

**STATEMENT OF THE HONORABLE DENIS MCDONOUGH  
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DEPARTMENT OF VETERANS AFFAIRS (VA)  
BEFORE THE  
COMMITTEE ON VETERANS' AFFAIRS  
UNITED STATES SENATE  
ON  
HONORING OUR PACT ACT OF 2021**

**MARCH 29, 2022**

Chairman Tester, Ranking Member Moran, and other Members of the Committee: thank you for inviting me here today to present the Department's views on H.R. 3967, the Honoring our Promise to Address Comprehensive Toxics Act of 2021, or the Honoring our PACT Act of 2021.

I will begin my written testimony with a general discussion of VA's current approach to ensuring Veterans who have experienced environmental exposures receive the care and benefits they have earned and then provide a general discussion of each title of the Honoring our PACT Act of 2021. In discussing each title, I will provide a summary of its provisions, describe the potential impact of the bill on the timely delivery of VA health care and benefits, discuss potential costs associated with that title and other resources needed to implement the bill, and explain how the title could support ongoing research efforts. In addition, I have included an appendix to my testimony identifying technical amendments or corrections we believe need to be made to the bill.

**General Discussion**

VA has struggled for decades to address the health effects of harmful environmental exposures that occurred during military service from World War I to the post-9/11 generation. All too often, VA's historical process resulted in VA denying claims from Veterans for lack of evidence, only for VA to eventually create presumptions of service connection decades later, but often too late for many Veterans, caregivers, families, and survivors. These issues loom large for the post-9/11 Veteran cohort, numbering 3.5 million, whose exposures to burn pits, carcinogenic substances, airborne and environmental hazards, chemical warfare agents, and other toxins have been potentially linked to a broad array of maladies.

Over the past 12 months, VA has taken a number of important steps to ensure Veterans who served in Southwest Asia since 1991 and who were exposed to burn pits and other environmental hazards get the timely access to world-class care and benefits they deserve. VA is establishing a holistic approach, informed by science, for determining toxic exposure presumptions going forward. This new approach expands our focus concerning scientific evidence and considers all available data, listens to and learns from Veterans' experience, and is guided by one core principle: getting Veterans the benefits they have earned and therefore deserve. This new approach already has

resulted in real progress, including new presumptions of service connection for three respiratory conditions (asthma, rhinitis and sinusitis) for Veterans who served in Southwest Asia and certain other areas. The establishment of these new presumptions makes President Biden the first President to provide exposure benefits proactively to the Veterans who have fought our wars in the Middle East and Southwest Asia for the past 30 years, and more importantly, ensures that over 10,600 of those Veterans are now finally getting the benefits they have earned and deserve. Earlier this month, VA announced our intention to initiate rulemaking to add several rare respiratory cancers to the list of presumed service-connected diseases in relation to exposure to toxic chemicals in the air, water or soil for certain Veterans. The presumptions would make it easier for affected Veterans to obtain VA health care and other benefits. The cancers under consideration include squamous cell carcinoma of the larynx, squamous cell carcinoma of the trachea, adenocarcinoma of the trachea, salivary gland-type tumors of the trachea, adenosquamous carcinoma of the lung, large cell carcinoma of the lung, salivary gland-type tumors of the lung, sarcomatoid carcinoma of the lung, and typical and atypical carcinoid of the lung.

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VA is piloting a new comprehensive, evidence-based, presumptive decision-making model to consider possible relationships between in-service military exposures to environmental hazards and medical conditions. VA designed the model to expand the aperture for reviewing scientific information and facilitate timelier decision making, thereby lowering the burden of proof for Veterans impacted by exposures and speeding up the delivery of health care and benefits they need. At the President's direction, VA will use this new presumptive decision-making model to assess associations between environmental exposures and constrictive bronchiolitis, rare brain cancers, and lung cancer. By April 1, 2022, I will receive the results of the model, and, from there, we will leverage the validated model to seek answers on those conditions that may be strong candidates for presumptions of service connection later this year.

## **Title-by-Title Discussion**

### **Title I: Expansion of Health Care Eligibility**

#### *Summary*

Title I of the bill, named the Conceding Our Veterans' Exposures Now and Necessitating Training Act, or the COVENANT Act, would make various amendments to sections 101, 1703, 1710, and 7322 of title 38, United States Code (U.S.C.). These changes would add new terms and their definitions and would expand eligibility for health care and the scope of benefits in six important ways.

- First, the bill would amend VA's current requirement to provide care to any Veteran who was exposed to a toxic substance, radiation or other conditions, and instead refer simply to "toxic-exposed Veterans."
- Second, it would require VA, on a phased-in cycle, to provide hospital care, medical services and nursing home care for any illness to three new categories of Veterans:

- Those who participated in a toxic exposure risk activity while serving on active duty, active duty for training or inactive duty training;
  - Covered Veterans (as defined in a new § 1119(c), which would be added by section 302 of the bill), which would include:
    - Veterans who were assigned to a duty station in Bahrain, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, Somalia or the United Arab Emirates on or after August 2, 1990, during active service; or
    - Veterans who were assigned to a duty station in Afghanistan, Djibouti, Egypt, Jordan, Lebanon, Syria, Yemen, Uzbekistan, the Philippines or any other country determined relevant by VA on or after September 11, 2001, during active service.
  - Veterans who were deployed in support of Operation Enduring Freedom, Operation Freedom's Sentinel, Operation Iraqi Freedom, Operation New Dawn, Operation Inherent Resolve and Resolute Support Mission.
- Third, the bill would expand access to clinically appropriate mammography screening to certain Veterans, based on their period and place of active service, who are not enrolled in VA health care by amending § 7322 of title 38.
  - Fourth, the bill would extend the window for eligibility to enroll in VA health care from 5 years to 10 years from discharge or release from active service for certain Veterans who were discharged or released from active service after September 11, 2001. It would also create a 1-year period of eligibility to enroll, beginning on October 1, 2022, for Veterans who were discharged or released between September 11, 2001, and October 1, 2013.
  - Fifth, it would clarify eligibility for health care for Veterans who served in a combat theater during a period of war after the Persian Gulf War and received the Armed Forces Expeditionary Medal, the Service Specific Expeditionary Medal, the Combat Era Specific Expeditionary Medal, the Campaign Specific Medal or any other combat theater award established by a Federal statute or an Executive order.
  - Sixth, it would allow VA to authorize emergency care under the Veterans Community Care Program (VCCP) if VA is notified of an admission of a covered Veteran within no less than 96 hours of such admission.

In addition, title I would require VA to submit to Congress:

- Plans to conduct outreach to Veterans who will become eligible for health care at least 180 days before such Veterans become eligible on the phased-in schedule;
- Within 180 days of enactment, an assessment to determine the personnel and material resources necessary to implement the expanded health care eligibility under section 103 of the bill, as well as the total number of covered Veterans who receive hospital care or medical services under chapter 17;
- Annual reports on the effect of the implementation of and the provision and management of care under section 103 of the bill on the demand for health care services, including patterns and changes in health care delivery;

- Biennial reports, in collaboration with the Department of Defense (DoD), specifying other periods and places of active service for purposes of eligibility for clinically appropriate mammography screening;
- Within 2 years of enactment, a report that compares the rates of breast cancer among members of the Armed Forces who deployed to locations during periods identified in § 7322, as amended, to members of the Armed Forces who did not deploy to those locations during those periods and to the civilian population; and
- A plan to conduct outreach to Veterans who would become eligible to enroll during the 1-year period previously described, as well as a report on the number of Veterans who enrolled during this period.

Title I also would require VA to establish information systems to assess the implementation of section 103 of the bill and use the results of the assessments to inform its annual reports to Congress.

#### *Impact on Care and Benefits*

We want to ensure that the expansion of eligibility required by title I does not result in the delay or disruption of care for those Veterans already receiving health care from VA. In this context, we appreciate the bill's phased-in approach to some of the expanded eligibility, as well as the flexibility to accelerate that timeline if VA can do so responsibly.

We believe there would be at least some, and potentially significant, overlap between different categories of Veterans who would become eligible under some of the different provisions in this title. This overlap could result in more Veterans becoming eligible at once on the outlined schedule than was perhaps intended. On the other hand, at least some portion of the Veterans described in this bill would already be eligible to enroll in, and may have already enrolled in, VA health care under a current authority, for example, based on service in combat (see § 1710(e)(1)(D)). Initial estimates indicate that somewhere between 60 and 75% of Veterans described in these provisions are already eligible for enrollment. While these Veterans may already be enrolled in VA care, this title could result in their placement in a higher priority group, which could reduce their financial liability for care. Among currently enrolled Veterans who would benefit from this title, VA expects this population would rely on VA for more of their care. We would like to work with Congress to ensure that the provisions related to the phased implementation are clearly understood so that VA can effectively implement this bill.

