likely to increase significantly. Congress established special monthly pension precisely to offset somewhat the increased expenses. The Veterans Court's conclusion in Hartness that enactment of section 1513 authorized increased pension to every wartime Veteran age 65 or over who has a disability rated 60 percent or higher is inconsistent with the clear purpose of special monthly pension.

We estimate that enactment of section 101 would result in cost savings of \$3.2 million during FY 2011 and \$181 million over the ten-year period FY 2011-2020.

**Sec. 102. Month of death benefit for every surviving spouse of a Veteran who died while in receipt of compensation or pension.**

Section 102 would revise 38 U.S.C. §§ 5310 and 5111 to make clear that every surviving spouse of a Veteran who was receiving VA compensation or pension at the time the Veteran died is entitled to a benefit for the month of death in the amount of compensation or pension the Veteran would have received for that month but for his or her death. This would clarify existing law concerning the month-of-death benefit and would make the benefit easier to administer.

Pursuant to 38 U.S.C. § 5110(d), a surviving spouse's award of death compensation, dependency and indemnity compensation (DIC), or death pension may be made effective from the first day of the month of the Veteran's death in certain circumstances. Section 5310(a) of title 38, United States Code, enacted in 1962 (and then codified at 38 U.S.C. § 3010), provides that, if the surviving spouse is entitled under section 5110(d) to death compensation, DIC, or death pension for the month of the Veteran's death, the amount of the benefit for that month shall be not less than the amount of disability compensation or pension the Veteran would have received for that month but for his or her death. Section 506 of the Veterans' Benefits Improvements Act of 1996, Pub. L. No. 104-275, § 506, 110 Stat. 3322, 3343, added subsection (b) to section 5310, which provides a benefit for the month of a Veteran's death if the Veteran's surviving spouse is not entitled to death compensation, DIC, or death pension for the month of death. The benefit provided by section 5310(b) is a one-time payment

conditioned on the surviving spouse's nonentitlement to death benefits for the month of the Veteran's death. The clear purpose of the 1996 amendment was to ensure that each surviving spouse of a Veteran who was receiving compensation or pension at the time of death will be paid a benefit for the month of death, even if the surviving spouse would not otherwise be entitled to death compensation, DIC, or death pension for that month.

The statutory scheme is ambiguous, however, as applied to circumstances in which the Veteran was receiving compensation or pension at the time of death and the surviving spouse is entitled under section 5110(d) to death compensation, DIC, or death pension for the month of death in an amount greater than the amount of compensation or pension payable to the Veteran for that month. In that situation, section 5111(a) and (c) would appear to preclude payment under section 5110(d) for the month of death. The language of section 5310(b)(1) could be construed to provide that the surviving spouse is also not entitled to the month-of-death payment authorized by section 5310(b), because he or she is, in principle, "entitled to death benefits . . . for the month in which the veteran's death occurs," even though he or she is precluded from receiving those benefits. We do not believe Congress intended such a result, and we construe the statutes to permit payment of the month-of-death benefit under section 5310(b) in such circumstances. We believe the statutes should be revised to clarify this authority. Further, because the combined effect of subsections (a) and (b) is to permit payment for the month of death in all cases in an amount equal to the amount the veteran would have received for that month, we recommend revising the statute to provide a single month-of-death benefit for all surviving spouses of Veterans who were entitled to compensation or pension at the time of death. Providing for a single type of month-of-death payment would make this payment easier for VA to administer.

Section 102 would clarify these statutes and would establish a simplified scheme for month-of-death payments. It would amend section 5310 to provide that the surviving spouse of a Veteran who was in receipt of compensation or pension at the time of the Veteran's death would receive a payment for the month of death in the amount of compensation or pension the Veteran would have received for that month but for his or her death. The amendment to section 5310 would further provide that if a claim for increased compensation or pension pending at the time of the Veteran's death results in an increase in the Veteran's entitlement for the month of death, any amount not paid to the surviving spouse as a month-of-death benefit will be paid to the surviving spouse as an accrued benefit under 38 U.S.C. § 5121.

The amendment to section 5310 would also remove the provision currently in paragraph (b)(2) that provides that a check issued to a Veteran is negotiable by the surviving spouse and will be treated as payment to the spouse. Removing this provision would allow VA to request that all surviving spouses return the Veterans' checks, and then issue new checks directly to the surviving spouses to pay the month-of-death benefit. This would improve VA's ability to track month-of-death payments and would alleviate administrative issues, including, in some instances, the month-of-death benefit being paid twice. Further, this amendment would address any difficulties that

the surviving spouses are encountering when attempting to negotiate checks made out to deceased Veterans.

In addition, section 102 would amend 38 U.S.C. § 5111(c)(1) to provide that the month-of-death payments under 38 U.S.C. § 5310 are not subject to the restrictions of section 5111.

This amendment would help streamline VA's ability to automate payments through VA's electronic information system, VETSNET, without the manual processing necessary under the current statutory scheme.

There are no costs associated with this amendment, which would not result in any change in amounts currently paid to surviving spouses.

**Sec. 103. Time limits and effective dates for presumption determinations based on National Academy of Sciences reports on health effects of herbicide exposure and Gulf War exposures.**

Section 103 would amend 38 U.S.C. §§ 1116 and 1118 to provide extended time limits for VA action based on reports received from the Institute of Medicine of the National Academy of Sciences (IOM) concerning the health effects of herbicide exposure and Gulf War exposures. Pursuant to those statutes, when VA receives reports from the IOM concerning such health effects, VA must determine, for each health effect discussed in the report, whether a presumption of service connection is warranted by reason of a positive association between the health effect and herbicide exposure or exposure to hazards associated with Gulf War service. That determination must be made not later than 60 days after the date VA receives the IOM report. If VA finds that a presumption is warranted for any condition, the statutes require VA to publish proposed rules not later than 60 days after the date of its determination, and to publish final rules not later than 90 days after the date the proposed rules are published. Further, not later than 60 days after making its initial determination, VA must also publish a "negative notice" explaining the scientific basis for its determination that presumptions are not warranted for any other diseases discussed in the IOM report.

The current time limits afforded under sections 1116 and 1118 have proven impractical in view of the complexity of the issues, the need for thorough and fully-informed review of the evidence, and the requirements of the rule-making process. The IOM's reports routinely are several hundred pages in length, contain detailed analysis of hundreds of scientific studies, and state findings with respect to dozens of distinct health outcomes. Upon receipt of each IOM report, VA convenes a working group, including members with relevant scientific expertise, to analyze the report, to review relevant studies and data cited in the report, and to prepare analyses and recommendations to a task force of high-level VA officials, who in turn advise the Secretary of Veterans Affairs. Due to the complexity and importance of these matters and the need for full and fair consideration of the medical and legal issues they entail, VA has often been unable to meet the 60-day statutory deadline for an initial determination. We believe, based on our experience, a 120-day period for the Secretary's decision would permit adequate

time for full consideration of the IOM report by VA medical experts and legal and policy officials through the established work group and task force review process.

