

STATEMENT OF
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VETERANS BENEFITS ADMINISTRATION
BEFORE THE
SENATE COMMITTEE ON VETERANS' AFFAIRS
May 13, 2015

Good afternoon, Mr. Chairman and Members of the Committee. I am pleased to be here today to provide the views of the Department of Veterans Affairs (VA) on pending legislation affecting VA's programs, including the following: S. 270, S. 602, S. 627, the "21st Century Veterans Benefits Delivery Act," the "Veterans' Compensation Cost-of-Living Adjustment Act of 2015," and a draft bill concerning VA small business contracting, Veterans benefits, and burial matters. We will separately provide views on the following bills: S. 681; sections 202, 203 and 206 of the "21st Century Veterans Benefits Delivery Act"; the bill associated with legislative proposals from the Report of the Military Compensation and Retirement Modernization Commission; the bill associated with legislative proposals from the Department of Defense (DoD); and sections 201 and 206 of the consolidated bill related to bills from the 113th Congress. Accompanying me this afternoon is Renée Szybala, Assistant General Counsel.

S. 270

S. 270, the “Charlie Morgan Military Spouses Equal Treatment Act of 2015,” would amend sections 101 and 103 of title 38, United States Code, to revise the definition of spouse for purposes of Veterans’ benefits. Specifically, the bill would remove from the definition of “surviving spouse” under section 101(3) the phrase “of the opposite sex,” and amend the definition of “spouse” under section 101(31) to include an individual if the marriage of the individual is “valid under the laws of any State.” The bill would define “State” in the same way that term is defined in section 101(20) of title 38, United States Code, for purposes of title 38, but include also “the Commonwealth of the Northern Mariana Islands.” Additionally, S. 270 would amend section 103(c) of title 38, United States Code, removing the limitation that a marriage shall be proven as valid “according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued.” The bill would amend section 103(c) to follow the revised definition of “spouse” in section 101(31).

VA generally supports the passage of this bill but has some concerns with the bill’s language. Current section 101(3) and section 101(31) of title 38, United States Code, limit the definitions of “surviving spouse” and “spouse,” respectively, for purposes of title 38 to only a person of the opposite sex of the Veteran. The language in these provisions is substantively identical to the language in section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, which the Supreme Court, in *United States v. Windsor*, 133 S. Ct. 2675 (2013), declared to

be unconstitutional because it discriminates against legally-married, same-sex couples. On September 4, 2013, the President directed VA to cease enforcement of section 101(3) and section 101(31) of title 38, United States Code, to the extent that those provisions preclude the recognition of legally-valid marriages of same-sex couples. Pursuant to the President's direction, VA is no longer enforcing the title 38 provisions to the extent that they require a "spouse" or a "surviving spouse" to be a person of the opposite sex. Therefore, VA supports this bill as a means to amend the law to be consistent with the Supreme Court's decision in *Windsor* and the President's directive. In particular, VA supports the removal of the requirement that a "spouse" or a "surviving spouse" be a person of the opposite sex from subsections (3) and (31) of section 101.

Further, current section 103(c) of title 38, United States Code, requires VA to apply the law of the place in which the couple resided at the time of the marriage or where they resided when the rights to benefits accrued, resulting in unwarranted disparate treatment in the delivery of federal benefits. For example, VA may be precluded from recognizing a Veteran's same-sex marriage even though DoD, which is not subject to the limitation of section 103(c), may have recognized the marriage as valid based on a place-of-celebration standard while the Veteran was in service. The "valid under the laws of any State" standard in S. 270 would promote greater consistency in the administration of federal benefits based on same-sex marriages.

However, VA has some concerns with the new standard. Under the provisions of this bill as currently drafted, the marriage has to be "considered

valid under the laws of any State.” The phrase “considered valid under the laws of any State” may have unintended consequences. For example, this bill language may require VA to recognize a purported common law marriage in a State that does not recognize common law marriages, as long as *any* State would recognize the relationship as a valid common law marriage. Presumably, Congress does not intend to eliminate any and all differences between States regarding the types of relationships that would constitute a valid marriage for purposes of administering federal benefits, but, rather, intends to obtain greater consistency regarding recognition of same-sex marriages. Furthermore, this bill language may require VA to determine whether a foreign marriage is valid based on a multitude of laws and would require an in-depth legal analysis that is not appropriate in the adjudication of claims.

Costs related to this bill are not available at this time.

S. 602

S. 602, the “GI Bill Fairness Act of 2015,” would amend the term “active duty” under chapter 33 of title 38, to include certain time spent receiving medical care from DoD as qualifying active duty service performed by members of the Reserve and National Guard. Under this bill, individuals ordered to active duty under section 12301(h) of title 10, United States Code, to receive authorized medical care; to be medically evaluated for disability or other purposes; or to complete a required DoD health care study, would receive credit for this service under the Post-9/11 GI Bill.

S. 602 would apply as if it were enacted immediately after the enactment of the Post-9/11 Veterans Educational Assistance Act of 2008, Public Law 110-252.

VA defers to DoD regarding the change to qualifying active duty service under the Post-9/11 GI Bill, with the observation that a similar proposal was submitted by the Administration for inclusion with the 2016 NDAA, with an exception that this bill would be retroactive. Currently, individuals with qualifying active duty service of at least 30 continuous days who are honorably discharged due to a service-connected disability become eligible for 100 percent of the Post-9/11 GI Bill benefit. Because service under 10 U.S.C. § 12301(h) does not meet the current definition of active duty, Guard and Reserve members with such service who are discharged under these circumstances do not automatically qualify for 100 percent of the benefit. If enacted, this change would allow for an increase in benefits from the 40-90 percent benefit tier up to the 100 percent level, and the change would be retroactive to as early as August 1, 2009.