In particular, the bill includes language consistent with a legislative proposal from the Administration to expand the window for eligibility to receive care and enroll to up to 10 years from separation, as well creating a 1-year period for those who did not enroll during their previous window, for certain combat Veterans. For awareness, this Committee's Health Care for Burn Pit Veterans Act, S. 3541, would include this authority as well. These amendments will ensure Veterans have the opportunity to make informed decisions about when, where and how to receive their care. In relation to the expansion of access to clinically appropriate mammography services, female Veterans should be provided mammography in accordance with recognized medical best practices, evidence and the best available science in consultation with their

providers. All women Veterans enrolled in our system are eligible for clinically appropriate breast cancer screening; this bill would expand the number of women Veterans eligible for such screening. VA follows the American Cancer Society guidelines for breast cancer screening in average-risk women by offering screening mammography beginning at age 40, and we screen earlier for high-risk women when clinically appropriate. VA has reviewed the medical literature, and there is currently no population-based evidence that military exposures increase the risk of breast cancer and so relies on established best medical practice as our guide for care recommendations. Part of our research, though, is focused on learning more about these risks, and we are training our providers to better understand potential risks based on environmental exposures. If a woman believes she is at risk based on her service, we furnish an individualized risk assessment, and our providers discuss if early screening is indicated based on identifiable risk factors. We caution that it would not be clinically appropriate to conduct a mammogram without a clinical indication to do so, as this could lead to false positive results that could result in radiation exposure, unnecessary procedures (such as biopsies), anxiety, and other complications. We appreciate that this bill would allow VA to make these clinical determinations for more Veterans than we can today to ensure they receive appropriate, timely care. Concerning the extension of VA's current "72-hour" rule to 96 hours, we understand the intent of this effort, but we do not anticipate this extension would result in a significant change in eligibility for emergency care.

#### *Costs and Resources*

Many of the provisions in title I also are connected to provisions in other titles, such as titles II, III and IV. VA is still analyzing the interactions between these provisions and how they would affect the demand for care and benefits. As noted previously, the phased-in approach of the bill could mitigate immediate resource requirements. We estimate the cost of the extension of the window for enrollment from 5 years to 10 years, and the provision of an additional 1-year window for those previously eligible to enroll, would cost approximately \$534 million over 10 years. This estimate is inclusive of personnel and equipment. We are unable to determine at this time if additional physical infrastructure would be needed based on this expansion, as such decisions are informed by detailed build/buy analyses, but if construction is required, these cost estimates would increase. Some elements of title I, as is the case with other titles as well, would be subject to rulemaking that could affect the potential costs and resource needs for implementation. To implement this title effectively, VA believes it would need additional appropriations to support the necessary full-time employees, including health care providers, enhancements to VA's network of community providers, new or improved information technology systems and additional support staff in VA Central Office and the field to provide administrative support, guidance and oversight.

#### *Research*

While title I does not include provisions directly related to research, it could still provide new opportunities to support research related to Veterans' health and benefits. By enrolling more Veterans and providing them the care they need, we also benefit from learning more about this population's health issues and conducting further research

specific to their needs. VA can, in turn, use these findings to inform decisions about presumptions for service connection, risk factors and evidence-based treatments. These interactive effects could serve as a force multiplier to support VA in its mission of providing care and benefits to Veterans, Service members and their families.

## **Title II: Toxic Exposure Presumption Process**

### *Summary*

Title II, called the Fairly Assessing Service-related Toxic Exposure Residuals Presumptions Act, or the FASTER Presumptions Act, would create new provisions in chapter 11 of title 38, U.S.C., regarding determinations relating to presumptions of service connection based on toxic exposure.

- The new 38 U.S.C. § 1171 would establish the process by which VA could establish or modify presumptions of service connection based on toxic exposures.
- The new 38 U.S.C. § 1172 would establish a Formal Advisory Committee on Toxic Exposure.
  - VA could consult with, and seek the advice of, the Committee with respect to cases in which Veterans are suspected of having experienced a toxic exposure during active service or dependents of such Veterans.
  - The Committee would have to assess cases of toxic exposures of Veterans and their dependents by conducting ongoing surveillance and reviewing scientific literature, media reports, information from Veterans and information from Congress. These assessments would cover suspected and known toxic exposures.
  - The Committee also would be responsible for periodically assessing the accuracy of the Individual Longitudinal Exposure Record (ILER) and the data collected.
  - The Committee could develop a recommendation for formal evaluation under the new 38 U.S.C. § 1173 to conduct a review of the health effects related to an exposure if the Committee determines that the research may change the current understanding of the relationship between an exposure to an environmental hazard and adverse health outcomes in humans.
  - Based upon evidence regarding the periods and locations of exposure covered by an existing presumption, the Committee could nominate for formal evaluation under new 38 U.S.C. § 1173 modifications of the periods and locations for eligibility for benefits.
- The new 38 U.S.C. § 1173 would require VA to establish a process to conduct a formal evaluation for each recommendation of the Committee established under proposed § 1172.
  - Under this process, VA would have to conduct research regarding the health effects related to a case of toxic exposure or to evaluate evidence regarding the periods and locations of exposure covered by an existing presumption of service connection.

- Each formal evaluation would have to cover scientific evidence, claims data and other factors as VA determined appropriate.
  - The formal evaluations would have to evaluate the likelihood that a positive association existed between an illness and a toxic exposure while serving in active service and assess toxic exposures and illnesses to determine whether the evidence supported a finding of a positive association between the toxic exposure and the illness.
  - Not later than 120 days after a formal evaluation is commenced, the element of VA that conducts the evaluation would have to submit to the Secretary a recommendation with respect to establishing a presumption of service connection for the toxic exposure and illness, or modifying an existing presumption of service connection, covered by the evaluation.
- The new 38 U.S.C. § 1174 would require VA to commence issuing regulations if the Secretary determines, based on a recommendation under § 1173, that the presumption or modification is warranted or to notify the public that the presumption or modification is not warranted. If VA removed a presumption, Veterans and other beneficiaries who were receiving benefits based on that presumption would continue to receive such benefits.
  - The new 38 U.S.C. § 1175 would allow VA to modify the process under which it conducts formal evaluations under § 1173 and issues regulations under § 1174.
    - VA would have to ensure the new evaluations cover the evidence, data and factors required by § 1173(b).
    - VA would have to notify Congress and wait 180 days before implementing such changes.
    - VA also would have to seek to enter into an agreement with a non-governmental entity or a Federally funded research and development center to conduct a review of the implementation of this subchapter.
  - The new 38 U.S.C. § 1167 would require VA, whenever a law, regulation or Federal court decision established or modified a presumption of service connection, to identify all previously denied claims that were submitted to VA that might have been decided differently had the presumption been in effect at the time of the application.
    - VA would have to allow for the re-evaluation of such claims at the election of the Veteran.
    - Notwithstanding 38 U.S.C. § 5110, VA would have to provide compensation with respect to claims approved pursuant to such re-evaluation based on the date of the submission of the original claim.
    - VA also would have to conduct outreach to inform relevant Veterans they may elect to have a claim re-evaluated under this authority.
    - This section would apply to presumptions of service-connection established or modified on or after the date of enactment.

Title II also would amend 38 U.S.C. § 1116 to require VA to ensure that any determination made on or after the date of enactment regarding a presumption of

service connection based on exposure to an herbicide agent under this section would be made pursuant to the new authorities described previously.

In addition, title II would require VA to submit to Congress:

- Not less frequently than annually, a publicly available report on recommendations for research and any recommendations for legislative or administrative action from the Committee established under § 1172; VA would have to submit a publicly available report on the findings and opinions of VA with respect to the Committee's report.
- Within 2 years of enactment, a report on the implementation of, and recommendations for, the new §§ 1171-1175. On a quarterly basis during the 2-year period beginning on the date of enactment, VA would have to provide to Congress a briefing on the implementation of these provisions.
- Within 540 days of enactment, a report containing the review by the non-governmental entity or Federally funded research and development center on the implementation of the new §§ 1171-1175.

### *Impact on Care and Benefits*

As the President said in the State of the Union earlier this month, VA already is pioneering new ways of linking toxic exposures to diseases, thus helping more Veterans receive their benefits. Based on a focused review of scientific and medical evidence related to exposure to fine particulate matter and the subsequent development of rare respiratory cancers, VA recently announced its intention to initiate rulemaking that would consider adding presumptions of service connection for several rare respiratory cancers for certain Veterans. This announcement follows VA's rulemaking action last year establishing a presumption of service connection for three chronic respiratory conditions, including asthma, rhinitis and sinusitis.

We appreciate that the bill, as passed, includes changes made in collaboration between VA and the House Committee on Veterans' Affairs. For example, removal of the Science Review Board and Working Group on presumptions of service connection would allow VA to implement an efficient, science-driven process. We are concerned, though, that the creation of a new Committee, particularly one subject to the Federal Advisory Committee Act, would likely slow existing mechanisms for proposing and conducting research.