The drafting and issuance of proposed rules to establish new presumptions can seldom be accomplished within the current 60-day statutory time limit, due to the need to draft legally sufficient rules and explanatory material and to permit adequate time for review and coordination within VA and the Executive Branch. The same considerations apply to the issuance of final rules, which are further affected by the need to provide a period (usually 60 days) for submission of public comments and the need to analyze and respond to those comments. Finally, VA's notices explaining its decisions not to establish presumptions for certain conditions discussed in IOM reports generally are among the most complex documents VA is required to draft, due to the number of distinct conditions addressed in each IOM report and the need to discuss complex scientific evidence and concepts in a manner understandable by the public. Based on our experience in undertaking these actions over the past 17 years, we believe that time periods of 170 days to issue proposed rules, 200 days to issue negative notices, and 230 days to issue final rules would permit adequate time to draft and coordinate necessary notices, address public comments, and obtain Executive Branch clearance. The extension of the time periods is necessary to ensure that VA's determinations and actions within this process are properly based on thorough and accurate evaluation of the available scientific evidence and are fully explained to the public.

Sec. 103 would further amend 38 U.S.C. §§ 1116 and 1118 to provide that the regulatory presumptions will be given effect retroactive to the date on which the legislation requires the Secretary to make a determination. We believe this would promote greater consistency and fairness in the payment of benefits based on new presumptions and would ensure that beneficiaries are not adversely affected by delays in VA decision making or the rule-making process. The statutes currently require that new presumptions take effect on the date the final rules are issued. Under 38 U.S.C. § 5110(g), VA may not pay benefits for any period before the effective date of such new rules. The United States Court of Appeals for the Federal Circuit (Federal Circuit) has held that, under the Agent Orange Act of 1991, any delays beyond the time periods for issuing regulatory presumptions do not entitle claimants to a remedy, such as payment of benefits retroactive to the time VA should have issued the regulations. Accordingly, delays in the rule-making process may unintentionally delay the effective date of benefit awards.

We do not believe that the necessary extension of the statutory time periods governing VA action should require a corresponding delay in the effective date of awards under the new presumption. Section 103 would, in effect, provide that once VA issues a final rule establishing a new presumption it may pay benefits retroactive to the date on which the Secretary's determination was required to be made, which would be the date 120 days after the date VA received the IOM report. Providing for benefit awards to be effective from the date 120 days after VA receives an IOM report would be consistent in principle with existing law, which provides only an outer limit of 210 days for VA to issue final rules (i.e., 60 days for an initial decision, 60 days to issue proposed rules, and 90 days to issue final rules). In practice, however, section 103 would ensure

greater consistency and fairness in the effective dates of awards under all new presumptions irrespective of variations in the timing of issuance of final rules due to expected or unexpected delays in the rule-making process.

Sec. 103 would also remove the requirement in the Veterans Programs Enhancement Act of 1998 (VPEA) (Pub. L. No. 105-368, 112 Stat. 3315) that the Secretary, within 120 days of receiving an IOM report on the health effects of exposure to certain hazards of Gulf War service, and after consulting with other Federal departments and agencies, provide a report to Congress that discusses the available scientific and medical information and makes recommendations for establishing presumptions by legislation. The VPEA was enacted within three weeks of the Persian Gulf War Veterans Act of 1998 (PGWVA) (Pub. L. No. 105-277, title XVI, 112 Stat. 2681-742), which established the decision and rule-making procedures codified in 38 U.S.C. § 1118. Unlike the PGWVA, the VPEA contemplated that Congress alone would decide whether new presumptions are warranted on the basis of IOM's reports concerning Gulf War exposures. We believe that the VPEA reporting requirement is unnecessary because any actions VA recommends to Congress under the VPEA would be actions that VA would be authorized and required to take pursuant to its rule-making duties under 38 U.S.C. § 1118. The Secretary of Veterans Affairs promptly notifies Congress of his determinations made under 38 U.S.C. § 1118 and provides a thorough explanation of his determinations through the processes established in that statute. Thus, in our view, the essential purpose of the VPEA reporting requirement is accomplished through the section 1118 process.

There are no significant costs associated with this provision.

**Sec. 104. Extension of authority for the performance of medical disability examinations by contract physicians.**

Section 704(a) of the Veterans Benefits Act of 2003, Public Law 108-183, authorizes VA to provide for the conduct of VA compensation and pension examinations by persons other than VA employees by using appropriated funds other than mandatory funds appropriated for the payment of compensation and pension benefits. In accordance with section 704(b) of that act, VA exercises this authority pursuant to contracts with private entities. However, under section 704(c), as amended by section 105 of the Veterans' Benefits Improvement Act of 2008, Public Law 110-389, this authority will expire on December 31, 2010.

Section 104 would extend to December 31, 2012, VA's authority to contract for compensation and pension examinations. Extending this authority is essential to VA's objective of ensuring the timely adjudication of disability claims and would allow the Veterans Health Administration to focus its resources on providing needed health care to Veterans. The demand for medical disability examinations has increased, largely due to an increase in the complexity of disability claims, an increase in the number of disabilities for which Veterans claim benefits, and changes in eligibility requirements for disability benefits. Extending the authority to provide examinations to Veterans through non-VA medical providers would improve patient care and accelerate benefit delivery.

We anticipate no benefit costs or savings because this flexibility impacts only the timeliness of rating decisions. As this provision would only extend VA's current authority to effectively utilize supplemental and other discretionary appropriated funds as available for examinations, we estimate that enactment of section 104 would have no significant financial impact.

**Sec. 105. Extension of limit on pension payable to Medicaid-covered Veteran without spouse or children.**

Section 105 would extend through September 30, 2016, the provisions of 38 U.S.C. § 5503(d), which limit to \$90 the pension payable to certain recipients of Medicaid-covered nursing home care, and protect that pension payment from being applied to the cost of the recipient's nursing-home care. Prior to the enactment of the provisions codified in section 5503(d) pension recipients did not have their pension reduced upon entry into Medicaid-covered nursing-home care, but were required to apply their pension benefits to cover the cost of such care. Generally in situations now covered by section 5503(d), Title XIX Medicaid benefits cover the nursing care costs in excess of the protected amount (\$90) that is payable to the Veteran or surviving spouse under this provision.

Pursuant to subsection (d)(7) of section 5503, this limitation is set to expire on September 30, 2011. If this provision is allowed to expire, it would increase VA's pension expenditures, while potentially decreasing the funds available to certain Veterans and surviving spouses, who would be required to apply their pension to the cost of their nursing-home care. Without this provision, the amount that these Veterans and surviving spouses would be allowed to keep for their personal needs would vary under different state Medicaid plans, but generally would be less than the \$90 amount permitted by this provision. Further, if VA pension were to be paid to these recipients at the maximum rate permitted, the monthly payments would not be sufficient to cover the normal costs of nursing home care, but would exceed the amount an individual may receive in order to qualify for Title XIX Medicaid benefits. Allowing this provision to expire would likely result in certain Veterans and surviving spouses being unable to afford nursing care.

Benefit savings to VA associated with this provision are estimated to be \$559.4 million during the first year and \$2.9 billion for five years.

**TITLE II—ADJUDICATION AND APPEAL MATTERS**

**Sec. 201. Staying of claims.**

Section 201(a) would explicitly authorize VA to stay temporarily its adjudication of a claim pending before either a VA regional office (or other agency of original jurisdiction) or the Board of Veterans' Appeals (Board) when the stay is necessary to preserve the integrity of a program administered under title 38, United States Code.