The proposed change to the eligibility criteria under the Post-9/11 GI Bill would require VA to make changes to the type of data that are exchanged between DoD and VA through the VA/DoD Identity Repository (VADIR) and displayed in the Veteran Information System (VIS). In addition, new rules would need to be programmed into the Post-9/11 GI Bill Long Term Solution (LTS) in order to calculate eligibility based on service under section 12301(h) and to allow for benefit payments retroactive to 2009. VA estimates that it would need one year from enactment of S. 602 to complete these changes.

VA estimates that administrative cost requirements associated with the enactment of S. 602 would be insignificant. The Department is still evaluating benefit and resource costs related to this legislation.

S. 627

S. 627 would require VA to identify VA employees who, during fiscal years 2011 through 2014, contributed to the purposeful omission of the name of one or more Veterans from a VA medical facility's electronic wait list or supervisors of these employees who knew or reasonably should have known about the employee's actions and received a "bonus" in part as a result of the purposeful omission. The bill would further require VA to identify these responsible individuals within 180 days after VA's Office of the Inspector General (OIG) submits a report to Congress about inappropriate scheduling practices at VA medical facilities, if such report is based on investigations carried out by the OIG in calendar year 2014. VA would also be required, after providing notice and an opportunity for a hearing, to order that these individuals repay bonuses that they received as a result of a purposeful omission. An individual who has been ordered to repay a bonus may appeal that order to the Merit Systems Protection Board (MSPB).

VA has numerous constitutional concerns about the bill, including concerns arising under the Fifth Amendment Takings Clause, the Due Process Clause, and the Ex Post Facto Clause. VA also has policy and procedural

concerns about the bill. VA looks forward to working with the Committee in order to address these concerns.

S. 627 is a bill for which there is no precedent. No federal agencies have the authority to require employees to repay past monetary performance awards or bonuses that were given in accordance with law and without conditions or contractual obligations. This legislation threatens a number of core constitutional rights related to property and due process that the Framers of the Constitution sought to protect, – and the bill would likely give rise to litigation. VA believes that employees should not be penalized by legislation that attaches new penalties on the basis of past behavior and transactions and should have protection from deprivation of life, liberty, or property without due process of law. Further, performance awards are intended to be a key tool in motivating employees to provide outstanding service to Veterans, and the value of that tool should not be undermined by measures that would limit employee confidence in the performance award system. By singling out VA employees for punitive measures, the legislation would likely serve to demoralize a workforce dedicated to serving Veterans and hurt VA's efforts to recruit and retain high performing employees. VA is concerned that S. 627, if passed, would give rise to numerous lawsuits challenging the constitutionality of the provisions and VA's actions pursuant to it.

For these reasons, and as further explained in the below discussion, VA strongly opposes this legislation.

Implementing the bill, as written, would also be impractical for the government. First, the bill does not define the term “bonus” as a “performance award.” In accordance with law, VA does not give “bonuses,” but rather awards an employee based on his or her performance. Second, the type of hearing that needs to be provided to an employee before a repayment order must be issued is not specifically addressed in the bill. While the bill states that hearings “shall be conducted in accordance with regulations relating to hearings promulgated by the Secretary under chapter 75 of title 5, United States Code,” chapter 75 references various types of hearings. Consequently, the type of hearing that would need to be provided is not addressed in the bill. Third, the bill raises a number of tax questions. For example, should the Department of Treasury treat a repayment of a performance award as adjustments to prior year compensation, even though the award may have been paid a number of years ago? This tax question, while not addressed in the bill, would have to be addressed

As noted above, the bill would raise a number of constitutional issues. First, the bill may run afoul of the Fifth Amendment’s Takings Clause by requiring employees to return property that was given to them unconditionally by the government. The Takings Clause prevents the government from “depriving private persons of vested property rights except for a “public use” and upon payment of “just compensation.” *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). In the case of an employee who has already been paid a bonus by the government, that bonus is the property of the employee. The taking would occur if the government collects the bonus or even a portion thereof without just

compensation. See, e.g., *Nat'l Educ. Bd. v. Ret. Bd. of R.I.*, 172 F.3d 22, 30 (1st Cir. 1999) (the Takings Clause protects “[p]ension payments actually made to retirees”).

The bill may have a “retroactive effect” by increasing an employee’s liability for conduct that preceded the enactment of the bill. See *Landgraf*, 511 U.S. at 280 (a bill has a “retroactive effect” if it “increases a party’s liability for past conduct”). “The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.” *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976)). Under the bill, an employee must repay a bonus based on conduct that preceded the enactment of the bill. Because the employee was not aware that he or she would have to repay the bonus at the time of the conduct, the bill may have a “retroactive effect” and may implicate the employees’ due process rights to fair notice. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”).

Finally, the legislation may raise constitutional Ex Post Facto Clause concerns. The Ex Post Facto Clause prohibits laws that “impose[] a punishment for an act which was not punishable at the time it was committed; or impose[] additional punishment to that then prescribed.” *Cummings v. Missouri*, 71 U.S.

(4 Wall.) 277, 325-26 (1867). In *Hiss v. Hampton*, 338 F. Supp. 1141, 1147-48 (D.D.C. 1972), a three judge panel in the U.S. District Court for the District of Columbia held that a law denying payment of pensions to former employees who falsely testified with respect to Government service was an ex post facto law as it pertained to the conduct of those employees which preceded the passage of the law. *Id.* at 1148. According to the court in *Hiss*, “[t]he proper function of [law] is to guide and control present and future conduct, not to penalize former employees for acts done long ago.” *Id.* at 1148-49; see also *Peugh v. United States*, 133 S. Ct. 2072, 2085 (2013) (noting that “the “[Ex Post Facto] Clause ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action”). As currently drafted, the bill could potentially raise some of the same issues as the provision at issue in *Hiss*.