Rather than using an advisory committee that would create significant administrative burdens and slow down the presumptive decision-making process, we recommend Congress consider requiring VA to publish in the Federal Register an annual list of conditions the Department plans to evaluate under VA's presumptive decision model, explain why the conditions were chosen for evaluation and seek input from the public on that list. This approach would enable transparency, intentionality and allow for public participation. It also would allow for a timelier decision-making process. We further recommend that Congress establish clear effective dates indicating when the proposed changes would take effect. VA recommends that sufficient time be given to allow it to implement this authority based on a variety of factors, including the regulatory



development and public comment process, as well as the significant implementation requirements and dependencies (such as staffing and resources) associated with the bill as a whole.

We also are concerned that the current bill text is ambiguous, notwithstanding the four “strength of evidence” categories listed in proposed § 1173, as to when a presumption is warranted. It remains unclear whether Congress intends for the Secretary to adopt the recommendations from the bill’s proposed process as a matter of course. If Congress intends to allow VA to determine the applicable standards for creating a presumption, it would be helpful to make that clear and to provide specific guidelines for when VA must create or modify these presumptions. For example, if the strength of evidence for a particular condition falls in the category of “equipoise and above,” it is unclear whether the Secretary would be required to establish a presumption or if the Secretary would have discretion in those instances. If Congress intends any specific, triggering standards governing these determinations, it would be helpful to clarify such standards in the bill. The court orders in the long-standing, complex class action litigation in *Nehmer v. U.S. Dep’t of Veterans Affairs (Nehmer)* were based on a finding that, in creating presumptions based on herbicide agent exposure, VA applied standards inconsistent with Congressional intent. It would be helpful for the Committee to clarify Congressional intent on this point to avoid similar consequences with respect to this bill.

The new § 1167 would impose a *Nehmer*-type effective date mechanism for new presumptions. We want to be clear to the Committee, though, that applying a *Nehmer*-like retroactive effective date provision in this instance would create a significant exception to the legal structure governing Veterans’ benefits. Applying this standard makes it difficult to predict the consequences of this type of effective date provision. VA would be required to apply the provision in this new authority not only to the presumptions created in this bill but also to any future presumptions created by regulation, statute or court order. This requirement would present extraordinary workload challenges to the agency and unprecedented delays in the delivery of benefits to Veterans. For example, every previously denied claim for any of the presumptive conditions identified in or contemplated by this bill (out of the nearly 3.5 million Gulf War-deployed Veterans) would now be subject to a retroactive effective date as far back as 1991 for Gulf War I Veterans and 2001 for Global War on Terrorism Veterans.

We would welcome the opportunity to work with Congress to ensure that new authorities in this area support our ongoing work to help us make informed decisions as quickly as possible.

#### *Costs and Resources*

VA is concerned that an extremely large and unprecedented disability claims backlog would be created if the *Nehmer*-like provisions in this bill are retained. Based on VA’s previous experience in implementing similar retroactive effective date provisions, we understand this provision would result in complex and time-intensive claims processing procedures. In this case, claims processors would be required to review 20 to 30 years

of evidence for a single issue. Considering that more than 1.9 million Gulf War-era deployed Veterans have filed disability claims in the past 30 years (over 900,000 of whom filed claims for respiratory issues), VA is very concerned about the impact of this provision. VA claims processors would be required to re-adjudicate hundreds of thousands of previously denied claims for earlier effective dates. Estimates from VA's initial technical assistance, without this provision, demonstrated a potential backlog increase to 1.5 and 1.8 million claims by the end of fiscal year (FY) 2023. Any further application of retroactive presumptions would drive further benefit delivery delays for all Veterans.

### *Research*

Title II would establish a new Committee and institute new processes related to the identification of and support for research related to toxic exposures. As noted previously, we are concerned some of the specific provisions in this title would prove more onerous and less nimble than our current approach.

## **Title III: Improving the Establishment of Service Connection Process for Toxic-Exposed Veterans**

### *Summary*

Title III, called the Veterans Burn Pits Exposure Recognition Act, would add two new sections in chapter 11 of title 38, U.S.C.:

- A new 38 U.S.C. § 1119, dealing with presumptions of toxic exposure, would provide that if a Veteran submitted to VA a claim for compensation for a service-connected disability under § 1110 with evidence of a disability and a toxic exposure that occurred during active service, VA could, in adjudicating such claim, consider any record of the Veteran in an exposure tracking record system and, if no record of the Veteran in an exposure tracking record system indicated the Veteran was subject to a toxic exposure during active service, the totality of the circumstances of the Veteran's service.
  - VA would, for purposes of § 1110 and VA health care, presume that any covered Veteran was exposed to the substances, chemicals and airborne hazards identified by VA during the service of the covered Veteran unless there was affirmative evidence to establish that the covered Veteran was not exposed to any such substances, chemicals or hazards.
  - VA would establish and maintain a list that contained an identification of one or more such substances, chemicals or hazards as VA, in collaboration with DoD, determined appropriate for purposes of this section.
  - This section would define the term "covered Veteran," as described in our previous summary of title I.
- A new 38 U.S.C. § 1168 generally would require that, if a Veteran submitted a claim for compensation for a service-connected disability with evidence of a disability and evidence of participation in a toxic exposure risk activity during

active service, and such evidence were insufficient to establish service connection for the disability, then VA would have to provide the Veteran with a medical examination under § 5103A(d) and obtain a medical opinion (to be requested by VA in connection with this medical examination) as to whether it is at least as likely as not that there is a nexus between the disability and the toxic exposure risk activity.

- In providing VA with a medical opinion, the health care provider would have to consider the total potential exposure through all applicable military deployments of the Veteran and the synergistic, combined effect of all toxic exposure risk activities of the Veteran.
- These requirements would not apply if VA determined there was no indication of an association between the disability claimed by the Veteran and the toxic exposure risk activity for which the Veteran submitted evidence.

In addition, title III would require VA to submit to Congress a biennial report identifying any additions to, or removals from, the list that identifies one or more substances, chemical, or airborne hazards as VA, in collaboration with DoD, may determine appropriate for purposes of eligibility of covered Veterans under the new § 1119.

#### *Impact on Care and Benefits*

Title III would adopt a policy for presumptions based on the period and place of service. We believe this approach is better than identifying a list of chemicals and substances, which often are difficult to measure or document the presence of, at the individual level. There are times when the scientific evidence demonstrates that a particular population was exposed to toxic levels of specific substances. VA relied on this evidence in presuming or conceding exposure to fine particulate matter in 38 C.F.R. § 3.320. But given the period of time involved—more than 30 years in parts of the Southwest Asia Theater of Operations (SWATO)—and the different locations involved, it would be extremely difficult to accurately measure and estimate all hazardous exposures for this population.

VA has taken extensive efforts to identify potential exposure to a wide range of toxins for deployed Veterans based on locations. VA is tracking over 3 million Veterans who were deployed to Southwest Asia and other locations and regularly analyzes claims activities and trends for such Veterans. For a specific example, VA is studying health outcomes and disability claims activities for the nearly 16,000 Veterans who served at Karshi-Khanabad (K2) Air Base in Uzbekistan from October 2001 to November 2005. There have been concerns over several potential exposures related to service at K2, and VA will continue to seek information on K2 exposure opportunities. For purposes of compensation benefits, VA already concedes exposure to airborne hazards if a Veteran indicates exposure to burn pits and records show service in the SWATO. In fact, of the locations identified in this title, the only one of concern is the Philippines, which does not have the same respiratory particulate profile known to cause certain lung diseases. As written, the bill would provide VA the flexibility to establish and maintain a list that contains identification of one or more substances, chemicals or airborne hazards as VA,

in collaboration with DoD, may determine appropriate. Allowing VA to establish and maintain this list would allow VA to make decisions based on scientific evidence; however, Congress may wish to make further clarifications to this provision. We have drafted language we are sharing in the Appendix on this provision for your consideration. This proposed change would remove any reference to a list of substances and chemicals but would still inherently consider and recognize the general hazards that are present in locations where Service members are deployed and would not result in the future establishment of service connection for conditions that may have no relationship to military service.

Regarding the proposed nexus examinations, current law requires such examinations only when necessary to make a decision on a claim. While VA would establish and maintain a list of identified substances, chemicals and airborne hazards, there is no way for examiners to measure the total potential exposure to a specific chemical, including the precise level of exposure or the duration of exposure. Therefore, attempting to determine the synergistic effects from exposures that are not well-characterized or have limited data would inevitably lead to a response from examiners that any opinion would be mere speculation. This outcome would likely result in delay in resolving appeals based on current caselaw.

Veterans who become eligible for benefits under the presumptions established under title III would also become eligible for health care benefits, as noted in our discussion of title I.