It is widely accepted that courts and administrative adjudicative agencies generally have the authority to manage their case loads and to stay cases as necessary for proper management. When a court decision in one case is likely to significantly affect numerous other pending claims, VA historically has used the option of “staying” affected claims while pursuing an appeal of the court decision. This enables VA to avoid waste and delay associated with claim processing and awards that may prove unwarranted based on a court’s decision on appeal. In addition, staying claims improves effectiveness and efficiency by ensuring consistent application of law concerning important issues.

However, the Veterans Court has curtailed VA’s ability to stay claims pending the outcome of an appeal. In Ramsey v. Nicholson, 20 Vet. App. 16 (2006), the Veterans Court found that VA lacked authority to stay claims while it appealed the Veterans Court’s decision in Smith v. Nicholson, 19 Vet. App. 63 (2005). Similarly, in Ribaud v. Nicholson, 20 Vet. App. 552 (2007), the Veterans Court held that VA could not stay cases while it appealed the decision in Haas v. Nicholson, 20 Vet. App. 257 (2006). Both of these cases involved legal issues with broad and costly implications for VA programs. According to these decisions, VA must obtain permission from the Veterans Court or the Federal Circuit to stay claims, thereby placing under control of these courts VA’s entire docket of claims affected by the decision on appeal.

VA believes that these Veterans Court decisions are contrary to the statutory authority of the Veterans Court, which is limited to review of final Board decisions in individual cases, and the statutory authority of the Federal Circuit, which is limited to review of final Veterans Court decisions. We believe also that these Veterans Court decisions improperly usurp VA’s authority to manage its own caseload. Further, the courts are ill-positioned to evaluate the numerous administrative, fiscal, and managerial concerns beyond an individual appellant’s case that necessarily factor into decisions concerning management of VA’s caseload, particularly with respect to issues that broadly affect VA’s claims-processing system. In addition, cases before the Board and regional offices are not properly before the Federal Circuit, and any order by the Federal Circuit regarding such claims would be entirely advisory and, thus, impermissible. Finally, VA believes it will often have difficulty obtaining the court approval for stays that VA considers necessary.

By restoring VA’s authority to stay cases, this legislation would enable VA to avoid the burdens of implementing a significant court decision which will later be overturned. VA rarely initiates appeals of adverse Veterans Court decisions and exercises its right of appeal only in those significant cases in which we believe there is a substantial likelihood of reversal. In recent years, VA has prevailed in its appeals on significant issues in a number of cases, including the Smith and Haas cases referenced above, as well as Shinseki v. Sanders, 129 S. Ct. 1696 (2009), and Vazquez-Flores v. Shinseki, 580 F.3d 1270 (Fed. Cir. 2009). VA does not routinely stay cases each time it appeals, but has used the authority to stay cases sparingly, where such action was necessary to prevent significant waste or disruption in VA’s adjudication process. Between 1992 and 2007, the Board issued stays on only six occasions while VA sought review of an adverse decision. In three of those cases, the adverse decision was

ultimately reversed on appeal. In three other instances, the Board issued stays while Veterans or Veterans service organizations sought review of decisions adverse to them. One of those stays was issued at the direction of the U.S. Court of Appeals for the Federal Circuit. VA anticipates that the authority to stay cases will continue to be used only in those rare instances where great administrative waste and delay would occur without the use of such authority.

Section 201(a) would also require VA to issue regulations describing the factors it will consider in determining whether and to what extent stays are warranted and would permit claimants to seek review of a stay in the Veterans Court.

Section 201(c) would clarify that the Board has the authority to decide cases out of docket-number order when a case has been stayed or when there is sufficient evidence to decide a claim but a claim with an earlier docket number is not ready for a decision.

Currently, 38 U.S.C. § 7107(a)(1) requires the Board to decide each case “in regular order according to its place upon the docket,” subject to limited exceptions which do not include the staying of cases pending judicial appeals. This provision would clarify that compliance with section 7107(a)(1) does not require the Board to refrain from deciding a case unaffected by a stay simply because that case has a higher docket number than a stayed case. It would also clarify that the Board may decide a fully developed case before a not fully developed case regardless of docket number. Permitting the Board to decide cases out of docket order in these circumstances would eliminate disruption and delay of claims not governed by a stay and improve efficiency for those claims that are ready for decision.

Under section 201(d), the provisions of this section would apply to benefit claims received by VA on or after the date of enactment and to claims pending before VA on that date or remanded to VA by a court on or after that date.

The provisions in section 201 governing staying of claims and management of the Board’s docket would save the benefit costs and administrative expenses associated with adjudicating claims under court decisions that are later overturned on appeal. The amount of savings cannot be predicted because the potential savings would depend upon the nature of the court decisions at issue, the extent to which those decisions compel payments or other expenses, and the number of claims affected.

However, past examples such as the Haas case illustrate the significant costs that the draft bill could avoid. In Haas, VA argued that the presumption of service connection for disabilities related to Agent Orange applied only to Veterans who served within the land boundaries of Vietnam. Rejecting this interpretation, the Veterans Court made the presumption of herbicide exposure potentially applicable to Veterans who received the Vietnam Service Medal or who served in the waters off the shores of Vietnam. VA appealed the Veterans Court decision to the Federal Circuit and stayed all claims involving the presumption pending at the Board and regional offices. However, the Veterans Court invalidated the stay and required VA to submit a motion for stay in

order to stay, the affected claims. Accordingly, VA filed a motion for stay, and the Veterans Court granted the motion.

Nearly two years after the Veterans Court decision, the Federal Circuit overturned the Veterans Court's interpretation. Without the stay implemented in Haas, VA estimated that the Veterans Court decision in that case would have resulted in approximately \$22.9 million in administrative costs in the initial year of implementation and approximately \$2.1 billion in benefit costs in the first year VA granted claims. These numbers were calculated based upon an anticipated implementation date of October 2007. The Federal Circuit issued its decision in May 2008, approximately eight months after the assumed October 2007 implementation date. Although the year-one cost estimates do not track the implementation time frame exactly, they do reasonably illustrate the potential financial burdens VA might face without the authority to issue stays. In fact, given the approximately two-year time span between the Veterans Court decision and the Federal Circuit decision on appeal, VA could have incurred costs equal to or in excess of these cost estimates, depending upon when and how implementation of the Veterans Court decision in Haas would have taken place.

#### **Sec. 202. Modification of notice of disagreement filing period.**

Section 202 of the draft bill would amend section 7105(b)(1) to require persons seeking appellate review of a VA decision to file a notice of disagreement (NOD) within 180 days from the date VA mails such decision.

Currently, persons challenging a decision of a VA agency of original jurisdiction (AOJ) have one year from the date the AOJ mails the decision to initiate an appeal to the Board by filing a NOD. This provision would reduce the time period for initiating appellate review from one year to 180 days and bring the appeal filing period more in line with that of Federal district courts and the Social Security Administration, which allows for appeals within 60 days of the initial agency decision.

The intent of this provision is to allow VA to more quickly resolve claims and appeals. Currently, VA must wait one year to determine if a claimant disagrees with a decision on a claim for benefits. If a claimant waits until the end of the one-year period to file a NOD, VA is often required to re-develop the record to ensure the evidence of record is up to date. Data from the Board supports the conclusion that such late-term NOD development delays the resolution of the claim. In Fiscal Year (FY) 2008, appeals in which the Board received a NOD more than 180 days after the date the decision was mailed took, on average, 32 additional days to decide. If the period in which to file an NOD were reduced to 180 days, VA could more quickly finalize the administrative processing of claims not being appealed and focus resources on the processing of new pending claims and appeals. Accordingly, adoption of this proposal would allow VA to more actively manage cases and work towards a faster resolution of claims and appeals.