Based on the implementation concerns discussed above, VA is unable to determine the costs for this bill. It is important to note, however, that apart from costs to investigate and identify the employees, as required by the bill, VA would also have to expend significant resources to conduct a hearing prior to issuing a repayment order, defend its repayment order before the MSPB, and assist the Department of Justice in defending the order before the U.S. Court of Appeals for the Federal Circuit.

S. 1203

Section 101

Section 101 would amend section 1144 of title 10, United States Code, by adding a subsection (f) to require modifications to the eBenefits Internet website

to ensure that members of the Armed Forces and spouses have access to the online curriculum for the Transition Assistance Program (TAP), as administered by the Secretary of Labor, the Secretary of Defense, the Secretary of Homeland Security, and the Secretary of Veterans Affairs. This would require modifications to the eBenefits website to host the online version of the TAP curriculum.

Section 101 would also note Congress' intent that the Secretary of Labor, the Secretary of Defense, the Secretary of Homeland Security, and the Secretary of Veterans Affairs collaborate to establish a process by which Veterans service organizations may be present for TAP to provide assistance relating to submitting claims for VA compensation and pension benefits. The Secretary of Defense would be required to submit a report to Congress, no later than one year after enactment, on Veterans service organizations' participation.

VA does not support the provision to make TAP curriculum available through eBenefits because it is unnecessary. This provision would be duplicative as all TAP curriculums are already available through the Joint Knowledge Online (JKO) system, which is linked to eBenefits. VA modified the eBenefits portal in fiscal year 2014 to provide an online version of VA's section of the TAP curriculum through the JKO link and facilitate online participation for transitioning Servicemembers and their families. This functionality lends support to geographically dispersed Servicemembers as well as members of the National Guard and Reserve components who are required to participate in VA's section of TAP. Additionally, the online version is beneficial to Veterans and their families if they would like to access the curriculum after separation.

VA defers to DoD and the Department of Homeland Security for comment on proposed new 10 U.S.C. § 1144(f)(2) regarding the feasibility of ensuring that Servicemembers who are mandated to fulfill the TAP requirement can satisfy the requirement through means other than solely through an internet website.

VA does not oppose having a process for Veterans service organizations (VSOs) to provide assistance relating to submittal of claims for VA compensation and pension benefits. VA currently provides an overview of the services offered by VSOs and introduces VSOs to Servicemembers during our benefits briefings. VA also partners with VSOs at military installations where they are co-located or available to offer claims support.

VA defers to DoD on subsection (b)(2) of section 101 of the bill regarding the requirement to provide a report on participation of VSOs in TAP.

VA estimates that no administrative or benefit costs to VA would be associated with enactment of this section.

Section 102

Section 102 would amend 38 U.S.C. § 5104, which provides requirements for VA's decisions and notices of decision. It would require VA, upon issuing a decision for a claimed benefit, to also explain the procedure for obtaining review of the decision and explain the benefits of filing a Notice of Disagreement (NOD) within 180 days.

VA does not support this section. While VA appreciates the effort to encourage individuals to file their NOD in a timelier manner, VA would prefer a more definitive legislative solution.

As noted in VA's Strategic Plan to Transform the Appeal Process, which was provided to the Senate Committee on Veterans' Affairs on February 26, 2014, the current process provides appellants with multiple reviews in the Veterans Benefits Administration (VBA) and one or more reviews at the Board of Veterans' Appeals (Board), depending upon the submission of new evidence or whether the Board determines that it is necessary to remand the matter to VBA. The multi-step, open-record appeal process set out in current law precludes the efficient delivery of benefits to all Veterans. The longer an appeal takes, the more likely it is that a claimed disability will change, resulting in the need for additional medical and other evidence and further processing delays. As a result, the length of the process is driven by how many cycles and readjudications are triggered. VA's FY 2016 budget request includes legislative proposals to improve the appeal process, and VA has collaborated with Veterans service organizations to develop an optional fully developed appeals pilot program. VA continues to work with Congress and other stakeholders to explore long-term solutions that would provide Veterans the timely appeals process they deserve.

VA estimates that GOE costs associated with this section would be insignificant.

Section 103

Section 103 would allow for greater use of video conference hearings by the Board, while still providing Veterans with the opportunity to request an in-person hearing if they so elect. This provision would apply to cases received by

the Board pursuant to Notices of Disagreement submitted on or after the date of the enactment of the Act. VA fully supports section 103 as drafted, as this provision would potentially decrease hearing wait times for Veterans, enhance efficiency within VA, and better focus Board resources toward issuing more final decisions.

The Board has historically been able to schedule video conference hearings more quickly than in-person hearings, saving valuable time in the appeals process for Veterans who elect this type of hearing. In FY 2014, on average, video conference hearings were held 124 days sooner than in-person hearings before a Veterans Law Judge (VLJ) at a Regional Office Travel Board hearing. Section 103 would allow both the Board and Veterans to capitalize on these time savings by giving the Board greater flexibility to schedule video conference hearings than is possible under the current statutory scheme.

Historical data also shows that there is no statistical difference in the ultimate disposition of appeals based on the type of hearing selected. Veterans who had video conference hearings had an allowance rate for their appeals that was virtually the same as Veterans who had in-person hearings; however, Veterans who had video conference hearings were able to have their hearings scheduled much more quickly. Section 103 would continue to allow Veterans who want an in-person hearing the opportunity to specifically request and receive one.

Enactment of section 103 could also lead to an increase in the number of final decisions for Veterans as a result of increased productivity at the Board.

Time lost due to travel and time lost in the field due to appellants failing to show up for their hearing would be greatly reduced, allowing VLJs to better focus their time and resources on issuing final Board decisions for Veterans.