### *Costs and Resources*

Title III and Title IV have the potential to have a significant impact on VA's claims processing system. VA would need additional mandatory funding appropriated to issue benefits payments for new presumptions of service connection for Veterans. VA also would need additional discretionary funds to support human resources management activities, including hiring, onboarding and training new staff, as well as to support costs related to these new employees. Further funding would be needed for outreach and vendor support. VA likely would need additional claims processing resources such as field support staff (including quality review teams, supervisors, analysts and human resources liaisons), systems and staff to identify an increased volume of requests (inbound calls, public contact team interviews, AskVA submissions for Intent to File claims status and general questions, and additional call center agents and other public contact staff at all regional offices), and more staff in VA Central Office to support training, administration and oversight. Technical resources to expand training administration and capacity, along with additional information technology (IT) equipment and bandwidth, also would be needed.

We further assume that additional claims will result in additional appeals and litigation, which would have resource implications for the Board of Veterans' Appeals and VA's Office of General Counsel, to handle appeals and litigation, respectively, as well as to advise on implementation of these new authorities. For example, we estimate the Office of General Counsel would need an additional 118 full time employee equivalents in

FY 2023, and 57 more in FY 2024 to account for the requirements in this bill as a whole. These personnel needs would require ancillary support through human resources, training, IT and other equipment. We have not consulted with the Court of Appeals for Veterans Claims or the U.S. Court of Appeals for the Federal Circuit, but as these courts hear these appeals, we anticipate they may require additional resources as well. Without these additional resources, resolution of appealed cases pending before the United States Court of Appeals for Veterans Claims and the Federal Circuit would be extended, resulting in further delays in outcomes on Veterans' cases. VA could begin to face sanctions if it was unable to meet all court-imposed litigation deadlines, and VA's ability to provide timely and complete legal support to other programs and initiatives relating to health care and benefits would be impaired.

### *Research*

This title would not appear to have a significant impact on VA's medical research, although the identification of additional claims data could be used to support further understanding of health needs and conditions in this population. In turn, VA research would help identify the list that VA, in collaboration with DoD, would develop identifying one or more substances, chemicals or hazards for purposes of service connection.

## **Title IV: Presumptions of Service Connection**

### *Summary*

Title IV would establish a series of new presumptions of service connection.

- It would add Veterans who participated in the cleanup of Enewetak Atoll, and those who participated in a nuclear response near Palomares, Spain, and Thule Air Force Base, Greenland, to the list of Veterans who participated in a radiation-risk activity.
- It would remove references to specific periods of service in Vietnam and refer instead to an expanded list of locations where a Veteran may have served such that the Veteran would be presumed to have been exposed to certain herbicide agents in service, adding to the Republic of Vietnam the following locations: Thailand (at any U.S. or Royal Thai base); Laos; Cambodia at Mimot or Krek, Kampong Cham Province; Guam; and American Samoa.
- It would add hypertension and monoclonal gammopathy of undetermined significance to the list of presumptions of service connection for diseases associated with exposure to certain herbicide agents.
- It would authorize VA to pay compensation to Persian Gulf Veterans with a qualifying chronic disability that became manifest to any degree at any time.
  - It also would remove the requirement for VA to prescribe by regulation the period of time following service in the SWATO that VA determines is appropriate for presumption of service connection.
  - It would require VA to ensure that, if a Persian Gulf Veteran at a VA medical facility presents with any one symptom associated with Gulf War Illness, VA health care personnel would use a disability benefits questionnaire or successor questionnaire, designed to identify Gulf War

Illness, in addition to any other diagnostic actions the personnel determine appropriate.

- It would include Afghanistan, Israel, Egypt, Turkey, Syria or Jordan in the SWATO for purposes of the definition of a Persian Gulf Veteran.
- It would require VA to take such actions as necessary to ensure that VA health care personnel are appropriately trained to effectively carry out this section.
- It would add a new § 1120 requiring VA to consider certain diseases to have been incurred in or aggravated during active service, notwithstanding that there is no record of evidence of such disease during the period of service.
  - These diseases would include asthma that was diagnosed after service of the covered Veteran, kidney cancer, brain cancer, melanoma, pancreatic cancer, chronic bronchitis, chronic obstructive pulmonary disease, constrictive bronchiolitis or obliterative bronchiolitis, emphysema, granulomatous disease, interstitial lung disease, pleuritis, pulmonary fibrosis, sarcoidosis, chronic sinusitis, chronic rhinitis, glioblastoma, and any other disease for which VA determines, pursuant to regulations, that a presumption of service connection is warranted based on a positive association with a substance, chemical or airborne hazard identified by VA under the new § 1119 as added by title III.
  - It also would include the following cancers of any type: head cancer, neck cancer, respiratory cancer, gastrointestinal cancer, reproductive cancer, lymphoma cancer, and lymphomatic cancer.

In addition, title IV would require VA to submit to Congress an annual report on the actions taken by VA to carry out training for compensation for disabilities occurring in Persian Gulf War Veterans.

#### *Impact on Care and Benefits*

Hypertension has the potential to significantly impact VA's ability to furnish care and benefits to all generations of Veterans. Hypertension is a common condition, and its prevalence increases with age, even among the general population. Currently, there are conflicting interpretations of the scientific evidence to prove or disprove that hypertension in Vietnam Veterans is due to exposure to Agent Orange rather than other factors (such as age). Creating a universal presumption for hypertension for Vietnam Veterans would result in a significant burden on the system for a diagnosis with conflicted science support its service connection; this would detract from VA's ability to deliver health care and provide benefits to other Veterans with diagnoses requiring more acute attention and with a clearer connection to military service. Based on this increase in workload, VA would need additional resources. Monoclonal gammopathy of undetermined significance is a laboratory finding measuring a protein; it has no known clinical manifestation, and hence, a disability rating could not be determined. The new § 1120 likely would have a significant impact on VA benefits and health care given the number of conditions identified.

Regarding the expansion of eligibility for Vietnam-era Veterans, it would be helpful for Congress to be clear whether it intends for this change to apply prospectively or retroactively for newly covered Veterans who are otherwise *Nehmer* class members. Whenever *Nehmer* applies to an expansion of the presumption of exposure to certain herbicide agents, that expansion becomes more expensive and more administratively complex than it otherwise would be. To provide clarity for Veterans and claim adjudicators, we recommend that Congress include language that either more explicitly addresses the *Nehmer* class of Veterans or includes effective date provisions that either include or exclude those Veterans (depending on Congressional intent).

Another concern with this title is that it would provide that if a Persian Gulf Veteran at a VA medical facility presented with any one symptom associated with Gulf War Illness, VA would have to ensure that providers use a disability benefits questionnaire designed to identify Gulf War Illness, in addition to any other diagnostic actions the personnel determine appropriate. We caution that any one symptom in medicine can have many different causes; we are concerned that this could lead to a harmful misdiagnosis and erroneous treatment recommendations. If the purpose of the questionnaire is for disability claims, we think this would be duplicative and unnecessary; for example, if a Persian Gulf War Veteran presents with one of the symptoms, but that symptom has an identified cause or etiology, completion of the Gulf War disability benefits questionnaire would be duplicative and waste resources that could be used providing examinations for other Veterans with pending claims. If the purpose of the questionnaire is for health care purposes, we recommend changing the name because disability benefits questionnaires are used in the disability medical examination process. There is no single set of criteria that defines Gulf War Illness, and there are collectively about 12 different symptoms. VA is actively studying and establishing a clinical definition of "Gulf War Illness" that would allow VA to evaluate and better monitor disability patterns that may be present in the Gulf War Veteran population. VA is completing its review using Artificial Intelligence/Machine Learning and intense chart reviews, and we hope to have a paper in the near future that may allow for a single case definition.

We believe this title would prematurely extend permanent eligibility to certain qualifying Gulf War disabilities without any apparent scientific justification. Further, VA has repeatedly extended the eligibility period for qualifying disabilities in regulation (see 38 C.F.R. § 3.317) and recently published rulemaking to effectively extend eligibility for 5 more years. We suggest Congress similarly extend eligibility for 5 years while VA continues to evaluate the health of Gulf War Veterans. We also have some concerns with including Veterans who served in Afghanistan, Israel, Egypt, Turkey, Syria or Jordan within the term Persian Gulf War Veteran, as these locations are not considered part of the SWATO.

We note that service connection is not a requirement for enrollment in VA health care, and many Veterans who would be covered under the presumptions established in this title are either already eligible for, or already enrolled in, VA health care. Enrolled Veterans are eligible to receive care for any medically necessary condition, including any of the conditions identified in this title.

### *Costs and Resources*

As noted in our discussion of title III, this title could create significant additional demand that would require new staff, additional IT support, additional human resources support and related support services that would require additional appropriations. While this title is more specific as to the new presumptions that would be created, VA is still evaluating the gross impact of these provisions; however, initial estimates indicate VA would need to hire tens of thousands of additional employees, and the disability claims backlog could increase as a result of the provisions in titles II, III and IV between 1.5 million and 1.8 million claims by the end of FY 2023.