Because the majority of claimants are able to quickly determine if they are satisfied with VA's decision on their claim and because the NOD is a relatively simple document, enactment of this provision would not adversely affect claimants for VA

benefits. In FY 2008, 77 percent of the NODs filed were filed in less than 180 days. Among these cases, the average time to file a NOD was just 41 days. In addition, a NOD is an informal communication that merely requires a claimant to express disagreement with a VA decision and a desire to challenge that decision without any special wording. Taken together, the average filing time for the majority of NODs and the ease of filing a NOD demonstrate that claimants would not be adversely affected by this amendment.

This proposal has no measurable monetary costs or savings. However, VA estimates that enactment of the proposal would result in more expeditious adjudication of final decisions on appeal because VA would not have to wait one year from the date of an adverse decision to determine whether a claimant intended to file an appeal. Rather, under this proposal, VA would only have to wait 180 days for such determination and could therefore more timely process the appeal.

### **Sec. 203. Substantive appeals.**

Section 203 would overturn Percy v. Shinseki, 23 Vet. App. 37 (2009), by making the filing of a substantive appeal within 60 days from the date of the mailing of the statement of the case a requirement for Board jurisdiction. The 60-day period in which to submit a substantive appeal could be extended for up to 60 days for good cause if a claimant submits a written request for extension prior to expiration of the initial 60-day period. A claimant would have 60 days from the date on which the agency of original jurisdiction provides notice that the appeal has been dismissed to request Board review of the dismissal. If the claimant does not file a request for review by the Board or if such a request is timely filed and the Board affirms the dismissal of the appeal, the determination of the agency of original jurisdiction regarding the claim for benefits under this title would become final and the claim could not thereafter be reopened or allowed, except as otherwise provided by regulations not inconsistent with this title. Section 203 would also clarify that, if an appeal is not dismissed by the agency of original jurisdiction, the Board would nonetheless be able to dismiss any appeal which is untimely or fails to allege specific error of fact or law in the determination being appealed.

Currently, 38 U.S.C. § 7105(a) provides that an appeal to the Board must be “initiated” by the claimant’s filing of a notice of disagreement and “completed” by the claimant’s filing of a substantive appeal. Section 7105(d)(3) states that claimants will be afforded a period of 60 days from the date on which VA mails the claimant a statement of the case within which to file the substantive appeal. The statute provides that the 60-day period “may be extended for a reasonable period on request for good cause shown” and that “[t]he agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans’ Appeals.” VA’s regulations provide that questions as to the timely filing and adequacy of a substantive appeal are “jurisdictional questions” affecting the Board’s “jurisdictional authority to hear a particular case.” 38 C.F.R. § 20.101(c).

In Percy, however, the Veterans Court concluded that the timely filing of a substantive appeal is not a jurisdictional requirement. Further, the Veterans Court concluded that, if VA does not close a case based on the failure to submit a timely substantive appeal, VA thereby waives any objection based on the lack of a timely substantive appeal and cannot thereafter close the case on that basis.

The Veterans Court relied upon the fact that section 7105(d)(3) states that the AOJ “may” close the case for failure to file a timely substantive appeal, concluding that the permissive language reflects Congress’ intention that an untimely substantive appeal not foreclose the Board’s exercise of jurisdiction over a matter. However, the permissive language of the statute may naturally be read to provide that the AOJ has discretion to either close the case on its own initiative or to defer to the Board to close the case, rather than providing that VA has discretion to waive the statutory filing requirement altogether. Because the substantive appeal filing requirement is a matter affecting the Board’s authority to hear the appeal, Congress reasonably provided that the Board would be vested with the primary authority to determine whether the filing requirement is satisfied. Section 7105(d)(3) provides that the substantive appeal filing period may be extended for a “reasonable time on request for good cause shown.” Percy creates an illogical statutory scheme whereby the filing period may be extended only for good cause shown, but the filing requirement may be completely waived for any reason, even through inadvertence.

The filing of a substantive appeal is a relatively simple task for claimants, which can be accomplished by completing a preprinted form provided by the AOJ or by submitting any other correspondence that meets the statute’s requirements. The substantive appeal serves an important role in defining the issues for the Board’s review. The requirement of a timely filed substantive appeal serves to determine when an AOJ decision becomes final (if a substantive appeal is not timely filed) or when an appeal to the Board is “complete” (if the substantive appeal is timely filed) such that the AOJ’s review is finished and the Board’s review begins. The holding in Percy, that the filing requirement may be implicitly waived by VA’s action or inaction, will create uncertainty as to the finality of decisions and as to the transfer of cases from the AOJ to the Board.

Section 203 would promote effective and efficient management of the VA appeals process by limiting the Board’s jurisdiction to timely appeals in which the claimant adequately identifies alleged errors by the AOJ. Section 203 would also clearly delineate when a decision by the AOJ becomes final, thereby eliminating confusion if a subsequent claim is filed. Section 203 would protect claimants’ rights by permitting extension of the filing period when a claimant, for good cause, is unable to meet the statutory time limit and by clarifying the procedures for obtaining review of an action by the AOJ closing the case.

We anticipate enactment of section 203 would have no measurable monetary costs or savings.

## **Sec. 204. Automatic waiver of agency of original jurisdiction review of new evidence.**

Section 204 would amend section 7105 to incorporate an automatic waiver of the right to initial consideration of certain evidence by the AOJ. The evidence that would be subject to the waiver is evidence that the claimant or his or her representative submits to VA concurrently with or after filing the substantive appeal. Such evidence would be subject to initial consideration by the Board unless the appellant or his or her representative requests in writing that the AOJ initially consider the evidence. Such request would be required to be submitted with the evidence.

Current law precludes the Board's initial consideration of evidence submitted in connection with a claim, unless the claimant waives the right to initial consideration by the AOJ. Evidence must first be considered by the AOJ in order to preserve a claimant's statutory right under 38 U.S.C. § 7104 to one review on appeal, which the Board provides on behalf of the Secretary. The requirement that the AOJ initially consider all evidence, unless the claimant waives the right, frequently delays the final adjudication of claims because claimants often submit additional evidence after perfecting their appeals to the Board by filing a substantive appeal. Under current procedures, each time a claimant, after filing a substantive appeal, submits more evidence without waiving the right to initial AOJ consideration, the AOJ must review the evidence submitted and issue a supplemental statement of the case that addresses it. If a claimant submits relevant evidence to the Board without waiving the right to initial AOJ consideration, the Board must remand the claim to the AOJ for initial consideration and preparation of a supplemental statement of the case. The proposed amendment would not deprive claimants of the right to initial consideration by the AOJ. It would permit claimants to obtain initial consideration by the AOJ by requesting such review in writing.

The establishment of an automatic waiver would necessarily improve the timeliness of processing appeals as a whole. Because the Board bases its decisions on a *de novo* review of all the evidence of record, many more appeals could be more quickly transferred to the Board following the receipt of a substantive appeal. The AOJs would spend less time responding to appellants who submit additional evidence following the filing of a substantive appeal, and the Board would avoid time-consuming remands in a case when the appellant submits evidence directly to the Board. By presuming a waiver of AOJ review of new evidence, the Board would be able to adjudicate claims without the delay of a remand, thereby getting final decisions to Veterans quicker and reducing the increased appellate workload caused by the reworking of remanded claims.