Major technological upgrades to the Board's video conference hearing equipment over the past several years leave the Board well-positioned for the enactment of section 103. This includes the purchase of high-definition video equipment, a state-of-the art digital audio recording system, implementation of a virtual hearing docket, and significantly increased video conference hearing capacity. Section 103 would allow the Board to better leverage these important technological enhancements.

We observe that section 103 would redesignate current subsection (f) of section 7107 of title 38, United States Code, as subsection (g); however, the draft legislation does not revise the reference to current subsection (f) in subsection (a) of section 7107 of title 38, United States Code. We suggest revising subsection (a)(1) to state: "Except as provided in paragraphs (2) and (3) and in subsection (g), each case received pursuant to application for review on appeal shall be considered and decided in regular order according to its place upon the docket."

In short, section 103 would result in shorter hearing wait times, focusing Board resources on issuing more decisions, and providing maximum flexibility for both Veterans and VA, while fully utilizing recent technological improvements. VA therefore strongly endorses this proposal.

Section 201

We defer to the U.S. Government Accountability Office.

Section 204

We defer to the VA Office of the Inspector General.

Section 205

Section 205 would require VA to submit an annual report to Congress on the capacity of VBA to process claims during the next one-year period. The reports would include the number of claims VBA expects to process; number of full-time equivalent (FTE) employees who are dedicated to processing such claims; an estimate of the number of claims a single FTE can process in a year; an assessment of whether VA requires additional or fewer FTE to process such claims during the next one-year, five-year, and 10-year periods; a description of actions VA will take to improve claims processing; and an assessment of actions identified in previous reports required by this section. VA would be required to make the report publicly available on the internet.

VA believes this legislation is unnecessary as VA's current budget reports address these issues adequately, and such budget reports are available publicly.

No administrative costs would be associated with enactment of this section.

Section 207

Section 207 would require VA to submit to Congress a report on the Department's progress in implementing the Veterans Benefits Management System (VBMS). The report would include (1) an assessment of current VBMS functionality; (2) recommendations from VA's claims processors, including

Veterans Service Representatives, Rating Veterans Service Representatives, and Decision Review Officers, on legislative or administrative actions to improve the claims process; and (3) recommendations from VSOs that use VBMS on legislative or administrative actions to improve VBMS. VA would be required to submit a report within 180 days after enactment of the bill and no less frequently than once every 180 days thereafter until three years after enactment.

VA believes this legislation unnecessary as VA currently provides regular updates to Congress regarding implementation and functionality of VBMS; quarterly briefings to the House and Senate Committees on Veterans' Affairs, advising them of the status of VBA operations and updates to VBMS; and a quarterly report to the House and Senate Appropriations Committees summarizing recent and upcoming changes to VBMS. Additional reporting requirements are not needed at this time.

VA estimates GOE costs associated with this section would be insignificant.

Section 208

Section 208 would require VA to submit, within 90 days of enactment of this Act, a report to Congress detailing plans to reduce the inventory of claims for dependency and indemnity compensation (DIC) and pension benefits.

VA does not support section 208. It is unnecessary as VBA continues to make significant improvements in processing DIC and pension claims.

VA's Pension and Fiduciary (P&F) Service, which oversees administration of the DIC and pension programs, reviewed the policies and procedures

applicable to the adjudication of these claims to identify obstacles to timely processing. P&F Service determined that certain claim processing steps are redundant and appropriate for elimination. On March 22, 2013, P&F Service issued Fast Letter 13-04 (FL 13-04), Simplified Processing of Dependency and Indemnity Compensation (DIC) Claims, which instructs VBA field staff on the procedures to follow when processing DIC claims. P&F Service is working on similar guidance for pension claims.

On July 7, 2014, VA began automating payment of DIC to certain surviving spouses of Veterans rated totally disabled at death. As part of VA's notice of death process, VA systems determine if the deceased Veteran met the requirements of section 1318 and if the surviving spouse met the relationship requirements. If the system determines that both requirements are met it will automatically process and award DIC under section 1318 within six days of notification of the Veteran's death.

Based on these changes and an aggressive workload management plan in VA's Pension Management Centers, VA has reduced its pending DIC claim inventory by 55 percent from its peak of 19,100 claims to 8,600 claims, and backlog by 87 percent from its peak of 8,800 to 1,000. Veterans pension inventory was reduced by 68 percent from its peak of 36,100 to 11,400, and backlog by 96 percent from its peak of 14,500 to 600. Average processing time for DIC has improved by 100 days from its peak of 168 days to 68 days, while maintaining 99 percent accuracy.

No benefits or GOE costs would be associated with enactment of this section.

Section 209

This section would require VA to include in its Monday Morning Workload Report (MMWR) the number of claims received by regional offices and pending decisions, disaggregated by the number of claims that have been pending for more than 125 days; the number of claims that have been pending for 125 days or less; and the number of claims that do not require a decision concerning a disability rating. This section would also require VA to include in the MMWR, the sections entitled "Transformation" and "Aggregate," the number of partial ratings assigned. Additionally, this section would require VA to include in the MMWR a report on the total number of fully developed claims (FDC) received by regional offices that are pending a decision and the subset of those claims that have been pending for more than 125 days, disaggregated by station.

VA does not support this section. The information required by section 209(a) is already published in the MMWR for rating-related disability compensation and pension claims. The section appears to propose requiring all other non-rating pending compensation and pension workload be added to the MMWR; however information about these pending claims is also already published in the MMWR. The single distinguishing new feature would be the application of the backlog metric of 125 days to all non-rating-related claims by regional office. However, 125 days is not a useful metric for the majority of non-rating-related claims. The significant differences in the work effort required for

various types of non-rating-related claims and the fact that much of this work is consolidated to the Pension Management Centers make comparison at the aggregate level across all regional offices a comparison without context or any real capability to inform how one regional office compares to another.