### *Research*

We have concerns about the scientific basis for several of the presumptions that would be established under this title. For example, evidence does not show that Veterans who participated in the cleanup of Enewetak Atoll, for example, experienced significant radiation dosages or have increased cancer mortality. Similarly, there are at this time no known adverse health outcomes for Veterans who participated in nuclear responses near Palomares, Spain, or Thule, Greenland, as known radiation exposure did not exceed thresholds of concern in either location. Veterans who participated in clean-up operations at either location are still permitted under current regulations to file claims on a direct basis for consideration of service connection.

While current evidence does not support the addition of new presumptions for at least some of the exposures identified in this title, VA is actively engaged in conducting further research to better understand these risks and to determine if a presumption is warranted. For example, VA is monitoring Veterans who participated in the nuclear response near Palomares, Spain, for adverse health outcomes that could be related to radiation exposure.

At present, there is conflicting evidence regarding hypertension and Agent Orange exposure. VA is committed to analyzing the issue of hypertension and currently is reviewing relevant evidence to include the recently-completed Vietnam Era Health Retrospective Observational Study (VE-HEROeS). This VA-sponsored research will complete processes to ensure that findings are supported and accepted by the scientific community. If VA determines there is an association, VA could use its current regulatory authority to establish a presumption.

## **Title V: Research Matters**

### *Summary*

Title V contains nearly a dozen sections regarding data analyses and other research related to toxic exposure that would:

- Add a new § 7330D establishing an interagency working group (the Working Group) on toxic exposure research consisting of employees from VA, DoD, Department of Health and Human Services (HHS), Environmental Protection



Agency (EPA) and other Federal entities involved in research activities regarding the health consequences of toxic exposure experienced during active service.

- Require VA to compile and analyze, on a continuous basis, all clinical data that is obtained by VA in connection with health care furnished under § 1710(a)(2)(F) and likely to be scientifically useful in determining whether a positive association exists between the illness of the Veteran and a toxic exposure experienced during service in the Armed Forces. VA would have to ensure the compilation and analysis of this data be conducted and used consistent with the informed consent of the Veteran and in compliance with all applicable Federal law.
- Require VA, not later than 180 days after the date of enactment, to conduct an updated analysis of total and respiratory disease mortality in covered Veterans, an epidemiological study of covered Veterans and a toxicology study to replicate toxic exposures of healthy, young members of the Armed Forces and potentially susceptible members with pre-existing health conditions.
- Require VA to conduct an epidemiological study on the health trends of post-9/11 Veterans.
- Require VA to conduct a study on the incidence of cancer in Veterans to determine trends in the rates of incidence of cancer in Veterans and on available early detection diagnostics to determine the feasibility and advisability of including such diagnostics as part of VA health care.
- Require VA to conduct a study on the feasibility and advisability of furnishing hospital care and medical services to qualifying dependents of Veterans who participated in a toxic exposure risk activity for any illness determined by VA to be connected to such activity carried out by the Veteran, as determined by VA, notwithstanding that there is insufficient medical evidence to conclude that such illness or condition is attributable to such activity.
  - It also would require VA to assess the feasibility and advisability of phasing in the furnishing of such care to qualifying dependents by the decade in which such toxic exposure risk activity occurred, starting with the most recent decade.
  - VA would have to review known cases of toxic exposure on DoD military installations, analyze the liability of DoD in each such case and assess whether DoD should provide care and services relating to such toxic exposures under the TRICARE program.
- Require VA to conduct a study on the health trends of Veterans who participated in activities relating to the Manhattan Project or resided at or near several locations in the county of St. Louis, Missouri, during active service.
- Require VA to enter into an agreement with NASEM for the conduct of a study of Veterans to assess possible relationships between toxic exposures experienced during service in the Armed Forces and mental health outcomes.
- Require the Comptroller General to conduct a study on access and barriers to benefits and services furnished by VA in the U.S. territories.
- Require VA, in coordination with other Federal agencies and others, to establish and maintain a publicly accessible website that would serve as a clearinghouse for the publication of all toxic exposure research carried out or funded by the Executive Branch.

In addition, title V would require VA to submit to Congress:

- A report on the establishment of the Working Group within 1 year of the date of enactment; a report containing the collaborative research activities identified by, and the strategic plan developed by, the Working Group within 2 years of the date of enactment; and an annual report during the 5-year period covered by the strategic plan on the implementation of that plan.
- An annual report containing any data compiled under section 502; an analysis of the data; a description of the types and incidences of illnesses identified by VA; an explanation for the incidence of such illnesses and alternate explanations for the incidence of such illnesses as VA considers reasonable; and a description of VA's views regarding the scientific validity of drawing conclusions from the incidence of such illnesses regarding the existence of a positive association between such illness and a toxic exposure.
- A report within 2 years of enactment on an epidemiological study on the health trends of post-9/11 Veterans.
- A report within 2 years of enactment on the study of incidence of cancer in Veterans and available early detection diagnostics.
- A report within 2 years of enactment on the feasibility and advisability of providing care to qualifying dependents of Veterans who participated in a toxic exposure risk activity.
- A report within 1 year of enactment on the study on the health trends of Veterans who participated in activities relating to the Manhattan Project or resided at or near locations in the county of St. Louis, Missouri.
- A report within 2 years of enactment on the study by NASEM of possible relationships between toxic exposures and mental health outcomes.
- A public report within 1 year of enactment, and biennially thereafter for 8 years, discussing the effect of various different types of jet fuels used by the Armed Forces on the health of individuals.

It also would require the Comptroller General to submit a report to Congress within 1 year of the date of enactment setting forth the results of the study on access and barriers to benefits and services furnished by VA in the U.S. territories.

#### *Impact on Care and Benefits*

Title V generally would not have a direct impact on the delivery of care and benefits, but the number of reporting requirements contained in this title would require significant time and resources, which could divert attention and other resources from the pursuit of VHA's mission. The studies and research conducted under or supported through this title could inform VA decisions regarding presumptions or evidence-based treatment approaches.

#### *Costs and Resources*

Some of the requirements in this title would duplicate existing efforts. If these efforts, either currently underway or currently planned, were considered sufficient to meet the requirements of this title, the resource demands on VA would be reduced. We do not

have cost estimates for most of the provisions in this title, but we do estimate the study on cancer rates among Veterans would probably require approximately 20 additional full-time employee equivalents and IT funding of approximately \$12 million. The study on furnishing care to dependents of Veterans who participated in toxic exposure risk activities likely would require significant additional resources given the complexity of the work and the breadth of the requirements (such as reviewing known cases of toxic exposure on DoD installations and assessing DoD's liability in such cases), many of which are outside VA's areas of responsibility or expertise.

### *Research*

Title V would require additional research and related activities to expand VA's and the public's understanding of the effects of different toxic exposures on the health of Veterans. Several requirements in this title could provide important support or findings. We believe the Toxic Exposure Working Group required by this title and its strategic plan would help advance our understanding of military exposures assessments and help inform care and policy. However, interagency collaboration will be required to ensure other agencies cooperate in forming and providing resources to the group and share their research results as contemplated by the bill.

With appropriate resources, a study on cancer rates among Veterans, conducted on a significant scale, could be very important and of high value to Veterans, VA and the public. We would welcome the Comptroller General's findings regarding barriers to care for Veterans in the U.S. territories, as this could help us engage and support the provision of services to Veterans living in these areas. While VA has robust websites for both its research and development programs and its public health programs, we agree that a website serving as a clearinghouse for toxic exposure research from across the Executive Branch would be beneficial, but we recommend against making the War Related Illness and Injury Study Center responsible for this effort due to the Center's small size. Further, the bill would require VA to coordinate with other Federal agencies, but VA has no authority to ensure that those agencies share the results of their research, which would be needed for a comprehensive clearinghouse.

Several of the other provisions, though, would replicate work already underway by VA researchers. For example, the compilation and analysis of clinical data is currently in progress through large, well-designed epidemiological studies, and the collection and organization of this data has been conducted successfully by VA for more than 30 years. It is possible, in some situations, to use this existing data in combination with other information to draw preliminary conclusions about the possible associations between disease and military toxic exposure. We are concerned that the bill's reporting requirements could risk drawing conclusions when there is inadequate data. VA has also undertaken health surveillance and longitudinal research on the health trends of post-9/11 Veterans. Other provisions, such as the mortality, epidemiological and toxicology studies of covered Veterans, would both duplicate current efforts and impose difficult reporting deadlines on VA (in this case, 180 days). VA is conducting studies to assess potential exposures and mental health outcomes. VA also is conducting an

investigation of the chronic effects of fuel exposure, and we would welcome the opportunity to report on the progress of these and other efforts.

Other provisions would impose requirements on VA where it lacks the scope or expertise to conduct such analyses. For example, the study related to the Manhattan Project would be better performed by NASEM. Similarly, the study on the feasibility and advisability of furnishing care to dependents of Veterans who participated in toxic exposure risk activities would require a national health record and national birth defects registry to explore intergenerational effects of exposures fully, but neither of these exist and would be outside VA's capacity to establish. Moreover, there currently is no science or evidence connecting adverse health outcomes of dependents with Veterans' exposures unless there is direct exposure of the dependents through contaminated water.