We anticipate that enactment of section 204 would have no measurable monetary costs or savings. The potential benefits that would result from enactment of the proposal include expedited adjudication of claims on appeal and a reduction in the time spent processing appeals, both at the AOJ and Board, allowing more time for deciding new claims.

### **Sec. 205. Board to determine the most expeditious manner of providing a hearing.**

Section 205 would allow the Board to determine the most expeditious location for and type of hearing (i.e. an in-person hearing or a video conference hearing) to afford an appellant, unless the appellant demonstrates good cause or special circumstances to warrant another location or type of hearing.

The proposed legislation would allow the Board wider use of video conferencing capabilities in conducting hearings. The potential benefits that would result from enactment of the proposal include serving more Veterans, reducing the waiting time for a hearing on appeal, and increased productivity by the Board in issuing final decisions on appeal. The Board would have greater flexibility over time management because video hearings would be conducted more efficiently from the Board's offices in Washington. The Board would not lose time in the field due to appellants failing to attend scheduled hearings. There is no statistical difference in the allowance rate of appeals in which hearings are held in the field compared to video conference hearings. Appellants have the same opportunity to interact with a Veterans Law Judge during a video conference hearing as they do during an in-person hearing that is held in Washington or in the field. By creating a good cause or special circumstances exception, any genuine objection to the video conference format will likely be resolved in the appellant's favor.

We anticipate that enactment of section 205 would have no measurable monetary costs or savings. Estimating the number of additional video conference hearings or the drop in travel board hearings is difficult; however, we would expect a significant reduction in the Board's travel expenses.

### **Sec. 206. Decisions of the Board.**

Section 206 would amend section 7104(d)(1) to require each decision of the Board to include "a plausible statement of the reasons for the Board's ultimate findings of fact and conclusions of law."

Currently, section 7104(d)(1) requires the Board to include in its decisions a written statement of its findings and conclusions "and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." Despite the Board's greatly expanded discussion of the reasons or bases in its decisions in order to facilitate judicial review, more than half of the claims appealed to the Veterans Court result in a remand back to the Board based on the Veterans Court's finding of an inadequate statement of "reasons or bases." While some of these remands are necessary, in many instances the Veterans Court remands the case for an additional explanation as to matters that are not essential to the final factual or legal conclusions already reached by the Board or matters as to which the Board's views reasonably may be discerned from its decision. The net result of these "reasons or bases" remands from the Veterans Court is that many appellants are deprived of a timely and final adjudication of their claims without any discernible benefit flowing to the

appellant as a result of the delay. Section 206 would reduce these remands by clarifying that the Board's decision need not specifically address every aspect of factual or legal matters having some bearing upon the Board's decision.

In view of the large volume of evidence that may be contained in VA claims files and the wide range of arguments a claimant may seek to raise before the Veterans Court, it often is not feasible for the Board to state specific findings on every issue that may in some way affect, or that a claimant believes may affect, the Board's decision. In Newhouse v. Nicholson, 497 F.3d 1298, 1302 (Fed. Cir. 2007), the Federal Circuit held that section 7104(d)(1) does not require the Board to discuss each item of evidence that arguably affects its decision. The Veterans Court has held that section 7104(d)(1) requires a statement that is adequate to enable the claimant to understand the basis for the decision and to facilitate appellate review. See Allday v. Brown, 7 Vet. App. 517, 527 (1995). However, the high rate of "reasons or bases" remands indicates that, in practice, the Veterans Court has applied section 7104(d)(1) much more stringently, resulting in unnecessary and time-consuming remands of appeals that reasonably may be decided on their merits.

As the Veterans Court's mandate is to consider whether the Board's factual findings are clearly erroneous in light of the entire record, as opposed to functioning as a fact finder itself, the statutory "reasons or bases" requirement should not serve as a basis for the Veterans Court to remand whenever it believes the Board could have better explained its views regarding the weight or credibility of a particular item of evidence. Rather, remand for clarification is appropriate in circumstances in which the Board's decision is so lacking in explanation that the Veterans Court cannot reasonably discern the rationale on which the Board based its ultimate finding of fact and conclusion of law and therefore cannot fulfill its duty to review those findings under the applicable standard of appellate review. Absent a clear need for such clarification, a "reasons or bases" remand ordinarily delays resolution of the claim without any significant corresponding benefit to claimants. The clarification of the reasons or bases requirement by section 206 would restore balance to the appellate review process and allow the Board to issue more final decisions. The requirement for a "plausible" statement of the reasons for the Board's findings would be consistent with the standard governing review of factual findings in the Veterans Court and other Federal courts. See Anderson v. Bessemer City, 470 U.S. 564, 574 (1985) (holding that a finding is not "clearly erroneous" if the factfinder provides an "account of the evidence [that] is plausible in light of the record viewed in its entirety."); Gilbert v. Derwinski, 1 Vet. App. 49, 52 (1990) (adopting the standard stated in Anderson). This revision would thus make clear that the Board's decisions supported by a plausible account of the evidence cannot be vacated or overturned simply because the reviewing court believes they could have been better explained. Under section 7104(d)(1), as amended, the Board's decision would still be more than sufficient to fully explain to the appellant and any reviewing court why the Board decided a particular case the way that it did, but without the need to address all factual determinations and legal conclusions in such a highly detailed and painstaking manner that the decision becomes confusing to a lay reader. In addition to simplifying Board decisions, this proposal would better focus the judicial review of Board decisions on whether the Board, as the expert finder of fact, reasonably



addressed the material facts presented by the record and explained its ultimate conclusions in applying the relevant law to those facts. This in turn will result in an increased number of final decisions by both the Board and the Veterans Court.

This proposal has no measurable monetary costs or savings. However, VA estimates that, if this change is implemented, Board attorneys will save approximately one hour per case when drafting a final decision because they will be able to limit the time devoted to discussion of nonessential facts and legal conclusions, and instead focus on those key facts dispositive to the decision. Given that the Board issued over 48,000 decisions in FY 2009, a savings of one hour per case would be significant and would allow for more decisions to be drafted in less time.

**Sec. 207. Definition of prevailing party for purposes of the Equal Access to Justice Act in veterans benefits appeals.**

The Equal Access to Justice Act (EAJA) authorizes a court to award to a “prevailing party” fees and other expenses incurred by the party in a civil action (including proceedings for judicial review of agency action) brought by or against the United States (including any agency and any official of the United States acting in his or her official capacity) in any court having jurisdiction of the action. The U.S. Supreme Court has held that, to qualify as a prevailing party under the EAJA, a party must obtain at least some relief on the merits of his or her claim pursuant to a judgment of a court. However, the Federal Circuit has extended prevailing party status to a party who obtains a court remand requiring further agency action because of alleged errors by the agency without regard to whether the further agency action results in an award of benefits, provided the court does not retain jurisdiction over the matter. This has resulted in an incentive for attorneys representing Veterans and other claimants before the Veterans Court to seek remands to VA based on allegations of administrative error without regard to whether the remand results in an award of benefits to the claimant.