Section 209(b) would elevate tallies of partial ratings of various claim types into a tool of comparison between regional offices. Data on partial ratings that award benefits for some, but not all, claimed conditions are not informative in this way as they reflect the unique circumstances of each claim. Additionally, irrespective of partial rating decisions, over half of the Veterans with pending claims are already receiving compensation as a result of a previously filed claim. Adding this partial-rating metric would not provide meaningful comparisons at the regional office level.

Section 209(c) would require pending FDC claims, one VBA high-priority claims category, to be added to the MMWR. To the degree making comparisons between regional offices is desired, the existing reporting in the MMWR on claims older than 125 days, VA's largest pending group of high priority claims, provides a better metric for such comparisons than FDC claims. However, should it be determined that a pending FDC metric would be useful, legislation is not required to add this metric to the MMWR.

VA estimates GOE costs associated with this section would be insignificant.

Section 210

This section would require VA to make available to the public on the internet the “Appeals Pending” and “Appeals Workload by Station” reports. VA would be required to include in one of these reports the percentage of appeals granted by station and the percentage of claims previously adjudicated by VBA’s Appeals Management Center that were subsequently granted or remanded by the Board.

VA does not support this section. VBA’s MMWR currently includes the total number of appeals pending and other metrics related to appeals. Before adding data elements to reports, VBA needs to ensure that the information is provided in a useful way that can be easily understood by the public.

For example, VBA is changing its workload management strategy by developing the National Work Queue (NWQ), a paperless workload management initiative designed to improve VBA’s overall production capacity. In the initial phase of NWQ, VBA is matching its inventory with claims processing capacity at the regional office-level, moving claims electronically from a centralized queue to an office identified as having capacity to complete the work. With this national workload approach, VA will continue to focus on the improvement of its traditional performance metrics, with an emphasis on improving quality and consistency of claims and appeals processing nationwide to ensure Veterans and their families receive timely benefits, regardless of where they reside. Appeals data by station will be less useful to the public as NWQ is implemented.

Additionally, it is unclear how the bill would define “appeals granted by station.” Multiple decisions may be appealed in each claim, and it is unclear if

VA would be required to report percentages associated with each decision or each appeal. Similarly, it is unclear at what point in the appeal process this metric would be reported. The current process provides appellants with multiple reviews in VBA and one or more reviews at the Board, depending upon the submission of new evidence or whether the Board determines that it is necessary to remand the matter to VBA. The longer an appeal takes, the more likely it is that a claimed disability will change, resulting in the need for additional evidence, further processing delays, and less clarity in whether an initial decision was correctly made.

VA estimates GOE costs associated with this section would be insignificant.

Section 211

Section 211 would revise provisions of the Veterans' Benefits Improvement Act of 1996 relating to contract examinations to clarify that, notwithstanding any law regarding the licensure of physicians, a licensed physician may conduct disability examinations for VA in any state, the District of Columbia, or a commonwealth, territory, or possession of the United States, provided the examination is within the scope of the physician's authorized duties under a contract with VA.

VA supports the provision regarding licensure requirements as a means to ensure the quality of contract examinations. 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 that Veterans claim,

and changes in eligibility requirements for disability benefits. This authority would help provide flexibility in examinations through non-VA medical providers while maintaining licensure standards and accelerating benefits delivery.

No benefit or discretionary costs would be associated with enactment of this section.

Section 301

Section 301 would require the appointment of at least one liaison between VA and DoD, and between VA and each of the reserve components. It would also require the National Archives and Records Administration (NARA) to appoint a liaison to VA. The intent of these appointments is to expedite the provision of information needed to process claims by VA, to ensure that such information would be provided within 30 days of the request. VA would be required to submit a report to Congress annually regarding the timeliness of responses from DoD and NARA.

While VA appreciates the intent to facilitate records retrieval, VA believes that this section of the bill is unnecessary because of the extensive ongoing efforts between VA and other Federal agencies to improve response times to VA requests for records that are required to adjudicate disability claims. For example, a memorandum of understanding (MOU) between VA and DoD provides VA, at time of discharge, certified and complete service treatment records in an electronic, searchable format. As this MOU applies to the 300,000 annually separated Active Duty, National Guard, and Reserve Component

members, it will significantly contribute to VA's efforts to achieve its 125-day goal for completion of disability compensation claims.

Costs associated with enactment of this section would be insignificant. DoD and NARA would be required to appoint liaisons; VBA would not hire additional employees. Costs associated with the report required by section 301(d) would be insignificant.

Section 302

Section 302 would require DoD and VA to jointly submit to Congress a report that sets forth a timeline with milestones for achieving interoperability between the electronic health records systems of both Departments.

The Veterans Health Administration (VHA) runs the largest integrated health care system in the country; delivering the quality care Veterans deserve is not possible without innovative information technology and data sharing. VA's Electronic Health Record (EHR) – Veterans Health Information Systems and Technology Architecture (VistA) – is the most widely used EHR in the United States, and VA is working rapidly to modernize it. VA is developing a new web application and services platform called the Enterprise Health Management Platform (eHMP). eHMP is the VistA application clinicians will use during their clinical interactions with Veterans. eHMP brings exciting new features to the clinician, including Google-like search capabilities and information buttons that help clinicians find needed information much faster than current systems. VA is already piloting eHMP, and expects to deploy it to 30 sites by the end of the

calendar year, with full rollout – including regular updates – over the next three years.

VA continues to work with DoD on health data interoperability, but it is important to note that the two Departments already share health care data on millions of Servicemembers and Veterans. In fact, the two Departments share more health data than any other health care entities in the nation. In addition to sharing health care data, VA and DoD have also paved the way for standardizing health care data, so that regardless of what system a clinician uses, the data is available in the right place and in the right way; for example, Tylenol and acetaminophen appear in the same place in the record because the system understands, through our data standardization, that they are the same medication. Today, VA and DoD clinicians can use the Joint Legacy Viewer (JLV) to see VA and DoD data on a single screen in a Servicemember or Veteran's record. Eventually, eHMP will replace JLV and will allow clinicians to see VA, DoD, and third-party provider data in their regular clinical care tool.