## **Title VI: Improvement of Resources and Training Regarding Toxic-Exposed Veterans**

### *Summary*

Title VI would be called the Toxic Exposure in the American Military Act, or the TEAM Act. It would include four substantive provisions that would require:

- VA to publish annually, update periodically and share with others a list of resources for toxic-exposed Veterans, their caregivers and their survivors in multiple languages. VA also would be required to develop an outreach program for Veterans on illnesses that may be related to toxic exposure and share both the list of recourses and outreach program with national Veterans Service Organizations and other Veterans groups.
- VA to incorporate a clinical questionnaire to help determine potential toxic exposures during active service as part of the initial screening conducted for an appointment with a VA primary care provider.
- VA to provide to its health care personnel training related to identifying, treating and assessing toxic exposures. Not later than 180 days from enactment, VA would have to ensure the existence of a standard training curriculum for:
  - VA claims processors who review claims for disability benefits relating to service-connected disabilities based on toxic exposure, and
  - Medical providers who conduct examinations and provide opinions pursuant to a new § 1168 (as added by section 303 of the bill), regardless of whether the provider is a VA employee or contractor.
- DoD and VA, no later than 90 days from enactment, to coordinate and establish joint guidelines to be used during training of members of the Armed Forces to increase awareness of the potential risks of toxic exposures and ways to prevent being exposed during combat.

### *Impact on Care and Benefits*

Title VI generally would not have a direct impact on the delivery of care and benefits, particularly given VA's current efforts in many of these areas. VA strives to inform the public of VA resources through all available and appropriate means. Currently, we reach

out to Veterans and their family members, survivors and caregivers to provide information about military environmental exposures through blog posts, townhalls, radio spots, social media posts, surveys and a very complete VA website covering specific exposure concerns (see <https://www.va.gov/disability/eligibility/hazardous-materials-exposure/>; see also <https://www.publichealth.va.gov/exposures/index.asp>). VA also conducts outreach regarding exposure registry participation and topics related to VA health care for Service members leaving the military during the Transition Assistance Program. We note that it could be unnecessary for VA to develop a separate clinical questionnaire, as DoD has, in collaboration with VA, revised and developed a 24-page Separation Health Assessment to be administered to the Service member upon separation from service that provides extensive self-assessment, medical history (including exposure history), clinical assessment, and physical examination information. This new assessment will go into effect later this year. Further, VA currently is developing a clinical screening tool we believe would satisfy the intent of this provision.

VA remains committed to providing all constituents, including Veterans Service Organizations and other Veterans groups, with timely, accurate, and complete information concerning disability benefits and health care and also is committed to working with the community to improve access to benefits and services. VA currently provides resources to the public in English, Spanish and Tagalog and free assistance to speakers of other languages (see <https://www.va.gov/resources/how-to-get-free-language-assistance-from-va/>). VA welcomes this Committee's ongoing support, along with the support from other Members of Congress, to share important information about military environmental exposures with Veterans, their family members, and the broader public.

VA's public health website provides a number of resources related to toxic exposures for Veterans and their families. Likewise, DoD has public health websites and a number of resources related to toxic exposure outreach and education. VA also is developing a screening tool, the Clinical Reminder for Environmental Military Exposure, to ensure that VA is able to identify deployment-related military environmental exposures (MEE) and offer referrals and resources for providers and patients. In fact, the Centers for Disease Control and Prevention recently selected VA's Health Outcomes Military Exposures' MEE to be placed on its website as "best" training in this topic.

VA strongly endorses training its health care and benefits personnel and has taken recent action to support these efforts even more. Last year, I signed a memorandum mandating all VA providers be trained in military environmental exposures. I also have encouraged non-VA providers who treat Veterans to complete this training, and I have encouraged VA providers and others to download the Exposure Ed App (available at <https://mobile.va.gov/app/exposure-ed>) to support their awareness and understanding of military exposures. While providers outside of public health often have limited time and opportunity to become experts in environmental exposure medicine, these trainings and resources can improve their ability to help identify potential exposures and concerns and refer Veterans to experts for further evaluation and treatment.

### *Costs and Resources*

Many of the requirements in title VI are already under development or have been implemented. If these efforts, either currently underway or currently planned, were considered sufficient to meet the requirements of this title, the resource demands would be less. We believe additional resources would be needed to support a more comprehensive publication of resources required by this title, but VA is currently taking necessary steps to ensure timely compliance with the requirements of the Veterans and Families Information Act (Pub. L 117-62) and does not anticipate that publication of information in multiple languages would have more than a minimal impact on administrative costs. We do note the joint guidelines from VA and DoD could not be developed within the 90 days permitted under the bill. We believe 180 days would be a more realistic goal. We also anticipate that development and implementation of the required training for claims processors and adjudicators could be accomplished with existing resources and within the specified period. Similarly, VA anticipates that required review of the quality of adjudicated claims can be accomplished with existing resources and within the specified period.

### *Research*

Title VI would not generally improve or enhance research directly, but many of the efforts VA has already taken consistent with the requirements of this section have been and will continue to be informed by available and appropriate research.

## **Title VII: Registries, Records, and Other Matters**

### *Summary*

Title VII contains 17 different sections dealing with a range of issues. This title would:

- Require VA to establish and maintain a registry for eligible individuals who may have been exposed to per- and polyfluoroalkyl substances (PFAS) due to the environmental release of aqueous film-forming foam (AFFF) on military installations. VA would have to:
  - Include any information in such registry VA determines necessary to ascertain and monitor the health effects of the exposure of members of the Armed Forces to PFAS associated with AFFF;
  - Develop a public information campaign to inform eligible individuals about the registry and periodically notify them of significant developments; and
  - Coordinate with DoD in carrying out this registry.
- Require VA, in consultation with DoD, to establish and maintain the Fort McClellan Health Registry, provide examinations upon request of such Veterans stationed at Fort McClellan during the specified period and conduct ongoing outreach to individuals listed in the registry.
- Establish a Veterans Toxic Exposures Fund to provide for investment in the delivery of Veterans' health care, research and benefits associated with hazardous exposure in the service.
  - This section would authorize to be appropriated for FY 2023 and each subsequent fiscal year such sum as necessary for any expenses

- (including administrative expenses and medical research) incident to the delivery of Veterans' health care and benefits associated with exposure to environmental hazards in service.
- Appropriated amounts would be counted as direct spending under the Congressional Budget and Impoundment Control Act of 1974 and any other Act.
  - Amend § 5100 to include a definition of notice, which would mean a communication issued through means (including electronic means) prescribed by VA. Additional amendments would include:
    - Amending § 5104 to allow VA to provide notice of a decision affecting the provision of benefits to claimants electronically if a claimant (or the claimant's representative) elects to receive such notice electronically, with the option to revoke such an election at any time.
    - Requiring VA annually to solicit recommendations from stakeholders on how to improve notice under § 5104 and publish such recommendations on a publicly available website.
    - Amending § 5104B to remove the requirement that decisions be provided in writing; and amending § 7104 to require the Board of Veterans' Appeals to issue notice promptly after reaching a decision on an appeal while allowing VA to provide notice electronically if the claimant (or the claimant's representative) elected to receive such notice electronically., with the option to revoke such an election at any time.
  - Authorize to be appropriated to VA \$30 million for FY 2023 to support expected increased claims processing for newly eligible Veterans pursuant to this Act.
  - Add a new § 7414 that would provide that certain covenants to not compete when entered into by certain persons applying for direct care provider positions in VHA would have no force or effect with respect to VA's hiring of such persons.
  - Amend § 7402 to allow VA to offer appointments in VHA to physicians on a contingent basis and update the physician qualification standards to require completion of a residency leading to Board eligibility in a specialty.
  - Add a new section in chapter 63 authorizing VA to provide grants to States to carry out programs that improve outreach and assistance to Veterans and their families to inform them about any benefits and programs for which they may be eligible and facilitate opportunities for such Veterans to receive services in connection with benefits claims.
  - Authorize to be appropriated to VA \$150 million for FY 2023 to continue the modernization and expansion of capabilities and capacity of the Veterans Benefits Management System (VBMS) to support expected increased claims processing for newly eligible Veterans pursuant to this Act.
  - Require VA, within 180 days of enactment, to take actions necessary to ensure that the burn pit registry may be updated with the cause of death of a deceased registered individual by an individual designated by such deceased registered individual or, if no such individual is designated, an immediate family member of such deceased individual.
  - Require VA medical professionals to inform a Veteran of the Airborne Hazards and Open Burn Pit Registry if such Veteran presents at a VA facility for treatment

the Veteran describes as being related or ancillary to exposure to toxic airborne chemicals and fumes caused by open burn pits.