Section 207 would eliminate that incentive by redefining the term “prevailing party” with respect to EAJA applications in the Veterans Court. It would define “prevailing party” to mean a party who, as a result of the court’s final disposition of an appeal, or a final disposition by VA on remand from the court with respect to the remanded matter, is awarded a monetary or other benefit. It would also authorize the Veterans Court and VA to prescribe regulations necessary or appropriate to implement the definition.

The Federal Circuit’s expansive interpretation of “prevailing party,” disconnected from any requirement to actually obtain relief on the merits of a claim for benefits, has created a financial incentive for attorneys to obtain remands to the Board as an end in itself, rather than as a means to ultimately obtain VA benefits for a claimant. An example of such a remand is one made only for the Board to adequately state the reasons or bases for its findings and conclusions on a material issue of fact or law presented on the record. The Board may restate the reasons or bases but continue to deny the benefit sought on appeal. The Veterans Court routinely awards EAJA fees to attorneys who obtain remands on behalf of their clients even when the remand results in

no monetary or other benefit being awarded to the claimant. In FY 2008, for example, the Veterans Court granted 2,433 applications for EAJA fees and expenses and denied only 16 applications. However, during the same period, the Court reversed the Board's decision and granted benefits to claimants in only 14 cases.

Based in part on the financial incentive to obtain remands, the appellants' bar frequently seeks a court remand based on an administrative error the correction of which does not or could not ultimately result in the award of VA benefits. Even attorneys representing appellants on a *pro bono* basis have requested EAJA awards. Because this remand practice fuels the "hamster wheel" phenomenon (the cycle of appealing, remanding, and appealing again claims from the Board to the Veterans Court, from the Veterans Court to the Board, from the Board to regional offices, and back again to the Board and to the court), a legislative solution is warranted. Changing the law to permit an award of EAJA fees only if an appellant actually prevails on the merits of a claim and not merely for obtaining a remand to correct an administrative error would discourage unnecessary remands and encourage more cases to be litigated on the merits before the Veterans Court.

This proposal is intended to protect claimants from attorneys who seek to use the judicial process for pecuniary gain without directly benefiting claimants. It would eliminate the incentive for appellants' counsel to seek remands only for the purpose of obtaining an EAJA award. However, EAJA fees could still be awarded for a Veterans Court remand that ultimately results in an award of VA benefits. In addition, it would reduce the number of claims remanded to the Board and result in more timely decisions on appeal. Because attorney fees could be awarded only if a claimant prevails on a benefit claim, this proposal would also provide an incentive for attorneys to continue representing appellants after obtaining a court remand to VA, instead of abandoning them before their cases are finally resolved.

To implement this proposal, the Veterans Court would have to retain jurisdiction over remanded cases for the limited purpose of addressing EAJA applications once a final decision on the remanded matter is made by VA or, if appealed, the Veterans Court. Any resulting administrative burden to the court would be minimal because the Veterans Court is already reviewing EAJA applications. Further, because the Veterans Court is now processing appeals using an electronic record, there would be no significant burden imposed in retaining the record for subsequent review in order to decide the EAJA application.

No monetary costs are associated with this section. To the extent savings are possible based on the reduced number of EAJA awards, it is not possible to estimate the amount of savings because it would depend on the number of cases remanded by the Veterans Court resulting in an award of benefits. However, by requiring a prevailing party to actually succeed on the merits of a claim as demonstrated by an award of benefits, VA would likely spend on EAJA awards less than the \$12,695,000 it spent on such fees in FY 2008.

**Sec. 208. Extension of authority to maintain regional office in the Republic of the Philippines.**

Section 208 would extend through December 31, 2015, VA's authority to maintain a regional office in the Republic of the Philippines. Maintaining a regional office in the Philippines is desirable for two principal reasons. First, it is more cost effective to maintain the facility in Manila than it would be to transfer its functions and hire equivalent numbers of employees to perform those functions on the U.S. mainland. Because the VA Regional Office in the Philippines employs mostly foreign nationals who are paid at a lower rate than Government employees are in the United States, transferring that office's responsibilities to a U.S. location would result in increased payroll costs. Secondly, our ability to manage potential fraud is significantly enhanced by our presence in Manila. In an FY 2002 study of Philippine benefit payments, VA's Inspector General stated: "VA payments in the Philippines represent significant sums of money. That, coupled with extreme poverty and a general lack of economic opportunity, fosters an environment for fraudulent activity." If claims processing for VA benefits arising from Philippine service were relocated to a mainland location, the decentralization would result in less control of potential fraud. VBA would lose the expertise the Manila staff applies to these claims and would need time to develop such expertise at a mainland site. We would also lose the close and effective working relationship that has been developed with the Veterans Health Administration's Outpatient Clinic, which is essential for the corroboration of the evidentiary record. Based on these factors, the same quality of service to the beneficiaries and the U.S. Government could not be maintained if full claims processing were moved outside of the Philippines.

There are no benefit costs associated with this proposal. VA estimates that maintaining a regional office in the Philippines rather than transferring that office's functions to the nearest mainland regional office in San Diego, California, would result in savings of \$7.3 million in the first year and \$70.3 million over ten years, based on the operating costs of those regional offices.

**Sec. 209. Good cause extension of the period for filing a notice of appeal with the Court of Appeals for Veterans Claims.**

Section 209 would authorize the United States Court of Appeals for Veterans Claims (Veterans Court) to extend the 120-day period for appealing a decision of the Board of Veterans' Appeals to the Veterans Court under 38 U.S.C. § 7266(a) to no more than an additional 120 days based on a showing of good cause. This amendment would also bar review of the Veterans Court's decision to grant or deny a motion for extension or on any issue related to the motion, such as whether a particular document constituted a motion for extension or whether a motion for extension was filed timely with the Veterans Court.

In Henderson v. Shinseki, 589 F.3d 1201 (Fed. Cir. 2009) (en banc), the United States Court of Appeals for the Federal Circuit (Federal Circuit) held that the 120-day period for filing a notice of appeal to the Veterans Court set forth in 38 U.S.C. § 7266(a)

is jurisdictional and not subject to equitable tolling. However, an inflexible application of the statutory time limit for appeal may have harsh results in some extreme circumstances, e.g., if a claimant was mentally incapacitated during the entire 120-day appeal period. Also, the absence of any provision for a “good cause” extension in section 7266(a) currently creates a disparity in that 28 U.S.C. § 2107(c) expressly permits a limited “good cause” extension of the period for appealing to a Federal circuit court of appeals, whereas section 7266(a) does not allow any extension of the period for appealing to the Veterans Court. Amending section 7266(a) to permit a limited “good cause” extension of the appeal period would place veterans on equal footing with appellants in other Federal courts.

Litigants seeking to appeal district court orders must request an extension from the district court in which the notice of appeal is required to be filed, and the district court possesses the sole discretion to act on those matters, subject to limited abuse-of-discretion review by the appellate court to which the appeal is sought to be taken. In contrast, claimants seeking to appeal a VA determination to the Veterans Court must file their notice of appeal directly in that appellate court. Accordingly, the Veterans Court will be best situated to decide matters relating to motions for extension of the filing period based upon the circumstances of each case and should be vested with the authority to make those determinations.