The Department does not object to providing a report. Costs of this report would be insignificant as the Department currently provides a similar report to Congress.

Draft Bill Cost-of-Living-Adjustment Act

The Draft bill on the “Veterans’ Compensation Cost-of-Living Adjustment Act of 2015,” would require the Secretary of Veterans Affairs to increase, effective December 1, 2015, the rates of disability compensation for service-

disabled Veterans and the rates of DIC for survivors of Veterans. This bill would increase these rates by the same percentage as the percentage by which Social Security benefits are increased effective December 1, 2015. The bill would also require VA to publish the resulting increased rates in the Federal Register.

VA strongly supports this bill because it would express, in a tangible way, this Nation's gratitude for the sacrifices made by our service-disabled Veterans and their surviving spouses and children and would ensure that the value of their benefits will keep pace with increases in consumer prices.

The cost of the cost-of-living adjustment (COLA) is included in VA's baseline budget because we assume a COLA will be enacted by Congress each year. Therefore, enactment of the draft bill which would extend the COLA adjustment through November 30, 2016, would not result in costs.

Draft to Amend Title 38, United States Code, to Modify the Treatment Under Contracting Goals and Preferences of the Department of Veterans Affairs for Small Businesses Owned by Veterans, to Carry Out a Pilot Program on the Treatment of Certain Applications for Dependency and Indemnity Compensation as Fully Developed Claims, and for Other Purposes
Section 101

Section 101 would expand the flexibility provided to a service-disabled Veteran-owned small business (SDVOSB) to continue to hold that socioeconomic status upon the death of the service-disabled Veteran owner. Current law provides a transition period for SDVOSBs for up to 10 years after the

Veteran's death, if the Veteran had a service-connected disability with a 100-percent rating or died as a result of a service-connected disability. This bill would create a similar transition period for three years, if the Veteran had a service-connected disability with a rating of less than 100 percent and did not die as a result of a service-connected disability.

VA supports this provision because, without the proposed transition period, the death of the Veteran owner could put at risk the jobs and livelihoods of the firm's employees, as well as the surviving spouse. The transition period provides the spouse a reasonable period of time to determine what should be done with the business after the Veteran's death.

VA anticipates enactment of this provision would entail minor administrative costs. VA would incorporate this change into its existing application processes with no material addition to costs.

Section 102

Section 102 would amend 38 U.S.C. § 8127 by providing a transition rule for a member of the Armed Forces who owns at least 51 percent of a small business and is killed in the line of duty. Such a Veteran's surviving spouse who acquires ownership interest in the small business would be treated as a service disabled Veteran owner until the earliest of the following: 10 years after the Servicemember's death; the date on which the surviving spouse remarries; or the date on which the spouse no longer owns at least 51 percent of the small business. Such a Veteran's dependent child that acquires ownership interest in the small business would be treated as a Veteran owner for 10 years after the

Servicemember's death or the date on which the child no longer owns at least 51 percent of the small business, whichever occurs first.

VA supports the spirit behind this provision but notes two substantive concerns with the draft language. First, Congress sought to ensure that Veteran small business owners genuinely own and control the small business receiving benefits under the Veterans First Contracting Program. This would be a challenge for members of the regular Armed Forces, especially those serving in active duty abroad. Moreover, members of the Armed Forces are also Federal employees, which places limits on their ability to receive Federal contracts under conflict of interest rules. In practice, this rule would mainly apply to members of the National Guard and Army Reserve who own small businesses in their civilian lives, become activated, and are killed in the line of duty, leaving survivors to assume operational control of the firm as a service disabled Veteran-owned small business. Second, if a dependent child owner is still a minor, this may complicate the actual operation of this rule because of limitations on a minor's capacity to enter into binding contracts or engage in commercial transactions as an owner. The firm may need to reside in a trust for the benefit of the dependent minor child with an adult trustee controlling the firm until the dependent reaches adulthood. VA would be pleased to provide technical assistance to seek resolution of these issues.

VA anticipates enactment of this provision would entail minor administrative costs. VA would incorporate this change into its existing application processes with no material addition to costs.

Section 202

Section 202 would require VA to submit a report on the standard of proof for service-connected disability compensation for military sexual trauma (MST)-based mental health conditions to the House and Senate Committees on Veterans' Affairs no later than 90 days after enactment. The report would include recommendations for an appropriate standard of proof and legislative actions, if necessary.

VA believes this legislation is unnecessary as VA provided a report with this information to the House and Senate Appropriations Committees in March 2015 and can share it with other interested Congressional offices.

No benefit or GOE costs would be associated with enactment of this section.

Section 203

Section 203 would require VA to submit a report with data on compensation claims for MST-based PTSD to Congress no later than December 1, 2016 and each year thereafter through 2020. The report would include the following information from the preceding fiscal year:

1. The number of MST-related PTSD claims submitted;
2. The number and percentage of claims submitted by gender;
3. The number of approved claims, including number and percentage by gender;
4. The number of denied claims, including number and percentage by gender;
5. The number of claims assigned to each rating percentage, including number and percentage by gender;
6. The three most common reasons given for denial of such claims under 38 U.S.C. § 5104(b)(1);
7. The number of denials that were based on the failure of the Veteran to report for a medical examination;

8. The number of MST-based PTSD claims resubmitted after denial in a previous adjudication and items 2-7 from this list for this subset of claims;
9. The number of claims that were pending at the end of the fiscal year and separately the number of such claims on appeal; and
10. The average number of days to complete MST-based PTSD claims.