Title VII also would require VA to submit to Congress:

- Within 1 year of enactment, a report on the sources of PFAS on military installations other than AFFF and any recommendations VA has regarding whether to expand eligibility for registry of PFAS exposed individuals.
- Within 2 years of establishment of the PFAS registry, an initial report providing an assessment of the effectiveness of actions taken by VA and DoD to collect and maintain information on the health effects of exposure to PFAS; recommendations to improve the collection and maintenance of such information; and recommendations regarding the most effective and prudent means of addressing the medical needs of eligible individuals with respect to PFAS exposure (using established and previously published epidemiological studies).
  - Within 5 years of submitting this initial report, VA would have to submit to Congress a follow-up report containing an update to the initial report and an assessment of whether and to what degree the content of the PFAS registry is current and scientifically up to date.
- Within 5 years of enactment, and every 5 years thereafter, recommendations for additional chemicals with respect to which individuals exposed to such chemicals should be included in the PFAS registry. VA would have to consult with DoD and EPA in developing this report.
- Annual detailed estimates for expenses incident to the delivery of Veterans' health care and benefits associated with exposure to environmental hazards in service, to be included in President's budget for the applicable fiscal year.
- Annual reports on the grant program established under chapter 63.
- On a quarterly basis, a report on each reported case of burn pit exposure by a covered Veteran during the previous quarter.
- Within 180 days of enactment, and annually thereafter, a report developed in collaboration with DoD detailing information about covered Veterans, including outcomes of their claims for disability compensation, conditions for which they seek treatment, locations of their exposure to open burn pits, illness related to such exposure and the total number who died after seeking care for such related illness. In the first report, VA also would have to include information otherwise required by each report with respect to reported cases of burn pit exposure made between January 1, 1990, and the day before the date of enactment.

Within 180 days of enactment, the Comptroller General would have to submit to Congress a report containing an assessment of the effectiveness of any memorandum of understanding or agreement entered into by VA with respect to the processing of reported cases of burn pit exposure and the coordination of care and provision of health care relating to such cases at VA medical facilities and at non-VA facilities.

Title VII also would create requirements for other Federal entities or establish authorities directly relevant to them, namely:



- It would require DoD, not later than 60 days after the date of enactment, to enter into a contract with an independent research entity to carry out a comprehensive study on ILER.
- It would require DoD, in consultation with VA, to submit to Congress, not later than 1 year after the date on which ILER achieves full operation capability, and every 180 days thereafter, a report on the data quality of the databases of DoD that provide the information presented in ILER and the usefulness of ILER in supporting members of the Armed Forces and Veterans in receiving health care and benefits from DoD and VA.
- It would require DoD, within 1 year of enactment, to submit to Congress a report on the feasibility of modifying ILER to ensure that a member of the National Guard who is deployed in connection with a natural disaster may record information regarding a suspected exposure by the member to toxic substances during such deployment.
- It would require DoD to provide a means for members of the Armed Forces and Veterans to reflect a toxic exposure by such Member or Veteran in ILER.
- It would establish a Federal cause of action allowing individuals (including Veterans), or their legal representatives, who were residing working, or otherwise exposed for not less than 30 days between August 1, 1953, and December 31, 1987, to bring an action in the U.S. District Court for the Eastern District of North Carolina to obtain appropriate relief for harm that was caused by exposure to the water at Camp Lejeune. Any award would be offset by the amount of any disability award, payment or benefit provided to the individual or legal representative under VA's authority or the Medicare or Medicaid programs, and in connection with health care or a disability relating to exposure to the water at Camp Lejeune.
- It would require DoD to conduct a study on the exposure of members of the Armed Forces to herbicide agents, including Agent Orange and Agent Purple, in the Panama Canal Zone between January 1, 1958, and December 31, 1999.
- It would require DoD to include in the budget submission of the President for each of FY 2023 through 2027 a dedicated budget line item for incinerators and waste-to-energy waste disposal alternatives to burn pits.

### *Impact on Care and Benefits*

Many of the provisions in title VII would not directly affect the delivery of care and benefits. This title would create or require updates to several registries.

- VA, in concert with our interagency partners, would welcome the opportunity to work with Congress to ensure that new authorities on PFAS support ongoing interagency work to help us make informed decisions as quickly as possible. As would be required in the bill, the registry would not provide sufficient benefits to warrant the expenditure of resources, would require distinguishing occupational exposures from ubiquitous consumer product exposures, and it would also create unreasonable expectations on the part of participants when the science is still developing on health effects from specific PFAS and at what exposure levels. We are already engaging in interagency activities and working with DoD and other

Federal partners, such as the Agency for Toxic Substances Disease Registry and EPA to understand and differentiate occupational exposures through research.

- Regarding the Fort McClellan registry, in the absence of any identified public health risk at that location, there is little to no value in having a registry that will not address the concerns of Veterans who served there. We believe a more fruitful alternative than a self-reported registry (the use of which NASEM discourages) would be a large epidemiological study to assess the health risks of Veterans who served at Fort McClellan. VA already has authority to establish a registry for a specific cohort like this as needed.
- Concerning the provision that would require VA to take actions necessary to ensure that the Airborne Hazards and Open Burn Pit Registry could be updated with the cause of death of a deceased registered individual, VA is working on ways to allow updating of this registry, but we caution that the cause of death should be verified by the VA/DoD Mortality Data Repository, which provides authoritative data on the cause of death. Numerous improvements have been made and will continue to be made to the Registry, but we do not believe it would be appropriate to allow laypersons to enter data that could be erroneous or misunderstood. There are also data security issues that may arise from allowing access by other-than-registry participants.

We appreciate the proposed amendments to § 5100 and would welcome the opportunity to work with the Committee to ensure this provides VA broad authority to provide electronic notification to claimants or their authorized representatives. We recommend that instead of an opt-in method, the bill should provide VA broader authority and flexibility to determine the best means of notifying claimants and their representatives without needing further statutory amendments. We further recommend that the bill's changes to § 7104 be clarified to reflect that the requirements of § 5104(b) do not apply to decisions by the Board of Veterans' Appeals. Absent that clarification, the bill's cross-reference in section 7104 may further misperceptions regarding the notice requirements for such decisions.

We appreciate the provision regarding the non-applicability of non-VA covenants not to compete, as this could help VA consider and appoint more providers. This provision could provide some benefit in addressing the increased demand for care we anticipate would result from this bill. We have some concerns with the provision that would allow residents to be hired as physicians on a contingent basis, as that would conflict with physician qualification standards. We have recommended technical amendments in the appendix that would resolve these concerns.

Concerning the proposed grant program under chapter 63 described previously, VA testified in support of this concept before this Committee last November but asked that Congress adjust some details of the bill.

VA defers to DoD in terms of the impact of the following sections on its delivery of care and benefits to Service members and other beneficiaries:

- Section 703 (Independent study on Individual Longitudinal Exposure Record).
- Section 704 (Biannual report on Individual Longitudinal Exposure Record).
- Section 705 (Correction of exposure records by members of the Armed Forces and Veterans).
- Section 713 (Study and report on herbicide agent exposure in Panama Canal Zone).
- Section 714 (Budget information for alternatives to burn pits).

We do not anticipate these sections would have any direct impact on VA's delivery of care and benefits to its beneficiaries, although it is possible that some of the research or updates DoD performs could provide a basis for expanded eligibility for VA benefits. As noted previously, the number of reporting requirements in this title could affect the delivery of benefits and care by requiring additional administrative resources be available for collection and production of this information. We do note that the National Defense Authorization Act for Fiscal Year 2022 requires the Government Accountability Office to do a biennial study of the Individual Longitudinal Exposure Record, which could duplicate the requirements in this bill; it may be more advisable to change the biannual report on this Record to be a biennial report as well.

VA defers to the Department of Justice on section 706 (Federal cause of action relating to water contamination at Camp Lejeune, North Carolina).

#### *Costs and Resources*

The PFAS registry required in this title, as written, could cost in the billions and affect up to 60 million Veterans and Service members.

We do not believe the proposed funding amounts for VBMS and VA's claims process would be sufficient to cover system modernization and automation needs to address increased claim volumes specific to newly eligible Veterans. We also caution against referring specifically to modernization and expansion of capabilities and capacity of VBMS, as it would constrain VA's ability to develop solutions using the full suite of systems and capabilities available.

The proposed grant program would authorize one additional full-time equivalent employee for the Office of General Counsel between FY 2023 and 2027 to carry out duties under the accreditation, discipline and fees program. It is unclear if this single additional employee would be sufficient to support this program.

VA would require specific IT support and resources for several initiatives under this title, including proposed updates to the Airborne Hazards and Open Burn Pit Registry under section 716 of the bill. Other provisions, like the quarterly reporting requirements under section 717 of the bill, would be resource-intensive and unlikely to improve Veterans' care or add to our understanding of the medical consequences of exposure to airborne hazards. Further, section 717 of the bill would only require reports when the Veteran presents to a VA medical facility and specifically describes that his or her condition is due to burn pits. VA provides benefits and services to Veterans regardless of the basis

on which they are seeking benefits, so we believe that this reporting requirement would grossly undercount the number of Veterans actually affected by burn pits.