Matters concerning the existence of good cause for the extension of the appeal filing period or the timeliness of a motion for extension necessarily turn upon the facts of each litigant’s case and are therefore not reviewable under 38 U.S.C. § 7292(a) and (d), which preclude the Federal Circuit from reviewing the Veterans Court’s decisions on factual matters or the application of law to the facts of a case. Notwithstanding the clear jurisdictional mandate of that statute, the Federal Circuit has at times asserted authority to review all matters pertaining to the Veterans Court’s jurisdiction, irrespective of whether the particular matter presented turned only upon the facts of a particular case. See, e.g., Morris v. Principi, 239 F.3d 1292, 1294 (Fed. Cir. 2001); Maggitt v. West, 202 F.3d 1370, 1379-80 (Fed. Cir. 2000). The language of this section would make clear that decisions regarding motions for good-cause extensions are factual matters outside the Federal Circuit’s jurisdiction, even though such fact-based determinations affect the Veterans Court’s jurisdiction in individual cases.

We estimate that enactment of section 209 would result in no significant costs or savings.

### **TITLE III—LOAN GUARANTY MATTERS**

#### **Sec. 301. Occupancy of property by dependent child of a Veteran.**

Section 301 would amend 38 U.S.C. § 3704(c) to allow a Veteran’s dependent child to satisfy the occupancy requirements of VA home loans. Currently, only a Veteran or a Veteran’s spouse may satisfy the requirement, which means that a single parent on active duty may be prevented from obtaining a VA-guaranteed loan. The

proposed change would make it easier for those serving in the Armed Forces to use their VA home loan benefit.

VA estimates the costs associated with this proposal to be \$336,000 in savings during the first year, \$2.6 million in costs over five years, and \$8.9 million in costs over ten years.

**Sec. 302. Covenants and liens created by public entities in response to disaster-relief assistance.**

Section 302 would amend 38 U.S.C. § 3703(d) to allow the Secretary to guarantee a loan, regardless of whether such loan is subordinate to a superior lien created by a public entity that has provided or will provide assistance in response to a major disaster. VA determined this authority was necessary in the aftermath of Hurricanes Katrina and Rita, when States were developing grant assistance programs to help disaster victims.

As part of State disaster relief programs, States may opt to create covenants ensuring that grant recipients rebuild their homes in accordance with program specifications. VA does not have authority to take a second-lien position to such liens, however, and as a result, some Veterans may be in jeopardy of not being able to obtain disaster relief. Moreover, if a Veteran is unable to obtain disaster relief, the loan holder may be in a position of having to foreclose the loan and file a claim against VA's guaranty. By allowing the VA-guaranteed loan to take a subordinate position to a superior lien resulting from disaster assistance, Veterans' homes are more likely to be repaired, thereby potentially reducing the likelihood of foreclosures and guaranty claims.

This section also would eliminate an anachronism from the text of the statute. Currently, the statute requires that, with respect to any superior lien "to be created after June 6, 1969," the Secretary must have determined in advance that the interests of disregarding such a lien created by a covenant would not prejudice the interests of the Veteran borrower or the Government. Reference to June 6, 1969, in the future tense is no longer necessary.

VA has determined that there are no expected costs associated with this proposal.

**Sec. 303. Extension of authority to pool loans.**

Section 303 would amend 38 U.S.C. § 3720(h)(2) to extend through December 31, 2013, the Secretary's authority to issue and guarantee certificates or other securities evidencing an interest in a pool of mortgage loans. VA's current authority to guarantee certificates related to pooled mortgage loans expires December 31, 2011. Because the guarantee is what allows VA to sell the pools at a premium, VA is seeking a two-year extension of the authority.

VA estimates the incremental total subsidy savings of this proposal to be \$190 million.

## **TITLE IV—EDUCATION AND VOCATIONAL REHABILITATION MATTERS**

### **Sec. 401. Employer incentives to provide employment and training opportunities to vocational rehabilitation and employment program participants.**

Section 401 would amend 38 U.S.C. § 3116(b)(1) to expand employer eligibility for incentives paid to employers who provide on-job training and employment opportunities to Veterans with service-connected disabilities. Under current law, employers are eligible for payments from VA for providing on-job training to Veterans who have been rehabilitated to the point of employability if these Veterans need further services to obtain suitable employment. This section would remove the condition that a Veteran must have been rehabilitated to the point of employability before these employer incentives may be paid, thereby creating an incentive for direct employment of Veterans.

Veterans who have been rehabilitated to the point of employability have completed a rehabilitation program under chapter 31, United States Code, which includes training or other rehabilitation services, before entering employment services. Current law authorizes incentive payments to employers to provide additional services to Veterans who have completed a rehabilitation program and need additional on-job training to help with the transition to suitable employment. However, current law does not allow employer incentives for employers who provide on-job training and employment opportunities for Veterans who have not completed a formal training program under chapter 31. We believe the proposed amendment would improve employment opportunities for Veterans who do not need an academic training program under chapter 31, but do need support to enter the job market.

The cost associated with this amendment would be insignificant because the caseload increase would be minimal. We anticipate that 10 percent of the eligible population of 301 Veterans entering employment services directly would use the special employer incentive benefit. The average cost of the employer incentive benefit would be half of the average salary of \$32,259 and we anticipate the average number of months an employer would be qualified to receive employer incentives under this program would be 6 months.

### **Sec. 402. SAA program approval criteria.**

Section 402 would amend several sections in chapter 36 of title 38, United States Code, to expand VA's authority regarding approval of courses for the enrollment of Veterans (and other eligible persons) that are in receipt of VA-administered educational assistance programs and to better utilize the services of State approving agencies (SAAs). The amendments are intended to contribute to streamlining the administration of educational assistance benefits and improve the delivery of benefits to Veterans, reservists, and other eligible individuals.

Currently, as provided in 38 U.S.C. § 3671, each State appoints an SAA for the purpose of approving programs of education or training for Veterans (and other eligible persons) who receive education benefits from VA. VA enters into contracts with each SAA, unless a State declines to appoint an agency. In cases where a State declines to enter into a contract, VA performs the approval duties in lieu of such State.

Section 3672 of title 38 specifically provides that a Veteran or eligible person may only receive educational assistance allowances if the course is approved by the SAA as provided for under chapter 36 of title 38, United States Code. The Secretary has authority to approve courses of education offered by the Federal Government and apprenticeship programs where the training establishment is a carrier directly engaged in interstate commerce. Chapter 36 contains additional provisions for approval of accredited programs, non-accredited programs, apprenticeship training programs, other on-the-job training programs, correspondence programs and flight training programs.

A U.S. Government Accountability Office (GAO) report (GAO-07-384, March 2007) recommended that VA take action to reduce the overlap of SAA functions with functions performed by the Departments of Labor and Education in approving education and training programs. However, as previously noted, section 3672 specifically gives the SAA the authority for approval of most programs. VA believes this provision should be amended to provide VA greater authority to utilize the SAAs more effectively and to reduce any overlap. For this reason, VA proposes amendments to deem various programs and courses to be approved, under stated conditions, for enrollment of Veterans. Further, VA proposes to authorize the Secretary to utilize the SAAs for compliance and oversight as the Secretary deems appropriate regardless of whether such agencies are under contract for the approval of courses.

Finally, VA proposes to amend 38 U.S.C. § 3679 to specifically authorize disapproval of any course by the Secretary if the course does not meet the approval criteria provided under chapter 36.

VA estimates that enactment of these amendments would not result in any increased cost or savings.