VA believes this legislation is unnecessary as VA provided a report with most of this information to the House and Senate Appropriations Committees in March 2015 and can share it with other interested Congressional offices. If additional information or data for subsequent years are needed, VA can provide this to interested Congressional offices without legislation.

No benefit or GOE costs would be associated with enactment of this section.

Section 204

Section 204 would direct VA to establish a one-year pilot program within 90 days of enactment to assess the feasibility and advisability of expediting the treatment of certain DIC claims, to include claims submitted:

1. Within one year of the death of the Veteran upon whose service the claim is based;
2. By dependents of Veterans who received benefits for one or more service-connected conditions as of the date of death;
3. With evidence indicating the Veteran's death was due to a service-connected or compensable disability; and
4. By a spouse of a deceased Veteran who certifies that he or she has not remarried since the Veteran's death.

Section 204 would also require VA to submit a report to the House and Senate Committees on Veterans' Affairs within 270 days of completing the pilot program. The report would include:

1. The number of DIC claims adjudicated under the pilot disaggregated by claims received by a spouse, child, or parent of a deceased Veteran;

2. The number of DIC claims adjudicated but for which benefits were not awarded under the pilot disaggregated by claims received by a spouse, child, or parent of a deceased Veteran;
3. A comparison of accuracy and timeliness of claims adjudicated under the pilot and DIC claims not adjudicated under the pilot;
4. VA's finding with respect to the pilot; and
5. Recommendations the VA may have for legislative or administrative action to improve processing of DIC claims.

VA supports the intent of this legislation, but believes it is unnecessary.

As discussed above, in fiscal year 2013, VBA's P&F Service reviewed the policies and procedures applicable to the adjudication of DIC claims to identify obstacles to timely processing. P&F Service determined that VA could quickly grant many DIC claims with little or no additional development, and that certain claim processing steps are redundant and appropriate for elimination. On March 22, 2013, P&F Service issued Fast Letter 13-04 (FL 13-04), Simplified Processing of Dependency and Indemnity Compensation (DIC) Claims, which instructs VBA field staff on the procedures to follow when processing claims.

The new procedures require screening of claims at the intake point and limited or no development of additional evidence when information in VBA systems supports granting benefits. It also clarifies that VA grants DIC under 38 U.S.C. § 1318 based upon total service-connected disability for a prescribed period before death in the same manner as if the death were service connected. Accordingly, in these cases, our field staff will grant service-connected burial benefits and presume the permanence of total disability for purposes of establishing the survivor's entitlement to VA education and health care benefits. These new procedures allowed us to grant DIC benefits faster and without unnecessary development.

Also, as discussed above, on July 7, 2014, VA automated some benefits to surviving spouses. VA can now automatically pay certain surviving spouses under section 1318. As part of VA's notice of death process, VA systems determine if the deceased Veteran met the requirements of section 1318 and if the surviving spouse met the relationship requirements. If the system determines that both requirements are met, it will automatically process and award DIC under section 1318 within six days of notification of the Veteran's death.

Based on these changes and aggressive workload management plan in VA's Pension Management Centers, VA has reduced its pending DIC claim inventory by 55 percent from its peak of 19,100 claims to 8,600 claims. Average processing time for these claims has improved by 100 days from its peak of 168 days to 68 days while maintaining 99 percent accuracy.

VA estimates no benefit or GOE costs would be associated with enactment of this section.

Section 205

Section 205 would require VA, DoD, and military historians recommended by DoD to review the process used to determine if individuals who applied for Filipino Veterans Equity Compensation (FVEC) benefits served during World War II in accordance with the requirements to receive this benefit payment. Section 205 would also require VA to submit a report to the House and Senate Committees on Veterans' Affairs no later than 90 days after enactment. The report would detail any findings, actions taken, or recommendations for legislative action with respect to the review. If a new process is established as a

result of this review, the process shall include mechanisms to ensure individuals who receive payments did not engage in any disqualifying conduct during their service, including collaboration with the enemy or criminal conduct.

VA does not support this section. In determining whether a claimant is eligible for a VA benefit, including FVEC, VA is legally bound by service department determinations as to what service a claimant performed. VA regulations provide two methods for establishing service. Under 38 C.F.R. § 3.203(a), VA may accept evidence submitted by a claimant if the evidence is a document issued by a U.S. service department; contains the needed information as to length, time, and character of service; and, in VA's opinion, is genuine and accurate. Otherwise, under 38 C.F.R. § 3.203(c), VA must seek verification of service from the appropriate service department. These regulations are applicable to all claimants. For claims based on Philippine Service in World War II, the U.S. Army is the relevant service department, but VA requests verification from the National Personnel Records Center which, since 1998, has acted as the custodian of the U.S. Army's collection of Philippine Army and Guerrilla records.

No benefit or GOE costs would be associated with enactment of this section.

Section 301

Section 301 would require VA to conduct a study and report to Congress on matters relating to the interment of unclaimed remains of Veterans in national cemeteries under the control of the National Cemetery Administration (NCA), including: (1) determining the scope of issues relating to unclaimed remains of

Veterans, to include an estimate of the number of unclaimed remains;
(2) assessing the effectiveness of VA's procedures for working with persons or entities having custody of unclaimed remains to facilitate interment in national cemeteries; (3) assessing State and local laws that affect the Secretary's ability to inter such remains; and (4) recommending legislative or administrative action the VA considers appropriate.

Section 301 would provide flexibility for VA to review a subset of applicable entities in the estimating of the number of unclaimed remains of Veterans as well as assess a sampling of applicable State and local laws.