### *Research*

While many of the provisions in title VII are intended to provide additional data on toxic exposures to aid our understanding of the consequences of such exposures, we do not believe many of these provisions would yield meaningful results and insights. Large, peer-reviewed epidemiological studies are more likely to produce findings that can inform policy on benefits and evidence-based care delivery. Separating the health care and claims-related reporting requirements in this title would ensure that a more comprehensive picture is developed, rather than just reporting claims activity for Veterans who present to VA for health care for treatment related to a burn pit exposure.

### **Conclusion**

This concludes my statement. I am happy to answer any questions you or other members of the Committee may have.

## **Appendix: Specific Technical Amendments**

### **Section 105: Revision of breast cancer mammography policy of Department of Veterans Affairs to provide mammography screening for Veterans who served in locations associated with toxic exposure**

- We note that proposed section 7322(c) would only refer to “active military, naval, or air service,” but would not include service in the space force . We recommend this be revised for consistency.
- We also note that proposed section 7322(d)(2) refers to the date of the enactment of the Supporting Expanded Review for Veterans In Combat Environments Act of 2021, but no part of this bill would bear that name. We believe the proper reference would be to the COVENANT Act or the Honoring our PACT Act of 2021.

### **Section 112: Authorization period for emergency treatment in non-Department of Veterans Affairs medical facilities**

- This section should define “emergency” consistent with the “prudent layperson standard” as set forth in § 1725(f)(1)(B).
- This section should refer to “presentation” to an emergency room, rather than “admission” as some types of emergency care result in treatment on an outpatient basis.
- This section should refer to “an eligible entity or provider” to be consistent with the language in § 1703 generally regarding eligible providers under VCCP.
- This section should refer to notification of VA of emergency care rather than “an application for such authorization,” as VA does not have a formal application process for emergency care authorization.
- This section does not address emergency transportation.

### **Section 202: Improvements to ability of Department of Veterans Affairs to establish presumptions of service connection based on toxic exposure**

- The language in proposed § 1172(c)(1) and (d)(1) makes it sound as though dependents will be considered to have active service. We believe the intent is for the dependents to qualify based on the Veteran’s active service.
- VA recommends that Congress establish clear effective dates for when the proposed changes are to take effect. As Congress considers establishing effective dates, VA recommends that sufficient time be given for VA to implement based on a variety of factors including the regulatory development and public comment process, as well as the significant implementation requirements and dependencies involved with the bill, such as staffing and resources.

### **Section 302: Presumptions of toxic exposure**

- In new § 1119, VA recommends deleting subsections (b)(2) and (3) and revising subsection (b) to read as follows:

“The Secretary shall, for the purpose of section 1110 and chapter 17 of this title, presume that any covered veteran was exposed to airborne hazards including fine particulate matter during the service of the covered veteran specified in subsection (c)(1), unless there is affirmative evidence to establish that the covered veteran was not exposed to any such airborne hazards in connection with such service.”

- VA recommends omission of the Philippines under proposed § 1119(c)(1)(B)(ix).

#### Section 403: Presumptions of service connection for diseases associated with exposures to certain herbicide agents for Veterans who served in certain locations

- We recommend that Congress include language that either more explicitly addresses the *Nehmer* class of Veterans or includes effective date provisions that either include or exclude those Veterans (depending on Congressional intent).
- The bill states that “active military, naval, air, or space service” should be struck in each place it appears in § 1116. However, the current version § 1116 does not include references to “space service,” and the bill should instead refer to “active military, naval, or air service.”

#### Section 501: Coordination by Department of Veterans Affairs of toxic exposure research

- We recommend Congress include language to explicitly state the Secretary would establish the interagency Working Group in collaboration with the Secretaries, Director(s) and heads of other agencies referenced in the Act to ensure interagency collaboration and support for the establishment and activities of the Working Group.
- The term “collaborative research activity” would include all research conducted by an entity represented by a member of the Working Group, funded by the Federal Government, and regarding the health consequences of toxic exposures experienced during active military, naval, air or space service. This scope of collaborative research activities overseen by the Working Group is overly broad. Collaborative research activities should instead mean a research activity “agreed upon by the Working Group and conducted by an entity represented by a member of the Working Group, funded by the Federal Government, and regarding the health consequences of toxic exposures experienced during active military, naval, air, or space service.”
- In section 501(c)(3), “a progress reports” should refer to “a progress report.”

#### Section 502: Data collection, analysis, and report on treatment of Veterans for illnesses related to toxic exposure

- The term “informed consent” is a legal term of art that is defined in 38 C.F.R. § 17.32, which implements 38 U.S.C. § 7331. Informed consent requirements apply only in connection with a patient’s receipt of VA recommended clinical treatment or procedures, or when a VA research subject undergoes treatment or procedures for research purposes, but that is not the case with data collection.

- In addition, the Clinical Data Warehouse currently provides an organized data mart of virtually every health care encounter delivered or paid for by VHA. In addition, VHA has successfully used these data for decades. No “informed consent” is required, as these data are collected as part of routine care and referred to as “extant” or operational/surveillance data, not research, which appears to have been the drafter’s assumption.
- Moreover, VHA has a long history of surveillance using extant data at the regional and national level. For studies that constitute research involving human subjects, VA follows all Federal human subjects protection regulations and privacy regulations and laws. This procedure is done to ensure any and all human subjects research in VA is done ethically and with protections for Veterans’ privacy.

Section 509: Study on Veterans in territories of the United States

- In section 509(a)(2)(G), it is unclear what the term “continuity of care” means in this specific context. We recommend deletion of the last phrase in this subparagraph.
- We also recommend the Comptroller General review include Veterans who reside in the Freely Associated States, as their citizens can participate in the Armed Forces.

Section 603: Incorporation of toxic exposure questionnaire during primary care appointments

- We previously provided technical assistance to the Committee on a similar provision the Committee incorporated in section 3 of the Health Care for Burn Pit Veterans Act. We appreciate the Committee’s work and recommend that language be adopted instead.

Section 708: Authorization of electronic notice in claims under laws administered by the Secretary of Veterans Affairs

- VA proposes replacing the language in § 5104(c) with the following:  
  
“[t]he Secretary may provide notice under subsection (a) through available means in writing, to include electronically”.
- VA recommends amending paragraph (6) and adding a new paragraph (8) as follows:  
  
(6) In section 7105A:  
    (A) in subsection (a) by:  
        (i) striking “mailed” and inserting “issued”, and  
        (ii) striking the phrase “at the last known address of the action taken” and  
    (B) in paragraph (b)(2) by striking the phrase “the last known address of record of.”

(8) In section 5112(b)(6) by striking the phrase “(at the payee’s last address of record).”

- VA recommends that the bill’s changes to § 7104 be clarified to reflect that the requirements of § 5104(b) do not apply to Board of Veterans’ Appeals (Board) decisions. Absent that clarification, the bill’s cross-reference in § 7104 may further misperceptions regarding the notice requirements for Board decisions.

Section 711: Recruitment of physicians on a contingent basis prior to completion of training requirements

- VA recommends the proposed subsection (h) of § 7414 read as follows:

“(h) The Secretary may provide job offers to physicians pending completion of residency training programs and completing the requirements for appointments under subsection (b) by not later than 2 years after the date of the job offer.”

Section 717: Burn pit transparency

- Regarding subsection (b)(1)(B)(ii)(IV), VA generally would not be able to provide accurate information on non-VA health care furnished to a covered Veteran unless that care had been authorized or paid for by VA.
- Regarding subsection (b)(1)(B)(ii)(V), there is no reason to believe that the rank of the covered Veteran would have a bearing on their care.
- Regarding subsection (b)(1)(B)(ii)(VII), we do not believe that burn pit location information can be reported reliably by VA.
- Regarding subsection (b)(2)(A), this would require VA collaborate with DoD in reporting this information, but we do not believe this interaction would be necessary or provide much additional value.
- Regarding subsection (b)(4), the Comptroller General report would require an assessment of the effectiveness of any memorandum of understanding or agreement entered into by VA with respect to the processing of reported cases of burn pit exposures and the coordination of care and provision of health care relating to cases of burn pit exposure at VA medical facilities and non-VA facilities. It is not clear that this assessment would address an actual need.



- VA suggests creating different definitions of the term “covered Veteran” for the purposes of health care and claims data. The following definition is suggested for disability claims reporting:

“For the purpose of disability compensation claims reporting, the term “covered veteran” means “a veteran who deployed to the Southwest Asia theater of operations any time after August 1990, or to Afghanistan, Syria, Djibouti or Uzbekistan after September 19, 2001, and who submits a claim for disability compensation under chapter 11 of title 38, United States Code.”