#### **Sec. 403. Delimiting date extensions for caretakers of certain seriously injured Veterans.**

Section 403 would amend 38 U.S.C. §§ 3031, 3319, and 3512 to permit the extension of delimiting dates for eligible individuals who could not pursue, or had to interrupt, a program of education while acting as the primary caretaker for a Veteran or Servicemember seriously injured while on active duty after September 10, 2001.

For individuals eligible for the Montgomery GI Bill-Active Duty or the Post-9/11 GI Bill, there are presently no provisions for the extension of an individual's delimiting date for any reason other than the disability of the person eligible for education benefits. In the case of a child eligible under the Survivors' and Dependents' Educational Assistance Program (DEA), provisions exist for extensions for reasons beyond the control of the claimant; however, the claimant must have interrupted a program of

education to be eligible for the extension. In the case of a spouse eligible under DEA, there is no provision to extend an individual's delimiting date except for the disability of the person eligible for education benefits.

VA believes there should be provisions in the law that allow for the extension of delimiting dates when an individual has been prevented from pursuing a training program while caring for a seriously injured Servicemember or Veteran.

VA estimates that the enactment of the proposed amendments would result in an insignificant benefits cost because it would only affect a small number of individuals. VA anticipates the majority of the delimiting date extensions would be for spouses who are eligible under the DEA program. Since most DEA spouses who are caretakers of seriously injured Servicemembers have 20 years to use their education benefits, we estimate only a small percentage would request a delimiting date extension. Although we expect minimal requests for an extension, this provision would provide the flexibility for those individuals who need additional time to complete their educational goals.

#### **Sec. 404. Technical amendment regarding references to institutions of higher learning.**

Section 404 would amend 38 U.S.C. § 3313 to substitute the term "institute of higher learning" for "institute of higher education." Title 38 of the United States Code uses the term "institution of higher learning" throughout chapter 36. For consistency, VA requests that "institution of higher education" be changed to "institution of higher learning." There would be no cost associated with this technical amendment.

### **TITLE V—INSURANCE MATTERS**

#### **Sec. 501. Permitting increases of Veterans' Group Life Insurance coverage.**

Section 501 would provide to Veterans' Group Life Insurance (VGLI) participants who are under the age of 60 and insured for less than the current maximum authorized for Servicemembers' Group Life Insurance (SGLI) the opportunity to obtain, without underwriting (i.e., health questions), an additional \$25,000 in coverage once every 5 years at the time of renewal. Current law limits the amount of VGLI coverage a Veteran may carry to the amount of SGLI coverage that continued in force after that Veteran was separated from service.

Through inquiries and responses to surveys, VGLI participants have expressed interest in increasing their coverage. Statistics indicate that 96 percent of VGLI-insured Veterans have less than the current SGLI maximum of \$400,000 in coverage. Currently, Veterans who separated from service when the maximum SGLI coverage was considerably less than the current \$400,000 maximum have no opportunity to increase their VGLI insurance coverage. This provision would provide Veterans, including service-disabled Veterans, an opportunity to purchase additional life insurance to protect and enhance the financial security of their families.

Although there would be no cost to the Government associated with this



provision, restricting eligibility to Veterans under the age of 60 and limiting the purchase amount to \$25,000 once every 5 years would minimize the cost to the program by limiting the degree of adverse selection. The currently strong financial position of the SGLI program makes this proposal to offer additional VGLI coverage more financially feasible.

#### **Sec. 502. Indefinite retention of two-year total disability extension of Servicemembers' Group Life Insurance.**

Section 502 would eliminate the expiration date for a potential two-year extension of SGLI coverage available to servicemembers who are totally disabled when they separate from service. Under current law, if a SGLI-insured servicemember is totally disabled at the time of his or her separation from service, the member's SGLI coverage can extend, at no cost to the member, for up to two years following separation from service. However, that potential two-year extension will shorten to 18 months effective for separations from service on or after October 1, 2011. This provision would permit the potential two-year extension indefinitely.

Retaining the potential two-year extension would allow VA additional time to contact Veterans having little or no chance of obtaining commercial insurance and give them useful information to help them make informed decisions about their life insurance needs and options. It would also guarantee that those most in need will be covered by SGLI during their transition period, at no cost to them.

The SGLI premium rates charged to servicemembers would cover the cost of indefinitely retaining the potential two-year period. Because the SGLI program would assume all costs associated with this proposal, there would be no cost to the Government.

### **TITLE VI—OTHER MATTERS**

#### **Sec. 601. Expanded eligibility for presidential memorial certificates.**

Section 601 would extend eligibility for presidential memorial certificates to the survivors of any servicemember who died in active military, naval or air service. Under current law, eligibility is limited to survivors of Veterans who were discharged under honorable conditions.

Under the statutory definition of "veteran," an individual who died in active service, including an individual killed in action, technically is not a "veteran" because the individual was not "discharged or released" from service. Therefore, under current law, the survivors of such an individual are not eligible for a presidential memorial certificate for honoring the memory of the individual. This provision would allow VA to provide a presidential memorial certificate to the next of kin, relatives, or friends of such individuals, who have made the supreme sacrifice for our Country, and express our Country's grateful recognition of the individual's service in the Armed Forces.

We estimate that this eligibility expansion would result in benefit costs of \$9,000 in the first year and \$90,000 over 10 years.

**Sec. 602. Extension of authority to carry out income verification.**

Section 602 would amend 38 U.S.C. § 5317 by changing the expiration date from September 30, 2011, to September 30, 2016, thereby extending for five years VA's income verification authority under that provision. Currently, section 5317 and a counterpart provision at section 6103(l)(7)(D)(viii) of the Internal Revenue Code authorize VA to verify the eligibility of recipients of, or applicants for, VA need-based benefits and services using income data from the Internal Revenue Service (IRS) and the Social Security Administration. The existing authority has been instrumental in correcting amounts of benefits payments and determining health care eligibility, copayment status, and enrollment priority assignment; however, this authority expires on September 30, 2011. Notably, there is no expiration date in the counterpart IRS provision. Expiration of this authority would cause interruption of the income verification process.

VA estimates that enactment of section 602 will result in a cost to its mandatory compensation and pension benefits programs of \$20.2 million during the first year but produce net savings of \$46.7 million over five years. Discretionary savings to VHA are estimated to be \$40.5 million in the first year and \$139.1 million over five years.

**Sec. 603. Extension of authority to use data provided by the U.S. Department of Health and Human Services for the purpose of adjusting VA benefits.**

Section 603 would amend Section 5317A of title 38, United States Code, and a counterpart provision in section 453(j)(11) of the Social Security Act (42 U.S.C. § 653(j)(11)), by extending the expiration date of those provisions until 2021. Currently, 38 U.S.C. § 5317A and section 453(j)(11) of the Social Security Act authorize VA to verify the eligibility of recipients of, or applicants for, certain VA need-based benefits and services, using income data from the U.S. Department of Health and Human Services. This authority expires on September 30, 2011. The existing authority is a major vehicle for ensuring program integrity; expiration of this authority would result in an increase of erroneous payments to applicants for needs-based benefits, and the under-charging of user fees.

VA estimates that enactment of Section 603 will initially result in increased benefit costs of \$2 million during 2012 and \$3.4 million through 2014, followed by a net savings of \$869,000 in 2015 and an estimated total net benefit savings of \$17 million through FY 2020.