In December 2014, NCA published a Fact Sheet to provide the public with information on VA burial benefits for unclaimed remains of Veterans. NCA prepared the Fact Sheet in collaboration with representatives from NCA, VBA, and VHA. As well as being posted on VA's website, the Fact Sheet was widely distributed to targeted employees in VA, including Homeless Veteran Coordinators, Decedent Affairs personnel, VBA Regional Compensation Representatives, and NCA Cemetery Directors as well as shared in a GovDelivery message sent to over 28,000 funeral director and coroner's office recipients who are entities that may come to NCA seeking assistance to ensure burial of a Veteran whose remains are unclaimed.

NCA strongly supports the goal of ensuring all Veterans, including those whose remains are unclaimed and do not have sufficient resources, who earned the right to burial and memorialization in a national, State, or tribal Veterans cemetery are accorded that honor. NCA appreciates the continued

Congressional support to meet the needs of Veterans whose remains are unclaimed. While NCA is remains concerned that the study may be unnecessary or premature at this time, we would appreciate working with the Committee to make sure any study that the Department is mandated to produce is targeting data that can be used to better serve these Veterans.

Over the past several years, Congressional and Departmental actions have increased the Department's ability to ensure dignified burials for the unclaimed remains of eligible Veterans. The Dignified Burial and Other Veterans' Benefits Improvement Act of 2012 (Public Law 112-260) authorizes VA to furnish benefits for the burial in a national cemetery for the unclaimed remains of a Veteran with no known next-of-kin and where sufficient financial resources are not available for this purpose. Those benefits include reimbursements for the cost of a casket or urn, for costs of transportation to the nearest national cemetery, and for certain funeral expenses.

NCA is pleased to report that our final rule was published on April 13, 2015, beginning today, we are able to accept requests for reimbursement for caskets or urns purchased for the interment of deceased Veterans who died on or after January 10, 2014, without next of kin, and where sufficient resources for burial are not available. As this new benefit is administered, NCA will have a new source for collecting data on the number of Veterans whose unclaimed remains are brought to NCA for interment. The data can be used to assist in targeting outreach efforts to partners and getting a fuller understanding of the issue.

The Department continues to identify areas to recommend legislative or administrative action that would support dignified burial of unclaimed remains of Veterans. Two legislative proposals are included in VA's FY 2016 Budget Submission. Currently, VA may furnish a reimbursement for the cost of a casket or urn and for the cost of transportation to the nearest national cemetery. These benefits are based on the Veteran being interred in a VA national cemetery. The legislative proposals are to expand these two benefits to include those Veterans who are interred in a state or tribal organization Veteran cemetery.

In conjunction with discussions we had last year with congressional staff, NCA reviewed its internal procedures and began to follow-up every thirty days with the public officials on any unclaimed remain cases shown as pending until the cases are scheduled for burial and the Veterans' remains are interred. While state and local laws designate who may act as an authorized representative to claim remains, NCA can work with any individual or entity that contacts us to determine a Veteran's eligibility for burial and scheduling the burial in a VA national cemetery.

The great work of the Missing in America Project (MIAP) and individual funeral directors is invaluable in complementing VA's role of ensuring that all Veterans, including those whose unclaimed remains are brought to us, receive the proper resources to ensure receipt of a dignified burial. Over the past several years, NCA has developed a strong working relationship with funeral homes, coroner offices, and medical examiners, to actively provide responses to requests for eligibility reviews. In FY 2014, NCA processed 2,805 MIAP requests

to determine eligibility for burial in a VA national cemetery, of which 1,642 were verified as eligible.

In light of VA's recent activities, detailed above, to implement legislation targeted at ensuring appropriate burial of the unclaimed remains of Veterans, NCA feels it is premature to undertake the proposed study. Furthermore, if legislation is passed requiring the study, we do not object to the proposed scope and content, we are concerned that the timeframe for reporting in the bill is unrealistic.

To implement the mandatory requirements outlined in the bill, even with the flexibilities included in the bill language, the Department would be required to contract with one or more private entities to perform such a study. Survey instruments would need to be developed to assess the number of remains in the possession of funeral directors and other entities for individuals with no known next of kin, and an appropriate sample would have to be identified and a legal review of state and local laws conducted regarding unclaimed remains of Veterans.

The bill provides a reporting timeframe of one year. The need to get formal clearances on survey instruments takes several months; therefore, a more realistic timeframe is two years.

The bill does not identify a funding source for this mandate. NCA is still evaluating the cost associated with this legislation.

Section 401

Section 401 would honor any person entitled under chapter 1223 of title 10, United States Code, to retired pay for nonregular service or who, but for age, would be entitled under this chapter to retired pay for nonregular service, as a Veteran. However, these individuals would not be entitled to any benefit by reason of this honor.

VA does not support this section. It would conflict with the definition of "Veteran" in 38 U.S.C. § 101(2) and would cause confusion about the definition of a Veteran and associated benefits. In title 38, United States Code, Veteran status is conditioned on the performance of "active military, naval, or air service." Under current law, a National Guard or Reserve member is considered to have had such service only if he or she served on active duty, was disabled or died during active duty for training from a disease or injury incurred or aggravated in line of duty, or was disabled or died during inactive duty training from an injury incurred or aggravated in line of duty or from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident. Section 401 would eliminate these service requirements for National Guard or Reserve members who served in such a capacity for at least 20 years. Retirement status alone would make them eligible for Veteran status.

VA recognizes that the National Guard and Reserves have admirably served this country and in recent years have played an important role in our Nation's overseas conflicts. Nevertheless, VA does not support this bill because it represents a departure from active service as the foundation for Veteran status. This section would extend Veteran status to those who never performed active

military, naval, or air service, the very circumstance which qualifies an individual as a Veteran. Thus, this section would equate longevity of reserve service with the active service long ago established as the hallmark for Veteran status.

VA estimates that there would be no additional benefit or administrative costs associated with this section of the bill if enacted.

This concludes my testimony. We appreciate the opportunity to present our views on these bills and look forward to working with the Committee.